Karani & another v Mwaura; Irungu & another (Applicant) (Suing as the Legal Representatives of the Estate of George Henry Irungu) (Environment and Land Case Civil Suit 361 of 2017) [2023] KEELC 20388 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20388 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND CASE CIVIL SUIT 361 OF 2017

LN GACHERU, J

OCTOBER 5, 2023

BETWEEN

LABAN WAHINYA KARANI ..... 1ST PLAINTIFF

GEORGE HENRY IRUNGU ..... 2ND PLAINTIFF

AND

MARY WAITHIRA MWAURA ..... DEFENDANT

AND

LOISE MUTHONI IRUNGU ..... APPLICANT

ANTHONY WAINAINA IRUNGU ..... APPLICANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF GEORGE HENRY IRUNGU

RULING

1. The Applicants moved this Court vide a Notice of Motion Application dated 22nd December 2022, for orders that:

    1. This Honourable Court be pleased to substitute the 2nd Plaintiff herein with his legal representatives; Loise Muthoni Irungu and Antony Wainanina Irungu.

    2. This Honourable Court be pleased to set aside its orders of 2nd October 2018, and reinstate the suit for hearing.

    3. This Honourable Court be pleased to give directions as to an expedient hearing of this suit.

    4. Costs of this application be provided for.

2. The application is premised on tweleve grounds set out on the face of the application and the Supporting Affidavit of Loise Muthoni Irungu, sworn on the 22nd December, 2022. It is the Applicants' claim that they have been in possession and use of the suit property since 1964, and had instituted the instant suit claiming adverse possession. That the instant suit was dismissed on technicality on circumstances beyond their control and that the Plaintiffs passed on, thus the Applicants had to undertake succession proceedings to acquire status.

3. They further contend that the Respondent acquired ownership of the suit property by dint of transmission and now intends to dispose of the suit property. The deponent details an account of how the suit was dismissed and posits that when the matter was dismissed, their Counsel on record could not attend Court on the said date as he was indisposed. Additionally, that their attempts to comply with the orders of the Court for 9th July 2018, were futile on account of non-availability of the dates within the 30 Days window period granted by the Court. That they were unable to move Court at the soonest because the 2nd Plaintiff suffered a terminal illness coupled with the emergence of Covid-19, which watered down their intentions to prosecute the matter. As a result, thereof, they are desirous of having the matter reinstated and prosecuted to its logical end, failure to which the Defendant/Respondent will take away their proprietary rights over the suit property.

4. In response to the application, the Defendant/Respondent filed her Replying Affidavit on the 10th February 2023, wherein she deponed that the application is not legally tenable for want of laxity, staleness and delay. That the Applicants took four years before they could file the instant application and the reasons advanced are misleading. She maintained that the Applicants have never occupied her parcel of land and if any the 1st Plaintiff had constructed some houses for his workmen on a portion of land, but who left after the demise of the 1st Plaintiff. She adds that the Applicants reside on an adjacent land which they have developed thereon and as such have no claim over her land. It is her case that the suit property is her ancestral home and she has no intention of disposing off.

5. The Applicants filed a Further Affidavit in response to the Respondent's disposition. The deponent reiterate that the 1st Plaintiff put up permanent houses on the suit property, and gives details on the alleged current occupation of the suit property. That the issues for contention ought to be adequately dealt with by this Court.

6. The application was canvassed by way of written submissions as directed by the Court.

7. The Applicants filed their submissions on 13th June 2023, through the Law Firm of Kinoti & Kibe Co. Advocates and raised four issues for determination by this Court.

8. On substitution, the Applicants invoke the provisions of Order 24 of the *Civil Procedure Rules* and heavily relies on Rule 7(2), where in it empowers the Court to revive a suit where there is sufficient cause. Reliance was placed on the case of *The Honourable Attorney General v the Law Society of Kenya & Another*, Civil Appeal No. 133 of 2011 where the Court expounded what constitutes sufficient or good cause.

9. On the issue of setting aside, the Applicants have placed reliance on the provisions of review as set out under Section 80 of the *Civil Procedure Act* as well as Order 45 Rule 1 of the *Civil Procedure Rules*. The Applicants submitted that they have enunciated through the Affidavit adequate reasons showing that they are deserving of the orders sought. In an attempt to define what constitutes sufficient cause, the Applicants relied on a litany of cases.

10. The Applicants submitted extensively on the need for this Court to issue injunctive orders in a bid to preserve the suit property. They maintained that they have a right over the suit property and which

this Court should protect. In the end, the Applicants submitted that it is in the interest of justice that the application be allowed.

