Ng'ang'a & another (Suing in Their Own Behalf and as Representatives of the Members of Ngokaki Self Help Group) v Kang'ethe & 5 others (Civil Suit 377 of 2003) [2024] KEHC 3957 (KLR) (Civ) (18 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3957 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 377 OF 2003

CW MEOLI, J

APRIL 18, 2024

BETWEEN

KINYANJUI NG'ANG'A .... 1ST APPLICANT

MWAURA KABATA .... 2ND APPLICANT

SUING IN THEIR OWN BEHALF AND AS REPRESENTATIVES OF THE MEMBERS OF NGOKAKI SELF HELP GROUP

AND

WALLACE GATHUA KANG'ETHE .... 1ST DEFENDANT

JEREMIAH KIRURI KAMAU .... 2ND DEFENDANT

JOHN MUNGAI GITAU .... 3RD DEFENDANT

NGOKAKI LIMITED .... 4TH DEFENDANT

AURELIA MARGARET NGURE .... 5TH DEFENDANT

JANE WANGARI KAGIRI (KIIRU), WINNIE WAMBUI KIIRU , ROSE WAITHERA KAGIRI - ALL SUED AS THE ADMINISTRATORS OF THE LATE E.N. KAGIRI .... 6TH DEFENDANT

RULING

1. For determination is the motion dated June 16, 2023 by Kinyanjui Ng'ang'a and Mwaura Kabata (suing on their own behalf and as representatives of Ngokaki Self Help Group) (hereafter the 1st and 2nd Plaintiff(s)/Applicant(s) seeking inter alia that the Court be pleased to set aside the orders made herein on 27.04.2023 and May 11, 2023 dismissing the suit for want of prosecution. The motion is expressed

to be brought pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act* (CPA), Order 17 Rule 2 and Order 51 Rule 1, 2 & 3 of the Civil Procedure Rules (CPR). It is premised on the grounds on the face of the motion, as amplified in the supporting affidavit sworn by the John Mwangi Karanja, who describes himself as the Chairman of Ngokaki Self Help Group, and duly authorized by the members of the said group to depose.

2. The gist of his depositions is that the suit herein was dismissed on April 27, 2023 and that neither the Plaintiffs nor their advocate was notified of the intended dismissal of the suit for want of prosecution. That the suit has since abated as against Wallace Gathua Kang'ethe, Jeremiah Kiruri Kamau and Aurelia Margaret Ngure (hereafter the 1st, 2nd & 5th Defendant) and a default judgment was entered against Ngokaki Limited (hereafter the 4th Defendant) on July 4, 2006. Hence, only John Mungai Gitau (hereafter the 3rd Defendant) and Jane Wangari Kagiri, Winnie Wambui Kiiru & Rose Waithera Kagiri -, the latter three sued as the administrators of the late E.N.Kagiri - (hereafter the 6th Defendant) remain as Defendants in the suit.

3. He goes on to depose that as held in the cases of *Anniciata Waithera Kibue & 2 Others v Gibson Kamau Kuria t/a Kamau Kuria & Kiraitu Advocates* [2016] eKLR:-

   (a) such notices to show cause why suits should not be dismissed should be served on parties to a suit; and

   (b) when parties to a suit have not been notified of the court's intention to dismiss a suit for want of prosecution, the court ought not to dismiss the suit.

   Therefore, it was mistake for this Court to dismiss the instant suit. He averred further that the record further reveals that on March 9, 2021 the Plaintiff's advocate confirmed compliance with Order 11 of the CPR and the matter was ready for hearing. He asserts that the Plaintiffs had complied with directions regarding the filing and service of the amended Plaint on the 3rd and 6th Defendant; that the latter party, an advocate of this Court, confirmed on June 5, 2002 that he had received the amounts claimed from the purchaser of the suit property. In conclusion, he deposes that the Plaintiffs are desirous of prosecuting the suit and it is in the interest of justice that the orders sought are granted, and states that no prejudice will be occasioned in any event.

4. Despite service, neither the 3rd nor 6th Defendant and or their advocates participated in the instant proceedings either by filing a response and or submissions.

5. On December 6, 2023 the Court heard oral submissions by the Plaintiffs' counsel in support of the motion dated June 16, 2023. He reiterated that the suit was dismissed sometime in April 2023 and that the Notice to Show Cause (NTSC) was never served upon the Plaintiffs. Reiterating the affidavit material, he urged the Court to reinstate the suit.

