



REPUBLIC OF KENYA



**Kahara v Waweru & 3 others (Environment & Land Case 752 of 2017)
[2023] KEELC 22132 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 752 OF 2017
BM EBOSO, J
NOVEMBER 29, 2023**

BETWEEN

JANE KANYI KAHARA APPLICANT

AND

LUCY WAWERU 1ST RESPONDENT

ALEX WAWERU 2ND RESPONDENT

PETER TITITI WAWERU 3RD RESPONDENT

MONICA WAIRIMO WAWERU 4TH RESPONDENT

RULING

1. The subject of this ruling is the notice of motion application dated 2/2/2023, filed by Jane Kanyi Kihara [the plaintiff]. Through it, the applicant seeks the following reliefs: (i) that the order of this honourable court made on 15/4/2021 dismissing the plaintiff's/applicant's suit together with all other consequential orders be reviewed, varied and/or set aside; (ii) that this honourable court be pleased to furnish the plaintiff/applicant with a hearing date for the main suit upon certifying the matter ready for hearing; and (iii) costs of this application be provided for.
2. The application is premised on the grounds outlined in the motion and is supported by a supporting affidavit and a supplementary affidavit, sworn by the applicant on 2/2/2023 and 17/7/2023 respectively. It was canvassed through written submissions dated 17/7/2023. The applicant's case is that around August 2017, she gave instructions to M/s Nyaata & Company Advocates to file suit on her behalf. The said advocates filed the suit through the plaint dated 31/8/2017 but failed to prosecute the claim, causing it to be dismissed on 15/4/2021 by Gacheru J. She adds that she was informed by her said advocates that they had entered into negotiations with the respondents with a view of settling the case out of court. The applicant states that she has since instructed M/s Githui & Partners Advocates to pursue the matter on her behalf. She contends that the impugned dismissal order was made without



any fault on her part, adding that the respondents will not suffer any prejudice if the application is allowed, and that the delay in bringing the application is not inordinate as to be inexcusable. She urges the court to review the order and grant her the opportunity to prosecute the case.

3. The respondents oppose the application through a replying affidavit sworn by Lucy Waweru [the 1st respondent] on 23/6/2023 and written submissions dated 25/7/2023. Their case is that Alex Waweru [the 2nd respondent] who used to reside on land parcel number Dagoretti/Uthiru/568 [the suit property] died on 20/6/2021 and given that he had all the information about the suit property, which the other respondents lack, the respondents will be unable to proceed with the case in his absence. They contend that the applicant was indolent in prosecuting her case.
4. The respondents further contend that the applicant never challenged the ownership of the suit property by the respondents' deceased father during his lifetime. They add that the applicant's claim is statute-barred given that more than 12 years have lapsed since the cause of action arose. The 1st respondent adds that she was wrongly sued, stating that she was not privy to the sale agreement conveying the suit property; she does not reside on the suit property; and she is not the administrator of the estate of her deceased father. The respondents urge the court to find the application unmerited.
5. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Two key questions fall for determination in the application. The first question is whether the criteria upon which a trial court exercises jurisdiction to reinstate a dismissed suit has been met. The second question is what order should be made in relation to costs of the application. I will be brief in my analysis and determination.
6. The jurisdiction to reinstate a suit dismissed for want of prosecution is a discretionary one. The discretion is, however, exercised on the basis of well-settled principles. The court in *Shah v Mbogo & Another* (1967) EA 116 outlined the following principle on exercise of the discretionary jurisdiction:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
7. One of the policy considerations that guide our trial courts when exercising this discretionary jurisdiction is the need for expeditious disposal of cases. In *Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another* [2004] eKLR the court held as follows:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”
8. It does emerge from the materials placed before this court that, at the time the plaintiff initiated this suit, the 3rd defendant had died. It does also emerge that at the time the plaintiff initiated and prosecuted the application under consideration, the 2nd defendant was deceased. There is no evidence of substitution of the two defendants. Consequently, no reinstatement orders can be made against the two deceased defendants in the absence of their personal representatives under the *Law of Succession*



Act, duly joined to this suit in that capacity. The plea to exercise discretion to reinstate the suit can only be considered in relation to the claim against the 1st and 4th defendants.

9. The plaintiff lays blame on his advocates, M/s Nyaata & Company Advocates for her failure to prosecute the suit. On their part, the surviving defendants contend that those who would provide proper evidence have since died.
10. In the case of *Belinda Murai & Others v Amoi Wainaina* (1978), Madan J set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake by his counsel;

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”
11. I have considered rival positions in the context of the nature of the claim that is before court. The view the court takes is that justice can still be done and achieved to all the present parties notwithstanding the fact that two out of the four defendants are now deceased. The two surviving defendants can be adequately indemnified through an award of costs.
12. Consequently, taking into account the explanation tendered by the applicant; the response to the application; the parties’ submissions; and the prevailing jurisprudence on the issue at hand, I will reinstate the suit against the 1st and 4th defendants in the following terms:
 - a. The suit against the 1st and 4th defendants is reinstated.
 - b. The plaintiff shall pay advocates of the two defendants throw-away costs of the application assessed at Kshs 30,000 within 30 days.
 - c. In default of (b) above, the order reinstating the suit shall stand vacated and the suit shall remain dismissed.
 - d. For avoidance of doubt, the reinstatement order does not apply to the claim against the 2nd and 3rd defendants who are deceased. The suit against the two deceased defendants remains dismissed.
 - e. The plaintiff shall within 30 days file and serve a single, bound, paginated and indexed trial bundle containing pleadings, witness statements and documentary evidence. In default, this suit shall stand dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF NOVEMBER 2023

B M EBOSO

JUDGE

In the presence of: -

Ms Munyangi for the plaintiff

Court Assistant - Hinga

