



REPUBLIC OF KENYA



**Kirera v Chege & 8 others (Environment & Land Case  
55 of 2019) [2022] KEELC 7 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 7 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 55 OF 2019  
LC KOMINGOI, J  
MAY 12, 2022**

**BETWEEN**

**HELLEN MUTHONI KIRERA ..... PLAINTIFF**

**AND**

**JANE CHEGE ..... 1<sup>ST</sup> DEFENDANT**  
**ELIUD NDERITU ..... 2<sup>ND</sup> DEFENDANT**  
**LEONARD KOSGEI ..... 3<sup>RD</sup> DEFENDANT**  
**ROSELINE NYAMOSI ONSOMO ..... 4<sup>TH</sup> DEFENDANT**  
**MOSES MILIMO SHYAMENEEHA ..... 5<sup>TH</sup> DEFENDANT**  
**RAHAB MUKUHI MACHARIA ..... 6<sup>TH</sup> DEFENDANT**  
**THE LORDS LAST CALL CHURCH ..... 7<sup>TH</sup> DEFENDANT**  
**MARY NJOKI MUGAMBI ..... 8<sup>TH</sup> DEFENDANT**  
**KAGUTA KAGUTA ..... 9<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Plaintiffs Notice of Motion dated 10<sup>th</sup> August 2021.
2. It is brought under Order 1A, 1B, 1C and 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*.
3. It seeks orders;
  - a. Spent.



- b. That the Honourable court be pleased to set aside the order given on the 27<sup>th</sup> July 2021 dismissing this case for want of prosecution.
  - c. That this court be pleased to allow the Plaintiff to prosecute her case against the Defendants.
  - d. That the costs of this application be provided for.
4. It is supported by the Plaintiff's annexed affidavit sworn on 10<sup>th</sup> August 2021. She deponed that she filed this suit through the firm of Ochoki & Ochoki Advocates in the year 2019 and she been desirous of prosecuting it to its logical conclusion. She further deponed that she has previously been to the said Advocates to inquire of the progress of the matter but each time, she was told that she would be advised when a date for hearing is taken. She added that on 19<sup>th</sup> July 2021, she demanded for her file and instructed M/S Masore Nyang'au & Company Advocates to represent her in the matter.
  5. She also deponed that her advocates filed a Notice of Change of Advocates on 6<sup>th</sup> August 2021 and subsequently discovered that this suit was dismissed on 27<sup>th</sup> July 2021. She deponed that the mistake of M/S Ochoki & Ochoki Advocates for not informing her when the case came up for Notice to show cause why the suit should not be dismissed and not prosecuting the suit should not be visited upon her.
  6. The Defendants did not file a response to the application.

#### **The Plaintiff's written submissions**

7. They are dated 9<sup>th</sup> December 2021. The Plaintiff's counsel urged the court to consider the principles for reinstatement of suit in *Ivila v Kyumbu* [1984] KLR. He relied Article 159(2) (d) of *the Constitution* to submit that the court has discretion to issue the orders sought.
8. It was his submission that the dismissed plaint raises triable issues and the Plaintiff should not be condemned unheard in light of Article 50 of *the Constitution* that provides for the right to hearing. He added that mistake of counsel should not be visited upon the Plaintiff since it is her previous counsel who failed to prosecute the suit. He put forward the case of *Ahmed v Highway Carriers* [1986] LLR 258 (CAK).
9. The sole issue for determination is whether this suit should be reinstated. The record indicates that the suit was dismissed on 27<sup>th</sup> July 2021 for want of prosecution. On that day, there was no appearance by counsel for the parties despite service. The record also indicates that the matter has been mentioned 8 times when both parties did not appear. It is a 2019 matter that has never taken off. The Plaintiff blamed the inaction on her previous counsel. The Plaintiff's previous Advocates seem to have lost interest in the matter and abandoned it. Since the Plaintiff was represented, it will be improper to blame her for the inaction. The application for reinstatement is unopposed, and it was brought within a month of the suit's dismissal. In my view, the justice of the case tilts in favour of the Plaintiff.
10. I am guided by the decision of the court in *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR where the court stated:-

“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. 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."

11. In conclusion, I find merit in this application I grant the orders sought namely:-
- a. That the orders of 27<sup>th</sup> July 2021 dismissing the suit for want of prosecution are hereby set aside.
  - b. That the Plaintiff is directed to set down the suit for hearing within sixty (60) days from the date of this ruling failure to which this suit shall stand dismissed.
  - c. The costs of this application do abide the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 12<sup>TH</sup> DAY OF MAY 2022.**

.....  
**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Chelangat for the Plaintiff

**No appearance for the Defendants**

**Steve - Court Assistant**

