



**Kariuki & 2 others v Karania (Environment & Land Case  
997 of 2015) [2023] KEELC 20531 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20531 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 997 OF 2015  
OA ANGOTE, J  
OCTOBER 5, 2023**

**BETWEEN**

**NJENGA NANCY KARIUKI ..... 1<sup>ST</sup> PLAINTIFF**

**NJENGA MICHAEL KARANJA ..... 2<sup>ND</sup> PLAINTIFF**

**MARY NJENGA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KIRTISH CHANDULAL KARANIA ..... DEFENDANT**

**RULING**

1. Before this Court for determination is the Plaintiffs' Notice of Motion dated 14<sup>th</sup> October 2021 and brought under Section 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules*. The Plaintiffs are seeking orders that:
  - a. The order made herein on October 24, 2019 dismissing the suit herein for non-attendance be set aside and NRB ELC No 997 of 2015 (OS) be heard on merit.
  - b. The suit be transferred to the Chief Magistrate's Court in Kiambu.
  - c. Costs of the application be provided for.
2. The application is based on several grounds and supported by an affidavit sworn by the 2<sup>nd</sup> Plaintiff herein who deponed that the Plaintiffs' previous advocate failed to notify them that the matter was coming up for a Notice to Show Cause hearing on 13<sup>th</sup> February 2018.
3. The 2<sup>nd</sup> Plaintiff deponed that the suit relates to land on which the Plaintiffs live with their old and ailing parents; that allowing the Defendant to succeed would mean that they will be evicted from their residence; that such a move could only be deemed fair if taken after the Plaintiffs have been given an



- opportunity to be heard and that the errors committed by their previous advocate should not be visited on the Plaintiffs whose case should be heard on merit.
4. The Defendant filed a Replying Affidavit in which he deponed that he was the rightful owner of the land known as Kiambaa/Thimbigwa 7211 and 7212 having purchased the same from the John Njenga Karanja who is a father to the Plaintiffs.
  5. The Defendant further averred that the suit was rightfully dismissed as the Plaintiffs had failed prosecute it; that the Plaintiffs have not provided any justifiable reasons as to why it took them close to 4 years to have the suit reinstated and that the Plaintiffs were concealing material facts from the Court.
  6. The Defendant deponed that after the current suit had been dismissed, the Plaintiffs attempted to file CM Kiambu Civil Suit No 448 of 2019 which was dismissed for being res judicata following a ruling dated 31<sup>st</sup> January 2020. In conclusion the Defendant prayed that the application be dismissed with costs to the Defendant.
  7. The Plaintiffs filed two further affidavits sworn by the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs while the second one was sworn by the 2<sup>nd</sup> Plaintiff. In the first affidavit, the Plaintiffs stated that they were Co-Plaintiffs with the 2<sup>nd</sup> Plaintiff and that they were in support of the averments in his supporting affidavit.
  8. The Plaintiffs stated that the suit should be heard on merit as this would not prejudice the Defendant who will have an opportunity to answer any claims that will be presented and that they did not intentionally ignore the suit as their lives revolve around the suit property.
  9. According to the Plaintiffs, their advocate at the time failed to inform them of the on goings in Court. Additionally, it was deponed that the alleged sale of the suit property was illegal and fraudulent whereby the Defendant took advantage of their ailing father. In conclusion the Plaintiffs asked that it was in the interest of justice that the matter should be heard on merit.
  10. The Plaintiffs filed their submissions on May 15, 2023. Relying on Section 3A of the *Civil Procedure Act* and the cases of *Ivita vs Kyumbu* [1975] eKLR and *Bilba Ngonyo Isaac vs Kembu Farm Ltd & Another* [2018] eKLR, the Plaintiffs submitted that the Court should exercise its discretion to reinstate the suit as its dismissal was occasioned by circumstances that were not their fault.
  11. It was submitted that the Plaintiffs were taking care of their ailing father; that the two Plaintiffs were previously represented by the firm of TT Ng'ang'a Advocates who failed to keep the Plaintiffs apprised of the court proceedings and did not take steps to take a hearing date for the matter.
  12. It was submitted that the error of the previous advocate should not be visited on the Plaintiffs who have a legitimate claim; that the suit raises serious triable issues which include the fact that the suit property is the only inheritance that the Plaintiffs have; that the interaction between the Plaintiffs' father and the Defendant was tainted with illegalities and that the Defendant was seeking to recover a loan of Kshs 400,000 yet the suit property is estimated to be worth Kshs 30,000,000.
  13. The Plaintiffs submitted that the delay in filing the application was regretted and that it was not deliberate but was occasioned by the need to take care of their ailing father and that the suit was dismissed around the time the world was experiencing the Covid-19 pandemic.
  14. The Defendant submitted that the Plaintiffs had not demonstrated any justifiable reason to warrant the Court to exercise its discretion to reinstate the suit. The Defendant argued that the Plaintiffs had not submitted any evidence showing that the dismissal could be attributed to their previous advocate.
  15. Additionally, it was argued, the 4-year delay between the dismissal and the filing of the application could not be attributed to the previous advocate and showed a lack of effort on the part of the Plaintiffs.



