



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 140 OF 2014

STEPHEN M. KANUI1ST PLAINTIFF
JASPER M. MWINZI2ND PLAINTIFF
AGNES K. MUTISYA3RD PLAINTIFF
JEMIMA M. KAROVOO4TH PLAINTIFF
TABITHA K. MASAI & STEPHEN M. KANUI5TH PLAINTIFF
ARTHUR M. MUSYOKA6TH PLAINTIFF
JIMMY M. KANNO7TH PLAINTIFF
JOHNSON M. KANO8TH PLAINTIFF
MBAKA KIMANZI9TH PLAINTIFF
JUSTUS L. KIVITE10TH PLAINTIFF
JANE K. KILELEU11TH PLAINTIFF
KALUNDA KILONZI12TH PLAINTIFF
CATHERINE K. KYANDUI13TH PLAINTIFF
MWATHI NZINGA14TH PLAINTIFF
CHARLES K. MUNUVI15TH PLAINTIFF
MUTINDI MAITHYA16TH PLAINTIFF
ELIJAH M. MUTINDA17TH PLAINTIFF
MWIKALI M. NZEME18TH PLAINTIFF
MUTONGOI M. KITEMA19TH PLAINTIFF
MUMBE MUSYIMI20TH PLAINTIFF
JOYCE M. NZANGA21ST PLAINTIFF
ALICE MUTUO22ND PLAINTIFF

PATRICK M. KIVITE	23 RD PLAINTIFF
EMMANUEL K. LEVA	24 TH PLAINTIFF
PENINA MWINZA KIVITE	25 TH PLAINTIFF
JOSEPH K. MAILU.....	26 TH PLAINTIFF
BENJAMIN MUNYOKI	27 TH PLAINTIFF
PHYLLES MUTIO MUTISO.....	28 TH PLAINTIFF
JOHN KIOKO	29 TH PLAINTIFF
MBUNGA MWANZIA	30 TH PLAINTIFF
MBITI MAILU MBOO	31 ST PLAINTIFF
BEATRICE MWENDE MUSYOKA	32 ND PLAINTIFF
BENEDICT MUSYOKA KIVITE	33 RD PLAINTIFF
FREDRICK MWENDWA MUTUA.....	34 TH PLAINTIFF
ANGELINA MAKAA NZOMO	35 TH PLAINTIFF
DAVID NGUI MWASYA.....	36 TH PLAINTIFF
KASYOKA MUSUNZA MUVENGEI	37 TH PLAINTIFF
CHRISTINE MWENDWA KILELEU	38 TH PLAINTIFF
BENARD KAKULI KITEME	39 TH PLAINTIFF
ROSE MUMBE MUTHAMI	40 TH PLAINTIFF
MITIRU KITEME SAYA	41 ST PLAINTIFF
MARTHA HAITA MUTUA	42 ND PLAINTIFF
BENJAMIN MUNYOKI MUTEMI	43 RD PLAINTIFF
SARAH MUTINDI MEKA.....	44 TH PLAINTIFF
GEORGE MUSYIMI MUTEMI.....	45 TH PLAINTIFF
DANIEL KITEME	46 TH PLAINTIFF
PATRICK MWINZI MARETE.....	47 TH PLAINTIFF
JOSEPH I. KITULI MUNUVE	48 TH PLAINTIFF
MWINZI KITEME	49 TH PLAINTIFF
SIMON KAROVWE	50 TH PLAINTIFF
RHODA MWIKALI	51 ST PLAINTIFF
NDUNI M. SYUMA	52 ND PLAINTIFF

VERSUS

CHINA WU YI CO. LTD.....DEFENDANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 23rd July 2020, the Plaintiffs/Applicants sought for the following orders;

- (a) **The court be pleased to review, vary, set aside and reinstate the orders dismissing the suit herein for want of prosecution.**
- (b) **The suit be listed for hearing.**
- (c) **Any other relief in favour of the Applicants.**

2. The Notice of Motion is supported by grounds stated on its face as well as the affidavit of Stephen M. Kanui the 1st Plaintiff/Applicant sworn on 23rd July 2020. He deposed that this suit was filed on 24th October 2014 and on 12th October 2015, counsel for the Plaintiffs wrote a letter to court dated 9th March 2015 inquiring if the matter had been transferred to Kitui High Court; that on 12th March 2018, counsel for the Plaintiffs/Applicants was served with a Notice of Dismissal dated 26th February 2018; that the Notice of Dismissal was for 23rd March 2018; that on 23rd March 2018 some of the Plaintiffs attended court but were informed that their matter was not on the cause list; that the suit was dismissed without notice to Plaintiffs and that no prejudice will be suffered by the Respondent.

