



**Chomba v Chomba (Environment & Land Case 275 of 2017)
[2024] KEELC 1660 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1660 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 275 OF 2017**

LN GACHERU, J

APRIL 4, 2024

BETWEEN

EMMA WANGUI CHOMBA APPLICANT

AND

CHARLES MWANGI CHOMBA RESPONDENT

RULING

1. The Matter for determination is the Notice of Motion Application dated 29th June 2023, brought by the Plaintiff/ Applicant herein under Article 159(2)(d) of *the Constitution* of Kenya, Sections 1, 1A, 3, 3A of the *Civil Procedure Act* and Order 9 Rule 9 and 10 & Order 12 Rule 7 of the Civil Procedure Rules. The Plaintiff/Applicant has sought for the following orders:
 - a. That leave be granted to the Law Firm of Wangui Gachango & Associates Advocates to come on record for the Plaintiff/Applicant.
 - b. That this Honourable Court be pleased to vacate the orders made on 24th April 2019, which led to the dismissal of this suit on 25th May 2019, and reinstate the suit for hearing on merit.
 - c. That the costs of this application be in the cause.
2. The Application is supported by the grounds set out on the face thereof and on the Supporting Affidavit of Emma Wangui Chomba, the Applicant herein, sworn on 23rd June 2023.
3. These grounds in support are;
 - a. That on 24th April 2019, the court lifted a notice to show cause on condition that this suit be fixed for hearing within 30 days' failure to which the same would stand as dismissed.
 - b. That as of 25th May 2019, the matter had not been fixed for hearing as directed by the orders of 24th April 2019. Therefore, the suit stood as dismissed.



- c. That on 4th March 2020, the Plaintiff/Applicant filed an application seeking that the suit be reinstated for hearing.
 - d. That on 24th September 2020, the application dated 4th March 2020, was dismissed for non-attendance.
 - e. That the Respondent filed an application dated 5th March 2020, seeking to have the suit dismissed. The Application was allowed on 12th October 2020.
 - f. That this prompted the Plaintiff/Applicant to move the court through an application dated 26th November 2020, seeking to have the orders of 12th October 2020, dismissing the suit be set aside, and for the suit to be reinstated for hearing.
 - g. That in its ruling of 1st February 2021, the court noted that the orders of 12th October 2020, were issued erroneously as the suit had already been dismissed. As such, the orders of 24th April 2019, are still in subsistence.
 - h. That it is only just and fair that the orders of 24th April 2019, which prompted to the suit to stand as dismissed on 25th May 2019, be dispensed with so that the matter can be heard on merit.
4. In her supporting Affidavit, the Plaintiff/Applicant averred that she is a step-sister to the Defendant/Respondent, as they share the same father. It is the Plaintiff/Applicant's averment that the suit land LOC.6/MUTHITHI/373, which measures approximately 10 Acres is registered in the name of the Defendant/Respondent to hold it in trust for himself and his siblings including the Plaintiff/Applicant.
 5. It was her contention that their late father CHOMBA NG'ANG'A was the initial registered owner of the suit land, which he later transferred to the Defendant/Respondent (his son) herein in 1986, during which time the said CHOMBA NG'ANG'A, was sick and hospitalized.
 6. The deponent further averred that a dispute over the suit land was before the Land Disputes Tribunal (LDT), involving their father CHOMBA NG'ANG'A, and the Defendant/Respondent herein consequent to which an Award was rendered to the effect that CHOMBA NG'ANG'A, as the original owner of the suit property had a rightful claim to the property and ordered for its subdivision. A copy of the aforesaid award was annexed by the Plaintiff/Applicant.
 7. It was her further contention that the Defendant/ Respondent herein filed an Appeal in the High Court (Nyeri Misc. No. 70 of 2000), against the aforesaid Award of the LDT, whereby the Court delivered a Judgement to the effect that the LDT lacked jurisdiction to adjudicate on issues relating to title to land, which Judgement prompted the filing of Nyeri High Court O.S. 40 of 2011, which suit was later transferred to Muranga as ELC Case No. 275 of 2017, the suit herein.
 8. The suit that is sought to be reinstated was filed as an Originating Summons on 27th April 2011, by Prisca Njoki Chomba (now deceased) Anastacia Chomba(deceased) and Emma Wangui Chomba, the Plaintiff/ Applicant herein. Prisca Njoki Chomba, who was the 1st Plaintiff and the mother to the Plaintiff/Applicant died in 2014, while Anastacia Chomba, the 2nd Plaintiff who was sister to the Plaintiff/Applicant died in 2017.
 9. The said suit was dismissed on 25th May 2019, pursuant to directions issued by the Court on 24th April 2019, lifting the Notice given to the Plaintiffs to show cause why the suit should not be dismissed, on condition that the suit be fixed for hearing within 30 days, from the date of the said order, failure to which the suit would stand dismissed.