11. The Respondent filed her submissions on the 21st June 2023, through the Law Firm of L. M Kinuthia & Associates raising five issues for determination. The Respondent in submitting that there was delay in filing the application relied on the case of *Mwangi S Kimenyi v Attorney General & Another* {2014}, where the Court pronounced itself on what amounts to inordinate delay. She submits that the Applicants have failed to demonstrate that the delay was occasioned by the delay in Milimani which ought to have been demonstrated by filing a certificate of delay. She reiterates that the suit abated and there is no sufficient ground why it should be reinstated as it ceases to exist in the eye of the law. Reliance was placed in the case of *Sais Sweilem Gheithan Saanum v Commissioner of Lands*(2015)eKLR. She urged this Court to find that the application is void and is thus a nullity as was held in *Macfoy v United Africa Co. Limited* {1961}.

12. The genesis of this Application is the orders of this Court of 9th July 2018, wherein the Court gave orders that the suit be fixed for hearing within 30 Days, failure to which the suit would stand dismissed. As fate would have it, there was non-compliance leading to the matter being dismissed and which was affirmed by the Court on 2nd October, 2018. The crux of the suit is that the Plaintiffs filed the instant suit in Nairobi Civil Suit No. 222 of 2008, claiming orders for adverse possession over the suit property. The matter was never set down for hearing and a Notice to Show Cause was issued on 27th May, 2015. During the pendency of the NTSC, the matter was transferred to this Court on 27th April, 2017. The Plaintiffs never took any steps to set down the matter for hearing and the Court gave orders on 26th February 2018, directing the DR to issue a NTSC.

13. On 9th July 2018, when the matter came up for mention, the Plaintiffs failed to attend Court despite taking the date at the registry. It is this day that the Court gave conditional orders which the default led to the dismissal of the suit. A Mention date was fixed at the registry on 4th September 2018, and on 2nd October 2018, the Plaintiffs' counsel was present in Court and the Court noted that the matter was dismissed and advised that the parties move the Court appropriately. The Plaintiffs slept on this up until the year 2022, when the Applicants moved this Court.

14. Interestingly, the Applicants have intimated that both Plaintiffs have since passed on, but they have sought orders to substitute one of the Plaintiffs. In light of the orders of this Court of 9th July 2018, the suit herein stood dismissed. Even so, as per the Grant ad Litem it is evident the 2nd Plaintiff died on 16th July, 2021, which means the suit abated by application of Order 24 rule 3(2) of the *Civil Procedure Rules* by the time the Applicants moved this Court. Rule 7(2) allows the Legal Representatives to file an application to revive a suit on sufficient grounds.

15. The Applicants now want this Court to set aside its order that led to the dismissal of the suit. Taking into account the prayers sought and the grounds in support of the application, the rival written submissions by parties and the annexures thereto and as well as the record of this suit the issues for determination by this Court are

    i. Whether substitution can issue?

    ii. Whether the suit can be reinstated?

    iii. Who should pay costs for this application?

I. Whether substitution can issue?

16. It is common knowledge that no suit can be sustained by a dead person. However, where the suit is one that can survive a deceased person, the Personal Representative can be substituted. This is a requirement under Order 24 rule 3 which provides:

> " 3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

17. What donates a person the power to sue or defend a suit on behalf of a deceased person is a grant either a full grant or grant ad litem. This Court has perused a copy of a Grant ad Litem issued in favour of the Applicants for the 2nd Plaintiff. It is not clear why there is no application in favour of the 1st Plaintiff whom the Applicant allege is dead. Be that as it may, this Court has no reason not to allow the prayer for substitution and it proceeds to order for substitution in favour of the 2nd Plaintiff.

II. Whether the suit can be reinstated?

18. This Court gave orders on 9th July 2018, which non-compliance resulted in the dismissal of the suit. Prior to the matter being transferred to Murang'a, a NTSC had been issued as to why the suit could not be dismissed for want of prosecution. Sadly, since its filing in 2008 the matter has never proceeded for hearing and a perusal of the file informs this Court that parties had actively engaged in some applications.