3. The application is opposed. Mr. George Mahugu, Advocate on record for the defendant swore a Replying Affidavit dated 6th October 2020 in opposition of the application. He deposed that the application is misconceived, mischievous and an abuse of the court process; that the applicants are not candid as to who attended court on 23rd March 2018; that on 23rd March 2018, when the matter came up for Notice to Show Cause, there was a Notice in the Registry that indicated that the matters would be dealt with on 13th April 2018; that the Plaintiffs' suit was dismissed for want of prosecution on 13th April 2018 and not on 27th March 2018 as alleged by the Plaintiffs; that the Plaintiffs have come to court too late in the day after the dismissal order; that the Plaintiffs have been indolent and have come to court with unclean hands and therefore are undeserving of the orders sought.

4. The application was canvassed by written submissions. The Plaintiffs/Applicants filed their submissions on 17th December 2020 while the Defendant/Respondent filed his submission on 16th June 2021.

PLAINTIFFS/APPLICANTS' SUBMISSIONS

5. The Plaintiffs/Applicants submitted that they were not served with a Notice to Show Cause as provided for under Order 17 Rule 2 (1) of the Civil Procedure Rules; which was in breach of their right to a fair trial. They placed reliance on the case of *Associated Warehouse Company Ltd & Others vs. Trust Bank Ltd HCC No. 1266 of 1999 (unreported)* as cited in *Ibrahim Athman Said (Suing in his capacity as administrator ad litem) vs. Ibrahim Abdille Abdullah & Another [2014] eKLR* for the proposition that failure to serve a Notice to Show Cause on a plaintiff is against the Plaintiff's right to a fair trial. It was further contended by the Plaintiffs that the delay in prosecuting this matter was inadvertent and due to their error and hence the said mistake should not be visited upon the Plaintiffs' advocates. They relied on the case of *Belinda Murai & Others vs. Amos Wainaina [2018] KLR*, which this court has considered. They argued that this court should be guided by the overriding objective to achieve substantive justice.

6. The Plaintiffs/Applicants further contended that the court should consider the nature of the case, the number of parties involved and the history of the matter. They argued that if the suit is not reinstated, they will continue to suffer. They referred the court to the case of *Patrick Mubatsi Nambiro & Another vs. Solomon Watitwa Muugori & Another [2018] eKLR and Margaret Wangui Kangethe vs. Paul Kangethe Maina & Another [2018] eKLR*, for the proposition that this court has discretion to reinstate a suit that was dismissed for want of prosecution on such terms as may be just and for the ends of justice, to be met as long as sufficient cause had been shown for the exercise of such discretion.

7. The Applicants relied on the case of *IVITA vs. KYUMBU [1984] KLR 441* for the proposition that even where there is prolonged and inexcusable delay, where the court is satisfied that justice shall be done despite the delay, then the court should overlook such delay. Further, counsel placed reliance on the cases of *CMC Holdings Ltd vs. Nzioki [2004] 1 KLR 173* and *Philip Chemowolo & Another vs. Augustine Kubende [1982 -88] 1 KAR 103* for the proposition that the discretion to set aside exparte orders is to ensure a litigant does not suffer injustice or hardship due to excusable mistakes. Counsel emphasized that non attendance of court on his part and on the part of the Plaintiffs was not deliberate. Reference was made to the case of *Shah vs. Mbogo & Another [1967] EA 1116*, where it was held as follows;

“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 cause of justice.”

8. The Plaintiffs/Applicants contended that they are entitled to the right to be heard. They referred the court to the case of *Burhani*

Decorators & Contractors vs. Morning Foods Ltd & Another [2014] eKLR, where it was held as follows;

“The right to a hearing, in my view has always been a well protected right in our constitution and is also the cornerstone of the rule of law. The Appellant having produced all extracts of the diaries, delivery books and offering all manner of explanation, the learned Chief Magistrate by dismissing the appellants’ application departed from a long line of judicial precedents set over many years that courts are always reluctant to dismiss a suit and thereby deny a claimant an opportunity to ventilate his or her grievances.”