10. It is the Plaintiff/Applicant's contention that she retained various Advocates in the suit, who failed to update her on the progress of the case and dates of appearing in court. Therefore, it was not her fault for the non-attendance which led to dismissal of the suit.
11. She contended that at the time of dismissal of the suit on 25th May 2019, she had retained the Law Firm of M/s Karweru & Co. Advocates, as her legal representatives and was unaware that the aforesaid Firm of lawyers had filed before the Court an Application to cease acting for her, which Application was dated 28th August 2018.
12. Further, it was the Plaintiff/Applicant's contention that the record reflects that the Law Firm of M/s Karweru & Co. Advocates, did appear in Court on her behalf on 24th April 2019, which absence led to the setting aside of the Notice to Show Cause, issued against her, despite the subsistence of the aforesaid Notice to Cease Acting from M/s Karweru & Co. Advocates.
13. The Plaintiff/Applicant also contended that she approached the court on 4th March 2020, through the Law Firm of M/s Gitau J.h Mwara & Co. Advocates, who filed on her behalf an Application for reinstatement of the suit. She averred that the said Law Firm of M/s Gitau J.h Mwara & Co. Advocates, did not appear in Court during the hearing of her Application for reinstatement of suit on 24th September 2020, which absence led to the dismissal of her Application dated 4th March 2020, for reason of non-attendance.
14. Further, that the Defendant/ Respondent also filed an Application dated 5th March 2020, wherein he sought for dismissal of the Plaintiff/Applicant's suit for want of prosecution. This Application was allowed by the Court on 12th October 2020.
15. It was the Plaintiff/ Applicant averments that the Law Firm of M/s Gitau J.h Mwara & Co. Advocates, failed to appear in Court on 12th October 2020, when the Defendant/Respondent's Application dated 5th March 2020, and as a consequence, the said Application that sought to have the suit dismissed was allowed.
16. It was her further averment that she filed an Application dated 26th November 2020, wherein she sought for setting aside of the Orders dated 12th October 2020, which dismissed the Plaintiff's suit and also sought for reinstatement of the dismissed suit.
17. That in its Ruling of 1st February 2021, the court held that the orders dated 12th October 2020, were issued in error as the suit had already been dismissed and that the orders dated 24th April 2019, were still in force.
18. She contended that upon obtaining the said orders issued on 12th October 2020, the Defendant/ Respondent, demolished a house that was erected on the suit land, cut down trees and crops situated on the suit property without any recourse to the Plaintiff/Applicant.
19. Further, she contended that the order of the Court dated 12th October 2020, erroneously referred to the suit land as LOC.6/Gikarangu/373, instead of Loc 6/ Muthithi/ 373.
20. That following the non-attendance by the two Law Firms which the Plaintiff/ Applicant had instructed to represent her in the suit, she instructed the Law Firm of J.K. Kinyua & Co Advocates, to file an Application dated 26th November 2020, seeking to set aside the orders of the Court dated 12th October 2020, and it is upon delivery of the Ruling dated 1st February 2021, that the Court clarified two issues namely, that the orders dated 12th October 2020, were issued erroneously, and that the orders dated 24th April 2019, were still in force.



