



Muraguri & 2 others (Both as the Administrators of the estate of the late Irene Wanjiru Muraguri) Esther Njambi Muraguri) v Kasinga (Environment & Land Case 919 of 2015) [2022] KEELC 14703 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 919 OF 2015
OA ANGOTE, J
NOVEMBER 3, 2022**

BETWEEN

**CATHERINE MURAGURI 1ST PLAINTIFF
LILIAN GATHIGIA MURAGURI 2ND PLAINTIFF
ESTHER NJAMBI MURAGURI 3RD PLAINTIFF
BOTH AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE IRENE
WANJIRU MURAGURI) ESTHER NJAMBI MURAGURI**

AND

MONICA KATUNGE KASINGA DEFENDANT

RULING

1. In the notice of motion application dated May 10, 2022, the applicant sought the following orders:-
 - a. That the order dismissing this suit made on May 10, 2022 by the Hon. Justice O.A. Angote be set aside.
 - b. That the suit be re-instated for hearing.
2. The application is based on the grounds on the face of it and the supporting affidavit of the advocate for the plaintiffs, who deponed that when this matter came up for hearing virtually on May 10, 2022, he experienced challenges with logging on and that he later on found out that the matter was dismissed for non-appearance/attendance.
3. The plaintiffs' counsel deponed that he was aware that this suit was coming up for hearing on the material date and was listed as the second case on the cause list; that when he eventually logged on, the court was on the fourth matter on the cause list; that he waited until the court finished going through



the cause list and requested that this suit be mentioned; that his client was with him in chambers at the time the suit was dismissed and that this application was made without delay. No response to the application was filed.

Analysis and Determination

4. The issue for determination in this matter is whether this court should reinstate this suit, which was dismissed for want of prosecution on May 10, 2012. The law on dismissal of a suit that is coming up for hearing for want of prosecution is set out in Order 12 Rule 1 of the *Civil Procedure Rules* which provides that if on the day fixed for hearing, after the suit has been called out for hearing outside the court, neither party attends, the court may dismiss the suit.
5. Order 12 Rule 7 of the *Civil Procedure Rules* gives the court the discretion to reinstate a suit which has been dismissed for non-attendance upon such terms as may be just. The factors to be taken into consideration for the purpose of reinstatement of suits are numerous, and were addressed in the case of *John Nabashon Mwangi vs Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR as follows:

“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 act 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.”
6. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit.
7. The record of this Court shows that following the Ruling by this court allowing amendment of the Plaint on July 19, 2018, the Plaintiff failed to appear in court on seven occasions despite issuance of mention notices and hearing notices by the court. The record shows that the matter was mentioned on October 29, 2018, June 17, 2019 and December 10, 2019 after which it was scheduled for hearing on September 24, 2020.
8. In all those instances, despite service, neither the Plaintiffs nor their advocate appeared. The trend replicated itself on May 20, 2021, November 9, 2021 and on May 10, 2021, and on application by the Defendant, the suit was dismissed for want of prosecution.
9. The Plaintiffs in this suit have failed to prosecute their cause for a period of three years and have offered no explanation for this delay. Although they have argued that they suffered technological challenges in logging into court on May 10, 2021, they have not offered any reason why they were absent in the previous six instances when the suit came up before this court.



10. That being the case, this court can only find that the Plaintiffs have been indolent and that the delay of three years to prosecute this matter was prolonged and inexcusable. Considering the circumstances of this case, the reason given by the Plaintiffs' advocate that he was unable to log in when the matter came up for hearing on May 10, 2022 is not plausible.
11. For these reasons, this court dismisses the Plaintiffs' application dated May 10, 2022, and the suit remains dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wachira for Plaintiff/Applicant

No appearance for Defendant

Court Assistant - June

