



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 1377 OF 1993

FRANCIS KIMANI NJUGUNA.....PLAINTIFF/APPLICANT

VERSUS

PETER BEARD.....DEFENDANT/RESPONDENT

RULING

The plaintiff/Applicant in this matter filed a Notice of Motion dated 23rd December 2016 seeking for orders:

1. Spent
2. Spent
3. That this honourable court be pleased to set aside its orders issued in the year 2000 dismissing the Plaintiff/Applicant's suit and reinstate the same.
4. That if suit is reinstated, this honourable court be pleased to transfer the matter from the High Court to the Environment and Land Court for hearing and final determination.
5. The costs of the suit be provided for.

Counsel for the Applicant submitted that at the point the matter was dismissed for want of prosecution only pleadings had been filed and the matter was not heard on its merits. He asserted that there are no limitations to the court's discretion to allow the application.

He further submitted that the plaintiff was not at fault for the long delay in prosecuting the suit. He urged the court to allow the plaintiff to be heard in line with article 159 of the constitution in pursuit of substantive justice.

Counsel, additionally submitted that, by allowing the application, the defendant/respondent would not suffer any prejudice and at the same time reinstatement of the suit would allow justice to be served. He submitted that the plaintiff had a good case with a high chance of success and urges that the doors of justice should be open to a litigant unless there is prejudice to be occasioned to the defendant.

The defendant/respondent opposed the application through the grounds of opposition dated 20th February, 2017 together with the submissions dated 15th June, 2017. Counsel for the defendant submitted that the application dated 23rd December, 2016 was filed 16 years after the suit had been dismissed for want of prosecution. She did not dispute that the court has discretion but urged that the same has to be exercised

judiciously. She averred that the court should take into account the reasons for the delay. She further asserted that paragraphs 8 and 9 of the supporting affidavit by Francis Kimani Njuguna dated 23rd December, 2017 explained the delay up to the year 2000 but after that the court has not been told why the applicant did not take any action to prosecute the suit. Nothing has been placed before the court to allow it to exercise its discretion. Counsel went on to state that justice goes both ways and the defendant also has a right even in land matters.

Counsel for the Respondent submitted that the letters of administration are dated 27th October, 1995 and the suit herein was filed in 1993 and therefore, the plaintiff did not have locus to file the suit.

Finally, it was submitted that the application has been brought under Order 12 Rule 7 of the Civil Procedure Rules which is not relevant in this application. Counsel for the Respondent asked the court to dismiss the application. In rebuttal, the Advocate for the applicant submitted that the application was also brought under all other enabling provisions of the law and the court need not pay regard to technicalities.

Having considered the submissions and arguments articulated by both parties, this court finds the following as the issues for determination:

1. Does the applicant have locus standi in the matter?
2. Should the court exercise its discretion in favour of the applicant and grant the orders sought?

On the issue of locus standi, the respondent posited that the plaintiff had not come to court with clean hands. It was submitted that the plaintiff had brought the suit herein as the administrator of the estate of his late father, Kimande Gatura. The grant of representation that the plaintiff has annexed was issued in October, 1995 yet the plaintiff had instituted the suit on the 23rd day of March, 1993 meaning that at the time of filing the case he lacked locus standi. It is the respondent's contention that having filed the suit herein without first obtaining the letters of administration, disentitles the plaintiff from getting the orders sought.

In the case of **Rajesh Pranjivan Chudasama Versus Sailesh Pranjivan Chudasama {2014} eKLR** it was stated:

“In our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.”

The court in the **Rajesh** case further cited the case of **Otieno Versus Ougo & Another [1986 – 1989] EALR 468** where the court, differently constituted, rendered itself thus:

“...an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

From the foregoing, it is clear that the plaintiff lacked locus standi at the time of instituting the suit.

Where a party seeks to reinstate a matter that was dismissed for want of prosecution, the following principles must be observed. It must be shown that; if there was a delay, it was not inordinate and the defendant is not likely to be prejudiced by the delay, Chesoni, J. [as he then was} applied these principles in the case of **IVITA versus KYUMBU {1984} KLR 441**. He stated as follows in the said case:

“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 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. 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"

In the present circumstances, the plaintiff attributed the delay in prosecuting the suit to failure on the part of his advocate's ill health and the death of his wife and child. From a perusal of the affidavit and the submissions, these reasons only account for the delay until the year 2001. The delay between then and the time of filing this application is inadequately addressed. The court therefore finds this delay to be inordinate and not sufficiently explained.

In the premises aforesaid, I find and hold that the application dated 23rd December, 2016 lacks merits and the same is dismissed with costs.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 24th Day of **October, 2017.**

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent