



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 616 OF 2005

(ELC DIVISION)

PHILISLER WANGECI THUKUPLAINTIFF/APPLICANT

VERSUS

GITHUNGURI CONSTITUENCY RANCHING

CO. LIMITED1st DEFENDANT/RESPONDENT

GABRIEL NJOROGE WANYOIKE.....2ndDEFENDANT/RESPONDENT

THOMAS NJOROGE KIARIE.....3rdDEFENDANT/RESPONDENT

RULING

The Application for determination is the *Notice of Motion* dated 31st **March 2015**, brought under **Order 51 Rules 1&15 and Order 17 Rule 2 of the Civil Procedure Rules 2010** and **Sections 1A, and 1B of the Civil Procedure Act, Cap 21** seeking for orders, inter-alia, that;-

i. That the Order made on 12th March, 2015 be set aside and the suit herein be reinstated.

This application is premised on the supporting affidavit of **John Njongoro** (“*Counsel for the Applicant*”), who averred that the 1st and 3rd Defendants had never participated in the matter. It was his contention that the Matter was last in Court on **13th December 2012**, when it was scheduled for hearing, however the same did not proceed. Attempts to have the matter re-fixed for hearing in the **year 2013** were unsuccessful as the Court file could not be traced.

He further deponed that the Plaintiff had always being keen to have her case heard. It was his further contention that the Notice to Show Cause to dismiss the suit for want of prosecution issued by Court was sent by ordinary post and he received the same on **13th March 2015**, whereas the matter was slated for dismissal on **12th March 2015**, rendering the matter to be dismissed.

The Plaintiff/ Applicant therefore urged this court to reinstate her suit which was partly-heard for hearing and final determination.

Despite participating in the proceedings, the 2nd Defendant did not file a response. The matter was canvassed by the Applicant’s Submissions which were filed **on 25th August 2016**. The Applicant urged the Court to reinstate her suit. Applicant cited ***Nairobi HCCC No. 53 of 2005 Francis Githinji Karobia...***

Vs...Stephen Kageni Gitau, wherein *Waweru J.* held in brevity that the Court's duty is to decide the fundamental issues in dispute between the parties without undue regard to technicalities. Applicant also cited *Nairobi HCCC No. 359 of 2008, City Council of Nairobi .. Vs.. University of Nairobi*, which enunciated the principles laid down in *Francis(Supra)*.

From the Court record, the parties were before this Honourable Court on **13th December 2012**, when the matter was scheduled for hearing. However the same did not proceed at the behest of both parties. Subsequently it came up for hearing of the current application on **24th June 2015**. The Court has noticed that there has been a lapse of three years since any action was taken in the matter. However, the fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with Article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the Court. Courts should sparingly dismiss suits for want of prosecution, for dismissal is a draconian act which drives away the Plaintiff in an arbitrary manner from the seat of judgment. The matter was partly heard and it would be unfair and unjust to dismiss the suit without the final determination of it.

In *Mwangi S. Kimenyi...Vs... Attorney General & another [2014] eKLR*, *Gikonyo J.* quoted the case of *Ivita... Vs.. Kyumbu [1984] KLR 441*, wherein *Chesoni, J.* in rendering a decision whether a suit should be re-instated for trial, and held that it is a matter of justice and it depends on the facts of the case. The court held that:-

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

Having considered the present Application and the rationale provided by the Applicant, dismissal would only mete unfair justice upon the Plaintiff's suit which was already part-heard. There was no objection from the 2nd Defendant. It is for these reasons that this court finds that the Plaintiff's Application dated **31st March 2015** *has merit* and is consequently ***allowed entirely with costs in the cause.***

Further the Plaintiff/Applicant to ensure that she has set the suit down for hearing within the next 30 days from the date of this Ruling. Failure to do so, the suit will stand dismissed.

It is so ordered.

Dated, Signed and Delivered at Nairobi this **31st** day of **August, 2017**.

L GACHERU

JUDGE

In the presence of

Mr. Njorongoro for Plaintiff/Applicant

No appearance for 1st Defendant/Respondent

M/S Mbichira holding brief for P. K. Njoroge for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Catherine - Court clerk.