16. The Defendant also called into question the conduct of the Plaintiffs. The Defendant submitted that it was unlikely that the Plaintiffs were not aware of the progress of the matter as they had instituted Kiambu Civil Suit 448 of 2019 (which was dismissed for being res judicata) after the current suit had been dismissed.
17. In view of the fact that the Plaintiffs did not disclose to this the Court about the existence of the Kiambu matter, the Defendant argued that the Plaintiffs have come to court with unclean hands and should have their application dismissed. The cases of *Esther Nugari Gachomo vs Equity Bank Limited* [2019] eKLR and *Caliph Properties Limited vs Barbel Sharma & Another* [2015] eKLR were relied upon.
18. Additionally, it was deponed that the Plaintiffs are clutching at straws in seeking the reinstatement of the suit on the ground that the suit was dismissed during the Covid-19 pandemic. However, it was submitted that the pandemic started in 2020 while the suit was dismissed in 2018.

### **Analysis and Determination**

19. Based on the foregoing, the following one issue arises for determination: Whether the Plaintiffs' suit should be reinstated.
20. This suit was dismissed under Order 17 Rule 2(1) which provides as follows:

“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.”
21. In supporting their application, the Plaintiffs have argued that the suit should be reinstated because firstly, the dismissal was due to the fault of the advocate; secondly, that the suit raises triable issues and that it is in the interest of justice that it is heard on merit.
22. In the case of *Ivita vs Kyumbu* [1975] eKLR it was stated as follows:

“So 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... Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding 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. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.”
23. This suit was dismissed on February 13, 2018 while the application for reinstatement was filed on October 14, 2021, a delay of more than three years. While it could be plausible that the Plaintiffs' previous advocate was to blame for the dismissal of the suit, the blame cannot be apportioned to him for the failure to promptly file an application for reinstatement.
24. When it is all said and done, the case belongs to the Plaintiffs and not the advocate. It was always upon the Plaintiffs to monitor the progress of their suit, and take quick remedial measures in the event their counsel did not act efficiently in the prosecution of the suit.



25. The Plaintiffs have not shown that they took any tangible steps to follow up on the matter in the period between the dismissal and filing of the current application. They have stated that the Court should consider that the suit was dismissed during the Covid-19 pandemic.
26. However, that is a false assertion. The suit was dismissed on February 13, 2018, two years before the pandemic hit in 2020. They have also argued that all their time was taken up in caring for their ailing father. However, they have failed to explain how they were able to file the case at the Kiambu Chief Magistrate's Court during the period when they were supposedly unable to direct their attention to other things.
27. In view of the foregoing, I find that the delay in filing the application as explained by the Plaintiffs is not only prolonged but inexcusable.
28. Additionally, the Court in the case of *Ivita vs Kyumbu (Supra)* stated that in considering whether the suit should be reinstated, the position of the Court should be considered. Having perused the Court record, it is clear that the Plaintiffs were not serious about prosecuting their case.
29. I say so because the matter came up for mention on the following dates: July 27, 2016, April 26, 2017 and September 21, 2017 (when the notice to show cause was issued). There was no attendance from the Plaintiffs nor their advocate on all of the above dates. Consequently, reinstating the suit would not be a proper use of the Courts time which is limited and should be used responsibly.
30. In view of the foregoing, I find that the application lacks merit and is hereby dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 5<sup>TH</sup> DAY OF OCTOBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Okwaro holding brief for Kimani for Defendant

No appearance for Plaintiff

Court Assistant - Tracy

