



**Kangethe v Kinyeru; Ngugi & another (Applicant) (Civil Suit  
132 of 1983) [2024] KEHC 4173 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 132 OF 1983  
HM NYAGA, J  
APRIL 17, 2024**

**BETWEEN**

**SAMUEL NGUGI KANGETHE ..... PLAINTIFF**

**AND**

**KAMAU KINYERU ..... DEFENDANT**

**AND**

**JECINTA NJOKI NGUGI ..... APPLICANT**

**LUCIA WAIRIMU NGUGI ..... APPLICANT**

**RULING**

1. The application for determination is the Plaintiff/Applicant's Notice of Motion dated 18<sup>th</sup> October, 2023. It is said to be brought under the provisions of Sections 3A of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#) and seeks for the following orders:-
  - i. That the Order of the Honourable Court dismissing the Plaintiff's suit be reviewed varied and/or set aside.
  - ii. That the Plaintiff's suit be reinstated.
  - iii. That the Court order dated 11<sup>th</sup> October, 1990 be reissued and or renewed.
  - iv. That the costs of this Application be provided for.
2. The application is premised on the grounds on its face and supported by an Affidavit of Christine Gesare Kirera who is the advocate of the Applicant.
3. She deponed that the Applicants are the widows of the late Samuel Ngugi Kangethe, the Plaintiff herein, who died on 18<sup>th</sup> November, 2005.



4. She further deponed that the grant for letters of administration was confirmed to the Applicants on 11<sup>th</sup> February, 2010 and the Land Title Number LR No. 533/475 was declared to be the Plaintiff's parcel of land via court order dated 11<sup>th</sup> October, 1990 and upon lodging the transmission documents at the Nakuru Lands Registry, the Land Registrar advised the Applicants to present fresh order as the one for 11<sup>th</sup> October, 1990 had expired.
5. She averred that they filed notice of appointment dated 11<sup>th</sup> April, 2023 and they requested a mention for directions on the issue of fresh orders, however, this matter was dismissed.
6. She prayed that the suit be reinstated and fresh orders issued to enable the transfer of the property to the beneficiaries.
7. There is no Affidavit on record to prove that the defendant was served with this application. It is unverifiable therefore whether or not he is opposed to the same.

### **Analysis & Determination**

8. The key issue for determination is whether the Applicants are deserving of the orders sought.
9. It is indeed true that this court having found no action had been taken in this matter since 2004 dismissed the suit under Order 17 Rule 2(5) of the *Civil Procedure Rules*.
10. The said Order 17 Rule 2(5) states that;

“a suit stands dismissed after two years where no step has been undertaken.”

11. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in *Bilha Ngonyo Isaac vs Kembu Farm Ltd & another & another* [2018] eKLR which echoed the decision of the court in *Shah vs Mbogo & Another* (1967) EA 116 (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

12. In *Mobile Kitale Service Station vs Mobil Oil Kenya Limited & another* [2004] eKLR it was held:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

13. The guiding principles in an application of this nature have been articulated in several authorities. For instance, in the case of *Moses Mwangi Kimari vs Shammi Kanjirapparambil Thomas & 2 others* [2014] eKLR the court laid out the relevant principles in the following order for consideration:

- i) Whether there has been inordinate delay in the prosecution of the suit by the plaintiff;
- ii) Whether the delay is intentional and thus inexcusable;



- iii) Whether the plaintiff has offered a reasonable explanation for the delay;
  - iv) Whether the delay is an abuse of the court process;
  - v) Whether the delay prejudices the defendant(s);
  - vi) The prejudice that will be visited upon the plaintiff; and;
  - vii) Whether justice can still be done notwithstanding the delay.
14. On the first principle, it is apparent from the record that the suit was last in court on 19<sup>th</sup> April, 2005 when the court allowed an application dated 25<sup>th</sup> March, 2004 by the Applicant. It is not clear what that application was about as the same is not on record.
  15. Having perused the affidavit by the Applicants I discern that their mainstay in not expeditiously prosecuting this matter is that the plaintiff died on 18<sup>th</sup> November, 2005 and having successfully petitioned for grant of letters of administration intestate for his estate, the same was confirmed to them on 11<sup>th</sup> February, 2010.
  16. Since 2010, 13 years passed without any action being taken. The suit was then listed for dismissal on 21<sup>st</sup> June, 2023 and it was so dismissed under order 17 Rule 2(5) of the Civil Procedure Rules.
  17. I have perused the court file and I have noted that on 13<sup>th</sup> March 1985, the parties recorded a consent whereby *inter alia* the Land Reference Number 533/45/11 situated at Molo Township was to be subdivided into two equal portions and respective portions to be registered in the names of the parties herein and the defendant was to execute all documents vesting title to the half portion of the above land to the Plaintiff. After the land was subdivided into two portions i.e. LR No. 533/475 & 474, the court vide an order issued on 11<sup>th</sup> October 1990 directed the plaintiff to take possession of LR No. 533/475.
  18. The applicants have stated that the only issue pending is the transfer of the said portion to the estate of the deceased.
  19. In view of the said consents it is apparent that the suit between the parties was compromised and there was nothing else left for them to litigate on.
  20. This position was also confirmed by the Ruling of Justice B.K. Tanui vide his Ruling delivered on 4<sup>th</sup> March 1993. The learned Judge did stress that in view of the consent of 13/3/1985 and recorded in court on 18/3/1985, there was no suit pending.
  21. Therefore as regards the suit itself, the same was compromised and there is nothing left to litigate upon. What remained were the post judgment/execution proceedings since the deceased plaintiff has already been declared the owner of the land parcel number LR No. 533/475 vide the consent above and the court order dated 11<sup>th</sup> October, 1990.
  22. From the above, the listing of the suit for dismissal was improper and I review the order dismissing the suit. It was an error apparent on the face of the record. Consequently, I also reinstate the orders issued on 11<sup>th</sup> October 1990.
  23. I therefore review the orders dismissing this matter and reinstate the suit for conclusion of the remainder of the proceedings.
  24. Costs shall be in the cause.



25. Having so reinstated the suit and the orders in question, the next challenge that the applicant has to surmount is in respect to the limitation period affecting the orders in question. Section 4 (4) of the *Limitation of Actions Act* provides that;

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

26. It is imperative that the applicant takes note of the said provision before he embarks on any further steps in the matter.

27. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 17<sup>TH</sup> DAY OF APRIL, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Philip

No appearance for parties