9. The Plaintiffs/Applicants concluded that the court ought not to have dismissed the suit for non attendance, and therefore that this suit ought to be reinstated and set down for hearing.

DEFENDANT/RESPONDENT’S SUBMISSIONS

10. The Defendant/Respondent submitted that the Plaintiffs have never been serious in prosecuting this suit. They argued that the application sought to review this court’s orders of 13th April 2018, which orders could not be granted through such an application except by way of appeal. It was contended for the Defendant that the Plaintiffs came to court after a long unexplained and inordinate delay as the suit was dismissed on 13th April 2018 while the instant application was filed on 28th July 2020.

11. It was the Respondent’s contention that the application does not meet the tenets for review; to wit discovery of new and important matter or evidence which after due diligence was not without his knowledge or could not be produced at that time nor has it been established that there is a mistake or error apparent on the face of the record or that there is sufficient reason to warrant the court exercise its discretion in favour of the Applicants.

12. Counsel argued that equity aids the vigilant and not the indolent. He argued that lack of diligence on the part of the Plaintiffs and their counsel should not be reason for holding the Defendant at ransom. Reliance was placed on the case of *Johanna Muturi Njogo vs. Joseph Njogo Mathenge & 2 Others [2008] eKLR* for the proposition that the court can decline an application for reinstatement of a suit where it is shown that both the advocate and the Plaintiff were indolent.

13. It was argued for the Respondent that reinstating this suit would prejudice the Respondent by subjecting them to unnecessarily lengthy litigation. Counsel relied on the case of *Peter Kinyari Kihumba vs. Gladys Wanjiru Migwi & Another C. A Civil Application No. Nairobi 121 of 2005 (6/05) (unreported)* where it was held as follows;

“With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead the applicant and his advisers exhibited undesirable nonchalance, which I am not inclined to countenance.”

The Respondent further relied on the case of *Alice Mumbi Nganga vs. Danson Chege Nganga & Another [2006] eKLR* which this court has considered.

PLAINTIFFS/APPLICANTS’ SUPPLEMENTARY SUBMISSIONS

14. The Plaintiff in a rejoinder to the Respondent’s submissions argued that a court ought not to dismiss an application merely because wrong provisions were quoted. Counsel further relied on the case of *Essanji & Another vs. Solanki (1968) EA 218* and *East African Cables Ltd vs. Procurement Complaints Review Appeals Board & Another [2007] eKLR* for the proposition that the court should strive for substantive justice.

ANALYSIS AND DETERMINATION

15. I have carefully considered the application, the response together with submissions of both parties. It is my considered view that the issue for determination is whether the Applicants are entitled to the orders sought.

16. Order 17 Rule 2 of the Civil Procedure Rules provides as follows;

- 1) **“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.**
- 2) **If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**
- 3) **Any party to the suit may apply for its dismissal as provided in sub-rule 1.**
- 4) **The court may dismiss the suit for non compliance with any direction given under this order.**
- 5) **A suit stands dismissed after two years where no step has been undertaken.**

6) A party may apply to court after dismissal of a suit under this order.”

17. Essentially therefore under Order 17 Rule 2 of the Civil Procedure Rules the court may dismiss a suit *suo motto* or on application where no step is taken by either party in one year as long as notice is duly served on the parties. However, where no action is taken by either party in a suit for two years, service of Notice to Show Cause is not necessary as the suit by law automatically stands dismissed. Where a suit has been dismissed by court after lapse of one year or where the suit is dismissed upon the lapse of two years, a party may apply to court for reinstating the suit upon sufficient cause being shown to the satisfaction of the court.

18. Principles for reinstating a suit have been settled by many decisions. In the case of *John Nahashon Mwangi vs. Kenya Finance Bank Limited (in Liquidation) [2015] eKLR* the court stated as follows;

“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 the 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 matters of reinstatement if a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; 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. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice, the plaintiff will suffer if the suit is not reinstated.”

19. Similarly, in the case of *Utalii Transport Company Limited & 3 Others vs. NIC Bank & Another [2014] eKLR*, it was held that it is the primary duty of the Plaintiff to take steps to prosecute their claim as they are the ones who dragged the defendant to court.

