



REPUBLIC OF KENYA



KENYA LAW
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**Kambi & another v Tile (Environment & Land Case 27 of 2013)
[2022] KEELC 13584 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 27 OF 2013
MAO ODENY, J
OCTOBER 12, 2022**

BETWEEN

CHRISTOPHER MUMBA KAMBI 1ST PLAINTIFF

PRISCILLA SIDI KITSAO 2ND PLAINTIFF

AND

TATU TILE DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated January 18, 2022 by the Plaintiff/Applicant seeking the following orders: -
 - a) Spent
 - b) That this Honourable Court be pleased to Review the order for dismissal of the suit herein for want of prosecution made on the March 23, 2021 and instead substitute the same with an order reinstating the suit.
 - c) That upon granting prayer (2) above, this Honourable Court be pleased to Order and direct that the application filed herein for substitution of the Defendant's name be deemed to be proper and duly filed and be allowed to sou motu or direct that the same be heard, determined and the Orders sought therein be granted.
 - d) That upon granting prayer (3) above, this Honourable Court be pleased to Order and direct that the suit do proceed for full hearing and determination.
 - e) That this Honourable court be further pleased to make or issue such other orders or directions as may appear to the court to be just and convenient.



- f) That costs of this application be in the cause.
2. The application was supported by the affidavit of Christopher Mumba Kambi sworn on the February 18, 2022 where he deponed that the suit was dismissed for want of prosecution on the March 23, 2021 and that before the matter could take off for hearing, he received information that the Defendant died on the February 4, 2020.
 3. The Applicant also deponed that they were not able to cite the representatives of the deceased Defendant as they declined to furnish them with a copy of the Death Certificate.
 4. The Applicant stated that he applied for a mandatory order compelling the Civil Registrar of persons and Deaths to furnish them with a certified copy of the Certificate of Death which order was granted and subsequently complied with whereby a citation was filed and order granted on November 23, 2021
 5. It was the Applicant's case that he presented an application for substitution of the deceased Defendant but found that the suit had been dismissed for want of prosecution.
 6. The Defendant opposed the application vide a replying affidavit by Advocate Onesmus Mangaro where he deponed that obtaining a grant of representation does not automatically make the intended substitutes parties to the suit.
 7. Counsel submitted that the it has been over two years since the deceased passed on and any claim against the estate has automatically abated. Further that it has been 7 years since the filing of this suit and the Plaintiff has never taken any action.
 8. Mr. Mangaro also submitted that this matter had earlier been dismissed for want of prosecution and urged the court to dismiss the application with costs.

Analysis And Determination

9. This is an application to reinstate a suit that was dismissed for want of prosecution.
10. The issue for determination is whether the application has merit. This matter was filed in 2013, was listed for hearing on the November 14, 2016, and was dismissed for want of prosecution since both parties were not in attendance.
11. The Plaintiffs thereafter filed an application dated April 16, 2018 to have the matter reinstated which application was allowed. The matter was later listed severally for pre- trial conference before the Deputy Registrar who after several mentions listed it for dismissal for want of prosecution on the March 23, 2021 when the same was dismissed for want of prosecution.
12. In the case of *Ivita v Kyumbu* [1984] KLR 441 the Court laid down principles in respect applications for reinstatement of suits dismissed for want of prosecution where it was held: -

“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 it 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".

13. As earlier stated, this matter was filed in 2013 and no steps have been taken to prosecute the same. It was also dismissed for want of prosecution and the Applicant filed an application for reinstatement of the suit which was allowed.
14. The Defendant also died in 2020 and the Applicant did not take steps immediately within 1 year. The suit therefore abated in 2021.
15. I have considered the application, the submissions by counsel and find that the reasons given by the Applicant are not plausible to benefit from the discretion of the court. The Applicant has been given several opportunities to prosecute the case but has failed to do so.
16. Consequently, I find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