21. The Defendant/Respondent though served with the instant Notice of Motion Application, as is evident from the Affidavit of Service of Susan Wangui Gachago, sworn on 21st July 2023, failed to file any documents in opposition to the said Application. Consequently, the instant Notice of Motion Application, proceeded for hearing *ex parte*.
22. The court directed that though the said Application was not opposed, it could only be allowed on merit. The Plaintiff/Applicant was directed to file brief written submissions in support of her Application. The written submissions were filed on 31st July 2023, through the Law Firm of Wangui Gachago & Co Advocates.
23. In her submissions filed, the Plaintiff/Applicant has relied on various decided cases, among them the holding of the Court in the case of Catherine Kigasia Kivai V Ernest Ogesi Kivai & 4 others [2021]e KLR for the proposition that even if delay by a Plaintiff is prolonged, as long as the court is satisfied with the Plaintiff's excuse for the delay, the suit should not be dismissed.
24. Further, the Plaintiff/Applicant relied on the reasoning of the Court in the case of Reynolds Construction Co. (Nig) Ltd V Festus M'Arithi M'Mboroki [2022]e KLR in support of the contention that pursuant to the provisions of Article 159 of *the Constitution* of Kenya as read together with Sections 13 and 14 of the *Environment and Land Court Act* and Sections 1A, 1B and 3A of the *Civil Procedure Act*, there is an obligation imposed upon the Courts to render substantive justice to parties.
25. The Plaintiff/Applicant also relied on the decision of the Court in the cases of Gladys Njeri Kirugumi V Langata Development Co. Ltd & Another [2016]e KLR ,and Films Rover International Ltd V Cannon Film Sales Ltd [1986] 3 All E.R. 772 , wherein the court held that the path of lesser risk of injustice entails allowing the application for setting aside *ex parte* judgement, or otherwise the Applicant would be more prejudiced if denied the opportunity to prosecute her said application.
26. Reliance was also placed in the case of David Bundi Muthee v Timothy Mwenda Muthee[2022]eKLR, in support of her submissions that the Court has discretion to set aside judgment in order to avoid injustice or hardship being visited upon a litigant. She also cited the decision of the Court in the case of Patel V E.A Cargo Handling Services Ltd [1974] E.A. 75 to support her contention that there exist no limits or restrictions on the Court's discretion to vary a judgment save that a judgment can only be varied on terms which are just.
27. In support of the proposition that mistakes by counsel should not be visited on a litigant, the Plaintiff/Applicant relied on the holding of the Court in the following cases of Philip Chemwolo & Another V Augustine Kubende [1986] KLR; Zebedee Mmata Injera V Bensons Anubi Luhongo, Joanne C.K. Luhongo (Interested Party) [2021]eKRL; Belinda Muras & 6 Others V Amos Wainaina [1978] KLR; and, in Martha Wangari Karua V IEBC (Nyeri Civil Appeal) No.1 of 2017.
28. The above are the pleadings and the submissions in support of the instant application, which the court has carefully read and considered. The court has also considered the relevant provisions of law, and finds as follows;
29. There is no doubt that this suit was filed in 2011. It moved from Nyeri High Court, to Nyeri ELC and finally to Muranga ELC. By the time the suit was dismissed, it had remained in the judicial system for about 8 years.
30. Having now considered the available evidence, the court finds the issue for determination is whether the Plaintiff/Applicant's instant Application is merited.



31. From the court record, it is clear that the court did issue an N.T.S.C on 20th March 2019, for Plaintiffs failure to comply with Order 11 and attend Pre-trial conference. The said N.T.S.C was heard on 24th April 2019, when the court lifted the said N.T.S.C, on condition that the matter should be set down for Pre-trial within a period of 30 days from the date thereof.
32. It is also evident that no action was taken by the Plaintiff/ Applicant as directed by the court. Given that there was a valid court order, the suit did stand dismissed after 30 days from 24th April 2019, that meant on 25th May 2019, the suit stood dismissed.
33. Further, it is evident that the Plaintiffs filed a Notice of Motion Application dated 4th May 2020, seeking to reinstate the suit. That was almost after one year since the orders of dismissal of the suit came into effect, and the suit stood dismissed.
34. It is trite that court orders are not given in vain, but are issued so that they can be obeyed and/ or adhered to. See the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR, where the Court made the following observations;
- “It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal.”
35. The court made an order on 24th April 2019, to the effect that N.T.S.C was lifted on condition that the matter be set down for Pre-trial directions within a one month from the date thereof. The Plaintiff/ Applicant did not comply, and did not go back to court to explain reasons for failure to comply. The Plaintiff seemed to have gone into deep slumber as stated by the court in its Ruling of 1st February 2021, and just woke up after the Notice of Motion dated 3rd March 2020, was filed for orders of dismissal of the case for want of prosecution.
36. Sections 1A and 1B of the *Civil Procedure Act* require the court to facilitate expeditious disposal of matters filed before it. From these provisions of law, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without any delay. These Sections 1A and 1B, of the *Civil Procedure Act*, Cap 21, Laws of Kenya provide as follows:

“1A. Objective of Act

- (1) 1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court

1B. Duty of Court



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”

37. Further, Section 3A of the [Civil Procedure Act](#), gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. The section reads as follows;

“3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

38. The factors to be considered for the purpose of reinstatement of suits were set out in the case of *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated;

“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.”