20. In the instant application, the Plaintiffs have argued that they blame their advocates as well as themselves for the delay in the prosecution of this suit. I have perused the record and noted that this suit was dismissed with costs under Order 17 Rule 2 (1) of the Civil Procedure Rules on 13th April 2018. The Plaintiffs have contended that the Notice served was for 27th March 2018 and not for 23rd March 2018. I also note that though the dismissal order was issued on 13th April 2018, the Plaintiffs filed the Application for reinstatement of the suit on 23rd July 2020; that is 27 months after the dismissal.

21. The Applicants have argued that the nature of this case, the number of parties involved and the history of this matter demand that this matter be heard and determined on merit. It is my considered view that while an order of dismissal of a suit without hearing the same on merit is indeed draconian, a plaintiff who by his conduct deliberately invites the sword of Damocles may eventually fall by the same. The fact that this is a land matter involving many parties was the very reason why both the Plaintiffs together with their counsel ought to have taken this matter seriously by taking all the necessary steps to prosecute their claim. Asking the court to take into consideration factors like the nature of the claim, the number of parties in the suit and the Plaintiff’s right to a fair trial is indeed a good proposition on the part of the Plaintiffs. However, where the Plaintiff has not considered the same factors as demonstrated by his conduct, he or she should not expect the court to mourn more than the bereaved.

22. As aptly captured by the Court of Appeal in *Peter Kinyari Kihumba vs. Gladys Wanjiru Migwi & Another C. A. Civil Application No. Nai 121 of 2005 (6/05 NYR) (unreported)* where it was held as follows;

“With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead, the applicant and his advisers exhibited undesirable nonchalance, which I am not inclined to countenance.”

23. This court is enjoined by both the constitution and statutes to ensure it delivers substantive justice. This substantive justice should not just be one sided or for the plaintiff alone. It ought to be substantive justice for both the Plaintiff and the Defendants and any other parties in the suit. I note that this matter was filed on 24th October 2014. No step was taken by the Plaintiffs to prosecute this matter until 13th April 2018. The record shows that a Notice to Show Cause was given for dismissal for want of prosecution to be heard on 23rd March 2018. There is also on record a Notice to the effect that this court was proceeding on Easter recess from 22nd March 2018 until 3rd April 2018 and therefore all matters slated for Notice to Show Cause why they should not be dismissed for want of prosecution on 23rd March 2018 were fixed for 13th April 2018.

24. Under Order 17 Rule 2 (1), the court’s obligation is to give notice and not necessarily serve Notice to the parties, before issuing a dismissal order. In the case of *Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR* the court held as follows;

“Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2(1) of the Civil Procedure Rules.”

25. I am therefore satisfied that notice for dismissal for want of prosecution was properly given. In the event that I am wrong on my finding above, I note that since the matter was filed and upon close of pleadings, the plaintiffs did not take any step towards prosecuting their suits. The Defendant entered appearance and filed their defence on 12th May 2015 and thereafter on 13th July 2015 the Plaintiff filed a reply to defence together with issues for determination and the pretrial questions. Between 13th July 2015 to 13th April 2018 no step was taken by the

Plaintiffs to prosecute their suit save for a letter dated 9th March 2015 filed in court on 12th October 2015 seeking to know whether their suit had been transferred to Kitui High Court.

26. Essentially therefore as at 12th October 2017, two years after the Plaintiff had filed his letter in court, this suit stood dismissed as provided for under Order 17 Rule 2 (5). Therefore the Notice given for dismissal for 13th April 2018, in my view was superfluous, as the suit stood dismissed.

27. The Plaintiffs have not placed any material before this court to persuade the court, why there was a delay between 2015 to 2018. Worse still even after being aware of the Notice of dismissal slated for 23rd March 2018, none of the 53 Plaintiffs thought it necessary to move the court and have the claim prosecuted. Even the application for reinstatement was filed 27 months after the dismissal. In my considered view, this was a callous attitude on the part of the Plaintiffs, which does not deserve the exercise of this court's discretion in their favour. I therefore find and hold that there is no justification for this court to set aside the dismissal order of 13th April 2018.

28. In the premises, I find and hold that the Notice of Motion dated 23rd July 2020 is unmerited and the same is dismissed with costs.

29. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Magogo for the Defendant/Respondent

Ms. Omari holding brief for Ms. Mutemi for the Plaintiffs/Applicants

Ms. Josephine Misigo – Court Assistant