



Towett & 2 others v Chelagat & 3 others (Environment & Land Case 87 of 2018) [2023] KEELC 20625 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 87 OF 2018**

**A OMBWAYO, J
OCTOBER 5, 2023**

BETWEEN

**ALICE CHELAGAT TOWETT 1ST PLAINTIFF
JULIET CHEMUTAI TOWETT 2ND PLAINTIFF
VICTORIA CHEPKEMOI 3RD PLAINTIFF**

AND

**RAEL CHELAGAT 1ST DEFENDANT
DAVID NGASURA KONES 2ND DEFENDANT
GEORGE OGENGO 3RD DEFENDANT
LAND REGISTRAR 4TH DEFENDANT**

RULING

1. Alice Chelangat Towett and Julie Chemtai Towett have come to this court vide application dated 9th March 2023 praying for a review of the order made on 2nd February 2022 dismissing the plaintiffs case for want of prosecution and that the plaintiffs be granted leave to prosecute the suit and to mount a defence to the counter claim.
2. The application is based on grounds that on 29th June 2021, when the matter came up for hearing the plaintiffs’ advocate did not attend because he had been suspended to practice law and that the 3rd plaintiff had passed on 17th June 2021. That the 1st and 2nd plaintiffs did not attend due to lack of communication from their advocate. The applicants contend that on the 2nd February 2022 when the matter came up for hearing, it was dismissed for want of prosecution. That judgment was passed against the 3rd defendant after the suit had abated. That there was no notice to show cause why the suit should not have been dismissed for want of prosecution. The court proceeded to hear the defendants counter



- claim undefended. The applicant contend that the application is made expeditiously and is merited. The supplementary affidavit of Alice Chelegat Towett reiterates the grounds of the application.
3. The 2nd application dated 20th March 2023 seeks the court to grant an order that the Officer Commanding Station Mauche Police station to enforce the eviction order issued by court against applicant as there were orders to vacate within 60 days but they did not . The application is supported by the affidavit of Cliff Koome who reiterates the grounds of the application.
 4. The 3rd application dated 24th April 2023 seeks to revive the suit by the 3rd defendant which abated on 17th June 2022. The applicant seeks orders that upon reviving the suit the honorable court be pleased to grant leave to the applicants to substitute the deceased Victoria Chepkemioi with legal representative Alice Chelegat Towett. The application is based on facts that the 3rd plaintiff passed on 17th June 2021 whereas the suit was to be heard on 29th June 2021 when the plaintiffs' did not attend because they were mourning the death of the 3rd defendant and their advocate who had been struck out of the role of advocates did not attend hearing. The court proceeded into the defendants counter-claim and delivered judgment on 27th September 2022. The applicant's claim that the delay in substitution was caused by lack of representation since their advocate had been suspended from the practice of law.
 5. The 1st plaintiff applied for letters of administration ad litem on 8th March 2023 and were issued with the same on 9th March 2023 whereas the suit had abated on 17th June 2022. The defendants have filed grounds of opposition in respect of application dated 24/4/2023 whose import is that the same is incompetent, unmerited and an abuse of court process and the same ought to fail, that the reasons given for reinstatement are unsatisfactory and unfounded since the suit was dismissed for want of prosecution and the same should be dismissed with costs,
 6. The respondent argues that the applicants herein are guilty of laches since they did not inform this honorable court and/or the parties herein without undue delay about the demise of the 3rd plaintiff and the alleged suspension of their former advocates and as a matter of fact the applicants have not annexed any evidence of the alleged suspension.
 7. They state that this suit is very old, the same was dismissed for want of prosecution on 2/2/2022 and the Applicants were not keen on following up on the suit or taking up any action to prosecute the suit and/or reinstate the same and their right is limited to filing a new suit if it is not time barred.
 8. According to the respondents, the plaintiffs' suit has no chances of success in view of the evidence of the land registrar who was an independent witness and from the proceedings it is evident that from the land register there is no record that the plaintiffs are the registered proprietor of the suit parcels of land. That there is no good explanation why the 1st plaintiff delayed in filing the application dated 24/4/2023 the same having been filed approximately twenty two months after the 3rd plaintiff died. The same was also opposed by the affidavit of Koome Gitonga who reiterates the grounds of opposition.
 9. I have carefully considered the applications dated 9th March 2023, 20th March 2023 and 24th April 2023 and do find that the application dated 24th April,2023 should be dealt with first. The 3rd plaintiff died on 17th June 2021, the matter was to be heard on the 29th June 2021 but the plaintiffs did not attend. There is no evidence that Mr B.N Nyaribo of B M Nyaribo & Co advocates had been suspended from practicing law. Though the 3rd defendant was deceased the applicants took too long to apply for substitution of the deceased. She died on 17th June 2021 while the application was made on 24th April 2023 approximately 22 months thereafter. The letters of administration ad litem was obtained on 9th March 2003. There is no explanation why it took the applicant approximately 22 months to obtain letters of administration ad litem. I do not find any good reason given by the applicants why they could not substitute the 3rd plaintiff one year within her demise.