19. A Court has the discretionary powers to reinstate a suit or not. This power must be exercised judiciously to avoid an injustice. This Court is persuaded by the principles for reinstatement of a suit that were set out in the case of *Birket v James* [1978] AC 297as quoted by the Court in the case of *James Yanga Yeswa v Bob Morgan Services Limited* [2019] eKLR. The Court held:

> " .... I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution. These principles are:
>
> 1. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
> 2. Whether the delay is intentional, contumelious and, therefore, inexcusable;
> 3. Whether the delay is an abuse of the court process;
> 4. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
> 5. What prejudice will the dismissal occasion to the plaintiff?
> 6. Whether the plaintiff has offered a reasonable explanation for the delay;
> 7. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"

20. Similarly, this Court takes cue of the pronouncement of the Court in the case of *John Nahashon Mwangi v. Kenya Finance Bank Ltd (in Liquidation)* [2015] eKLR, where the Court held:

> "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 Judgement. 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."

21. In the present case, the applicant in his sworn affidavit contends that on the hearing day the Plaintiffs' counsel was unable to attend Court. It is clear from the record that there was no effort the Plaintiffs ever made to either follow up on the matter or know the position of the proceedings of 9th July, 2018. Interestingly, the Applicants seem to blame the Court for the delay in obtaining the Grant Ad Litem while it is evident the Petition was filed in 2022, and a Grant issued then. Grant Ad Litem was issued on 29th November 2022, vide Nairobi Succ' No. E3412 of 2022.

22. It is a show of dishonest to blame the Court when there is no evidence maybe in the form of a letter to demonstrate the difficulty in obtaining the Grant. Importantly, the 2nd Plaintiff died in 2021, that's about three years after the suit was dismissed. There was no document attached to the application to show that the deceased was unable to move the Court appropriately on account of illness as alleged.

23. It is trite law that there is no measure of what constitutes inordinate delay, but often times it will not be difficult to discern it when it occurs. Also, it is common knowledge that the provisions of the law aids both parties to a suit hence the need to handle Court proceedings with the diligence it deserves. The Plaintiffs slept on their right to prosecute the suit and there is no clear explanation that this Court has received as to their lacklustre attitude in prosecuting the matter. It is saddening that the Applicants have alluded to the fact that the Plaintiffs' counsel did not attend Court since he was indisposed and that he never found someone to hold his brief. This is such a cavalier attitude to the proceedings of this Court and it cannot be short of an abuse of the process of Court.

24. It should be remembered that the incorporation of overriding objectives in Sections 1A and 1B of the *Civil Procedure Act* placed obligations on this Court to facilitate the just, expeditious, proportionate and affordable resolution of cases. As well, the provisions of Article 50 of the *Constitution* is a right guaranteed on both parties to a proceeding. The sword of Damocles should not be let to hang on the head of the Respondent on account of an indolent party. The Applicants are interested on the seat of equity but they failed to do equity on their end. As the maxim of equity dictates, equity aids the vigilant not the indolent.

25. In the case of *Kizito Wafula (suing as the legal and personal representatives of the Estate of Pamela Nabangala Webale & Basilisa Nalonje Wafula (Deceaseds) v Kassam Hauliers Limited* [2021] eKLR, the Court declined to allow an appeal where the Appellant had moved the trial Court to reinstate a

suit 4.7 years since dismissal. The Court of Appeal in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2020] eKLR, declined to reinstate an appeal dismissed six years back and held that Article 159 is not a panacea for default in procedure it can only be granted to deserving parties.

26. This Court is alive to the prayers sought in the suit and while no one should be driven from the seat of justice, the law is clear and it applies to both the Plaintiffs and the Defendant. The Applicants have not adequately and sufficiently explained to this Court why they sat on the right for a period of three years. Entertaining the application will amount to unfair hearing on the part of the Respondent who despite the advanced age continues to have burden of litigation hanging over her shoulders.

27. To this end this Court finds and holds that the prayer for reinstatement is not merited.

III. Who should pay costs for this Application?

28. It is trite law that costs shall follow the events. This Court in exercise of the discretion donated by Section 27 of the *Civil Procedure Act* shall exercise it in favour of the Respondent.

29. Having now carefully considered and analysed the Notice of Motion Application dated 22nd December 2022, the Court finds and holds that save for the prayer for substitution (Prayer No.2) which was allowed, the other prayers are not merited and the Court proceeds to dismiss the said Application in respect to prayers 3 and 5, entirely with costs to the Respondent.

30. The suit cannot be reinstated.

31. It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 5TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered Online in the presence of:-

Mr. Mwathe for the 1st and 2nd Plaintiff

Mr. Kinuthis for the Defendants/Respondent

Mr. Mwathe for the Applicants

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

05/10/2023