



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 15 OF 1996

JULIUS KARIJO.....PLAINTIFF

VERSUS

MERU NORTH FARMERS CO-OPERATIVE UNION LTD.....DEFENDANT

RULING

1. This suit was instituted vide plaint dated 23rd January 1996 where the plaintiff sought special damages and general damages for wrongful dismissal. The Defendant entered appearance on 25th March 1996 and filed its defence on similar date.
2. On 12th October 2000 the plaintiff filed an application seeking an Order for inhibition in respect to parcel No. Ntima/Igoki/2523, Meru B/21 Milimani & Meru B 11-197 pending the hearing and determination of this suit. On 17th October 2000 this Honourable Court issued an injunction with reference to the aforementioned premises.
3. On 6th July 2015 and due to inaction for the last three years the suit was dismissed by this Honourable Court for want of prosecution.
4. The plaintiff/Applicant has now filed application dated 25th June 2019 seeking leave for the firm of M/S MutegiMugambi & Co. Advocates to come on record, review and setting aside of the Orders dated 6th July 2015, reinstatement of the suit and substitution of the plaintiff.
5. The application is supported by the sworn affidavit of **Alina KajujuNchebere** the legal representative of the plaintiff (now deceased). She avers that the plaintiff died on 7th July 2006. That at that particular time parties were negotiating and the same continued between herself and the Respondent. That on the date the suit was dismissed for want of prosecution his advocates on record were not informed but only the firm of C.B Mwangela & Co. Advocates (advocates for the Respondents) were informed of the same. That she was not aware of the dismissal of the suit until when she received an eviction notice from the Respondents. That she immediately applied for a grant of letters of Administration-*Ad litem* and thereafter filed this Application.
6. The application was opposed by the Respondent through Replying Affidavit dated 5th July 2019 sworn by **MicubuGichunge**, the Secretary of the Respondent. She averred that the suit was dismissed on 6th July 2015 **19 years** from the date of its institution. That the plaintiff (now deceased) was not keen in prosecuting the same after its institution. That as an administrator of the estate the applicant ought to have taken reasonable steps to prosecute the matter after the death of her husband in 2006. The delay from the year 2006 to 2015, approximately 9 years is extremely unjustifiable.
7. On 10th July 2019 parties consented to the firm of MutegiMugambi & Co. Advocates to come on record for the Applicant. The Court also directed parties to file their respective submissions to the application. Both parties have since filed their submissions which I have duly considered.

Analysis and Determination

8. An area that was not tackled and or mentioned by the parties is with regard to this Honourable Court jurisdiction to handle the matter. The cause of action as per the plaint relates to Employment and Labour relations.

Article 162 of the Constitution of Kenya, 2010 states as follows:

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

9. The Employment and Labour Relations Court was established and was clothed with jurisdiction to determine all disputes concerning employment and labour relations. Nevertheless, the drafters of the constitution provided a transition mechanism for dealing with pending matters. That mechanism is found at section 22 of the Sixth Schedule of the Constitution titled Transitional and Consequential Provisions. It states:

22. Judicial proceedings and pending matters

All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.

See Also GatembeNgumiKago v Mary MuthoniKamau [2017] eKLR

10. With the above analysis in mind I find that this Court has jurisdiction to entertain the application.

11. I have looked at the proceedings in this case. As highlighted above the suit was dismissed in the year 2015 at this time the suit had already abated by virtue of the death of the plaintiff herein who met his untimely death on 7th July 2006. Whereas the Court was justified in dismissing the suit for want of prosecution I find it apt to deal with the case of abatement of the suit as the same took precedence over dismissal of the suit. This court's reasoning is borne from the fact that abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. This much can also be revealed in the case of **Said SweilemGheithanSaunum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**

Abatement of the suit

12. The pertinent provisions of **Order 24 of the Civil Procedure Rules** relating to abatement of suits may be reproduced as follows;

Order 24

“1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

...

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

Provided the court may, for good reason on application, extend the time.

...

5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.

...

7. (1) ...

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit,

**the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”
(Emphasis supplied)**

13. The question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion. In this case the applicant had pleaded that she was not aware that the suit had been dismissed and that he did not take any steps to substitute herself in the place of the plaintiff due to the fact that they have been negotiating with the Respondents. The applicant has attached a letter dated 9th October 2006 from the Respondents calling her for a meeting to discuss on issues pertaining to this case. A brief summary of the facts and the context of their negotiations has been attached.

14. The letter attached by the applicant was an invitation to discuss issues related to the suit and the same was addressed to the applicant. This shows that the applicant was well aware of the case and its facts. The summary of the negotiated facts have been made by the applicant and have not been substantiated with any other credible evidence. The same is therefore *hearsay* at best. The Respondent on its part have denied the aforesaid averments.

15. In **Titus Kiragu v Jackson Mugo Mathai [2015] eKLR** the Court held that the burden of proving sufficient cause exists is placed on the applicant to show why the request should be granted or an action excused. Sufficient cause must be rational, plausible, logical convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a judge’s mind. It should not leave unexplained gaps in the sequence of events.

16. In this case the delay in applying for substitution of the plaintiff has been considerably inordinate. The applicant has been residing at the Respondents premises since the demise of her husband in the year 2007. This is twelve years which she has been afforded accommodation by the Orders of this Honourable court. The applicant has not sought to explain the reluctance of substituting the deceased during this period. The delay is therefore unexplained. The eviction Order resurrected the ongoing dispute and the applicant has moved with considerable speed and effort to remedy the impasse.

17. Justice shall not be delayed is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. (See **Said Sweilem Gheithan Saanum (supra)**) In this case I agree with the Respondents averment that it would be difficult for them to avail credible witnesses and evidence to support their claim. The delay of nine years is extremely inordinate and unjustifiable in this case.

Dismissal for Want of Prosecution

18. I have also looked at the record. This Honourable court has twice sought to withdraw the suit for want of prosecution. The record shows that the deceased was not keen in prosecuting its claim. There has also been constant adjournments in the matter. The applicant avers that her advocates on record were not given notice before the suit was dismissed for want of prosecution. I find that it would have been incumbent upon the applicants advocate on record to swear an affidavit to that effect. The learned Judge was not made aware that the deceased had passed at the time he made the Order to withdraw the suit for want of prosecution hence the same was in order.

19. I therefore find that the application dated 25th June 2019 lacks merit and the same is therefore dismissed with costs to the Respondent.

HON A.ONG’INJO

JUDGE

RULING, DELIVERED DATED AND SIGNED IN COURT ON 24TH OCTOBER 2019

In the Presence of:-

CA:- Mr Mutegi Advocate for Plaintiff

Plaintiff/Applicant:-Mr Mokua Advocate holding brief for Mwangua for Defendant/Respondent

HON A.ONG’INJO

JUDGE