10. The applicants were aware of the existence of this case but no effort has made to revive the suit. The allegation that their advocates was suspended from practicing and are not substantiated and the period of suspension is not given. There was no attempt to appoint another advocate within the period of the suit.

Section 24 rule 7 of the Criminal Procedure Rule 2010 provide:

Effect of abatement or dismissal [Order 24, rule 7.]

- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
 - (2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.
11. I do find the application to reinstate the suit and substitute the 3rd defendant not merited and is dismissed as no sufficient reason is given for failure to continue the suit within the stipulated time. The Court of appeal of the Republic of Kenya in Charles Wanjohi Wathuku Githinji Ngure & Another Civil Application No. 9 of 2016 stressed the importance of strict application of timelines set by the law stating that;
- “Timelines are not technicalities of the procedure which may be accommodated under Article 159 of the *Constitution* or section 3A and 3B of the Appellate Jurisdiction Act”.
12. This was reiterated in John Mutai Mwangi & 26 Others v. Mwenja Ngure & 4 Others, Civil Appl. No 126 of 2014, cited by learned counsel for the respondent, where it was held, in relation to rule 82 of the Court of Appeal Rules that;
- “That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner”.
13. On the application dated 9th march 2023 for setting aside and or varying the order for dismissal of the plaintiff suit for want of prosecution, this only affects the 1st and 2nd plaintiffs as the 3rd plaintiff’s suit abated before judgment was delivered. The applicants state that failure to attend court was due to lack of communication and that they were mourning the death of the 3rd plaintiff.
14. This court finds that the 1st and 2nd plaintiffs have failed to demonstrate that they faced any hardship to prosecute their case. Other than alleging, they have not shown that their advocate was suspended. In any event, the period taken to file the application demonstrates inordinate delay of about 22 months.
15. Setting aside an order for dismissal of suit is discretion of the court. The courts discretion ought to be exercised judiciously and not capriciously.
16. In *John Kiprono Chumo vs Phillip Kipng’eno Langat* (2017) eKLR. This case quoted the principles to guide the court in setting aside exparte judgements as stated in *Pithon Waweru Maina vs Thuku Mugira* (1983) eKLR that;
- (a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgement, he does so on such terms as may be just.



- (b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. As stated in *Shah v Mbogo* (1967) EA 116 at 123 and *Shabir Dir V Ram Parkash Anand* (1955) 22 EACA 48.
 - (c) Additionally, the court has no discretion where it appears there has been no proper service (*Kanji Naram v Velji Ramji* (1954) 21 EACA 20.
 - (d) It is also important to note that a discretionary power should be exercised judicially and in a selective and discriminatory manner not arbitrarily and idiosyncratically *Smith v Middleton* (1972) SC 30.
17. I do decline to grant an order of reinstatement of the plaintiffs claim as no good reason has been given for their failure to attend hearing on the 2nd February 2022 almost 8 months after the death of the 3rd plaintiff, and do hereby dismiss application dated 9th March 2023 with costs.
18. The application dated 20th March 2023 invokes this courts powers to order the Officer Commanding Station Mauche Police Station to enforce an eviction order issued by the court. I do find the application not merited as the police have no powers to enforce court orders they can only provide security for those who execute court orders. The applicant should engage licenced auctioneers to enforce the court order but not the police. Ultimately all applications are dismissed with cost to respondents.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER 2023

A .O. OMBWAYO

JUDGE