39. This decision in *Ivita vs. Kyumbu* [1984] KLR 441 was followed in the case of *Jim Rodgers Gitonga Njeru vs. Al-Husnain Motors Limited & 2 others* [2018] eKLR, where the court held as follows:

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

40. It is trite that reinstatement of a suit is done at the discretion of the court, which discretion ought to be exercised in a just manner. In the case of *Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another*



[2018] eKLR the court echoed the decision of the court in the case of Shah vs. Mbogo & Another (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“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 course of justice.”

41. Further, in the case of Mobile Kitale Service Station vs. Mobil Oil Kenya Limited & another [2004] eKLR, the court stated the need for expeditious disposal of suits as follows;

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

42. *The Constitution* is also very clear in Article 159(2)(b), that justice should be administered without undue delay. One of the cardinal principles in our Constitution is “the expeditious delivery of justice”. This principle finds its root in the legal maxim which states, “Justice delayed is justice denied”. Therefore, if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families.

43. This matter has been in the judicial system since 2011. The delay has been occasioned by the Plaintiff/Applicant herein in failing to comply with Order 11 of the Civil Procedure Rules and setting the matter down for hearing. Further, Article 50(1), of *the Constitution* states that all parties are entitled to fair hearing. Expeditious disposal of cases that are pending in court is one tenet of Fair hearing.

44. It is trite that Justice must cut across all the parties herein. The court too has a duty to ensure that backlog of cases has been reduced, and that cases in judicial system are heard and determined within a reasonable time. As noted earlier, this case has been in the judicial system for long, and by seeking to revive it, then the sword of Democles will keep on hanging over the Defendant/Respondent head for long.

45. The Plaintiff/Applicant herein would like the court to believe that the delay was caused by her advocates. However, in the Application for ceasing to act that was filed by KARWERU & CO Advocates, it was to the effect that the Plaintiff had failed to give the said Law Firm proper instructions. Even after the dismissal of the suit, the Plaintiff/ Applicant took more than one year to take any action. It seems the Plaintiff/ Applicant had lost interest in the suit, and only woke up from deep slumber in 2023, when she filed the instant Application.

46. Courts have found and held time and again that matters in court belong to litigants and they should take keen interest in the prosecution of their matters. It is not enough to hide under the submissions that mistake of a counsel should not be visited on a litigant.

47. In the case of Mwangi Gachiengu & 2 others v Mwaura Githuku also known as Bernard Mwaura J & Another [2019] eKLR, the court stated that;

“Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter, or when the matter is dismissed because it has not



been prosecuted or fixed for prosecution within one (1) year..... The court was therefore entitled to dismiss the suit for want of prosecution. The failure by the advocate, who is an authorized agent of the Applicants, to inform his clients about the dismissal, cannot be a good reason to vitiate the order of the court.”

48. Further, the court notes that the dismissal of the suit was done in the year 2019. The Plaintiff/Applicant filed an application for setting aside of the order for dismissal on 26th October 2020, and a ruling was delivered on 1st February 2021, which ruling clarified that there was no suit pending as the same was dismissed vide the court order of 24th April 2019.
49. The Applicant filed this Application on 23rd June 2023, which was more than 2 years after the Ruling of 1st February 2021. The explanation for delay was not satisfactory, and this court finds that litigation must come to an end. It is also evident that on 24th September 2020, when the Plaintiff/Applicant’s application for reinstatement of suit dated 4th March 2020, was dismissed, she did not seek for review or setting aside of the same. The Plaintiff/Applicant has not sought to reinstate that Application, but has filed a fresh one.
50. Having carefully considered the Pleadings herein, the court record, the filed submissions, cited authorities and similar decided cases, the court finds that no good explanation has been given for failure to file the instant Application on time. The suit was dismissed in 2019, and the instant application was filed after 4 years from the date of dismissal, which period is unreasonably long period.
51. For the above reasons, this court finds that the instant Application dated 23rd June 2023, is not merited. Consequently, this Notice of Motion Application for reinstatement of the suit is dismissed entirely, for lack of merit.
52. Prayer No.1 is for leave to come on record, after Judgement. There is no opposition to that prayer, and the same is allowed.
53. In a nutshell, this court allows prayer No.1, of the Notice of Motion Application dated 23rd June 2023, but dismisses prayer No. 2 entirely for lack of merit. Further, this court makes no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 4TH DAY OF APRIL, 2024

L. GACHERU

JUDGE.

Delivered online in the presence of:

Ms Wangui Gachago for the Plaintiff/Applicant

N/A for the Defendant/Respondent

Joel Njonjo – Court Assistant

