



Watita & 51 others v Satia (Administrator of the Estate of Richard Satia (Deceased) & 4 others (Environment & Land Case 100 of 2018) [2022] KEELC 2692 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2692 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 100 OF 2018
FO NYAGAKA, J
JULY 12, 2022**

BETWEEN

MUYUMBA WATITA & 51 OTHERS PLAINTIFF

AND

JOANNES SATIA (ADMINISTRATOR OF THE ESTATE OF RICHARD SATIA (DECEASED) 1ST DEFENDANT

BEATRICE INJETE FRANCIS (ADMINISTRATOR OF THE ESTATE OF NYONGESA AWELEKHE (DECEASED) 2ND DEFENDANT

NELSON WANYONYI (ADMINISTRATOR OF THE ESTATE OF JULIUS MABUSI (DECEASED) 3RD DEFENDANT

JOAB NYONGESA (ADMINISTRATOR OF THE ESTATE OF NYONGESA CHAIRO (DECEASED) 4TH DEFENDANT

LONAH NAKHUMICHA KITUI (ADMINISTRATOR OF THE ESTATE OF JACKTON SIBOKI (DECEASED) 5TH DEFENDANT

RULING

The Application

1. When the matter was placed before me on 15/11/2021, by the consent of the parties, the Court deemed, under Order 37 Rule 19 of the Civil Procedure Rules, 2010, the Originating Summons as a Complaint and the accompanying documents as the list and bundle of documents. Contemporaneously, the responses were treated as the Defences. This paved way for hearing of the matter which was slated for viva voce evidence taking on 19/01/2022. However, on the said date, the matter was adjourned on account of the fact that the 3rd - 6th Defendants had served the Plaintiffs with Grounds of Opposition on the eve of the hearing date. Consequently, the matter was adjourned to 24/03/2022 when the suit



was dismissed for non-attendance of the Plaintiffs or their instructing Counsel. That is what provoked the present Application by the Plaintiffs.

2. The Notice of Motion Application dated 29/03/2022 was anchored on the provisions enshrined in Sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 and 15 of the Civil Procedure Rules seeking the following reliefs:
 1. ...spent;
 2. That the Honorable Court be pleased to set aside the order issued on 24th March, 2022 and reinstate the suit;
 3. That costs of the application be provided for.
3. The Application was supported by the grounds on the face of the Motion and by Affidavits of Emmanuel S. Chonge, the 5th Plaintiff and Dr. John Kipkoech Chebii, Advocate for the Plaintiffs. The fundament of the Application was that the Plaintiff's Counsel was indisposed when the matter was to be heard on 23/03/2022. He annexed to the Affidavit in support and marked JKC1 a copy of a treatment sheet. He maintained that he channeled his predicament to one, Mr. Rioba Omboto who as a consequence, did not attend court on the said date. He further advised the Plaintiffs not to attend court. In his absence and that of the Plaintiffs, the suit was dismissed for non-attendance. According to the Plaintiffs, both Counsel agreed to take the matter out of the day's cause list. Counsel for the Plaintiffs deposed that upon recuperation, he reported to work on 29/03/2022 when he was notified that the suit had been dismissed. It was deposed that the misfortune of Counsel should not be visited on the case. Additionally, the Plaintiffs had a credible case that ought to be heard. They urged this court to allow the Application as prayed.

The response

4. The Application was opposed vide a Replying Affidavit sworn by David Rioba Omboto, Advocate for the Defendants, on 25/04/2022. While conceding that he was in receipt of the Plaintiffs' Counsel's communication that he was unwell, the same was only received on the hearing date. He added that no Counsel was, in the circumstances, in attendance in court to hold his brief. He deposed that the Application failed to demonstrate that the Plaintiffs stood to suffer great loss and prejudice thus opposed the reinstatement of the suit.

Submissions

5. Parties disposed of the Application by way of written submissions. The Plaintiffs submissions filed on 01/04/2022, rehashed the contents of the Application. They urged this court to allow the Application as prayed. The Defendants' submissions, filed on 04/05/2022, stated that the Plaintiffs were not deserving of the orders sought as litigation must proceed expeditiously since this was a 2018 matter. They submitted that the pendency of the suit was prejudicial to the Defendants. They further stated that the Application contravened Article 50 of the Constitution as their right to fair trial, if the Application was allowed, it would be infringed. This is because reinstatement protracted litigation which must come to an end. They submitted that the reasons for adjournment were insufficient and the Application was consequently unmerited.

Analysis & Determination

6. I have considered the Application and respective Affidavits of parties herein. I have also considered the respective rival written submissions by parties.



7. The present Application seeks to reinstate the suit that was dismissed on 24/03/2022. The principles governing reinstatement of suits were enunciated in the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (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 judgment. 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.”

8. Guided by the above holding, I now turn to the reasons advanced for reinstatement of the suit. The Plaintiffs posited that the suit ought to be reinstated as their absence from court proceedings on that day was not actuated by malice. Learned Counsel for the Plaintiff informed the Court that he was unwell. Due to the illness, he argued, he advised his clients not to attend court. He also proceeded to notify the Defendants’ Learned Counsel who in tandem did not attend court. Instead of his presence in court, he asked an Advocate to hold his brief. The Defendants did not deny the sentiments advanced by the Plaintiffs save that the notification of illness was communicated late in the day. The Defendants further stated that the Plaintiffs failed to demonstrate any prejudice they would suffer if the orders sought were not granted yet they claimed they would be condemned to live with the pendency of the litigation if the orders sought were granted.
9. I have considered the conduct of the Plaintiffs and their learned Counsel from the onset of the suit to the present Application. I note that the said parties and/or their instructing Counsel have consistently attended court as and when the matter was listed for hearing as long as service of the relevant notices was done duly. I have also noted the reasons given for reinstatement of the suit. I observe that the Defendants’ Counsel was well aware of the reasons for adjournment of that day. It further appears that parties had agreed to take the matter out of the day’s cause list. This is the reason why the Defendants’ Advocate indicated that since he was informed late, it was unfeasible to seek an Advocate to hold brief on behalf of the Plaintiff.
10. Taking into account the above circumstances, I am indeed satisfied that the reasons advanced for reinstatement are sufficient. However, I am also alive to the Defendants’ sentiments to the extent that they would be condemned with dealing with the pendency of the suit that will remain hanging over their heads. In balancing the pendulum of justice, I will order compensation by an award of costs to the Defendants owing to the reinstatement.
11. Consequently, I allow the Application dated 29/03/2022 in the following terms:
1. The order dismissing the suit on 24/03/2022 be and is hereby set aside thereby reinstating the suit.



2. The Plaintiffs shall pay the Defendants thrown away costs in the sum of Kshs. 30,000/= within twenty one (21) days from the date of this order failing which the suit shall stand dismissed.
3. Parties shall appear before court on 22/09/2022 with a view to confirming compliance in (2) above and fixing a mutually convenient hearing date.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 12TH DAY OF JULY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