6. That Court has considered the motion and perused the record before it in its entirety. Undoubtedly, the Plaintiff's suit was dismissed by this Court on April 27, 2023. The Plaintiff's motion invokes alongside Section 1A, 1B and 3A of the *CPA*, Order 17 Rule 2 of the CPR, the latter which provides that:-

> "(1) 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.
>
> (2) If cause is shown to the satisfaction of the court, it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

(4) The court may dismiss the suit for non-compliance with any direction given under this Order.

(5) A suit stands dismissed after two years where no step has been undertaken.

(6) A party may apply to court after dismissal of a suit under this Order."

7. Rule 2(6) of the foregoing Order grants the court jurisdiction to entertain an application of this nature. While the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in their favor. In the case of *Shah v Mbogo and Another* [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

> " The discretion to set aside an ex-part judgment 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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

8. The principles enunciated in *Shah v Mbogo* (*supra*) were further amplified by Platt JA in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein apply with equal measure in this matter. Indeed, the dismissal order issued herein can be construed to be an equivalent of a judgment, as it determined the suit conclusively by way of dismissal. The key plank in the affidavit supporting the motion is the sole fact that neither the Plaintiffs nor their advocate had notice of the intended dismissal of the suit for want of prosecution.

9. The events leading to the instant motion have in part been captured in the affidavit in support of the motion. However, for context it is apposite for the court to set out the entirety of the record and restate the events therein for the benefit of the Plaintiffs, especially in view of non-participation by the two remaining Defendants. This suit was filed on April 25, 2003 and thereafter the plaint was amended on 06.06.2003, further amended on May 30, 2003, further amended on 29.10.2009 and finally, further amended on October 31, 2019. The last action by the Plaintiffs' counsel was when he attended Court for mention on 09.03.2021 when the Court directed that another date be fixed at the registry once parties were ready. No step was taken thereafter. The Court registry suo moto proceeded to fix the matter for mention on May 11, 2023. However, on April 27, 2023 the file was placed before this Court during the then ongoing national Judiciary Case census.

10. Upon perusal of the entirety of the record this Court ordered as follows;

> " No steps taken to prosecute this 2003 suit since March 2020. The suit stands dismissed for want of prosecution pursuant to Order 17 Rule 2(5) *CPR*. File be closed." (sic)

11. It is evident from the pertinent history of the matter, that since filing in 2003 the suit remained unheard, despite numerous amendments. As of the date of dismissal, the suit had been pending for 20 years, as various parties passed on. It appears the earliest attempt to set down the suit for hearing by order of this Court was on October 15, 2010. Preceding the foregoing date, the Court dealt with a myriad of interlocutory applications. Since the last court appearance in March 2021 there was no activity by the Plaintiffs. Therefore, the last substantive step taken was when counsel attended court on March 9, 2021 and was directed to set down the matter for hearing.

12. Pursuant to Legal Notice No. 22 of 2020 various provisions of the *Civil Procedure Rules* were amended. Order 17 Rule 2 was amended by the insertion of sub-rules (5) and (6) after sub-rule (4). Thus introducing in Order 17 Rule 2, two new sub-rules 5 and 6 which provide;-

    (5) A suit stands dismissed after two years where no step has been undertaken.

    (6) A party may apply to court after dismissal of a suit under this Order."

13. The effect of the amendment was that where there was no activity in a suit after a period of two years, the suit automatically stood dismissed for want of prosecution. As earlier noted, in this matter, there were no attempts by the Plaintiffs to progress the suit since March 9, 2021. No explanation has been proffered for the delay between March 9, 2021 and April 27, 2023 when the Court by way of a formal order affirmed that the suit stood dismissed for want of prosecution pursuant to Order 17 Rule 2(5) of the *CPR*. The assertion by the Plaintiffs that they had no notice is therefore of no moment, as the suit stood dismissed for want of prosecution, as of March 9, 2023, by operation of the law.

14. It is trite that cases belong to litigants. The deponent to the affidavit supporting the motion, John Mwangi Karanja is not a party to the suit, and while stating that several of the Defendants are dead, has not explained why the original Plaintiffs have not found it necessary to swear the affidavit to explain the delay herein. Could they also have passed on, when and with what consequences for the suit? The court may well be dealing with a stranger seeking to reinstate a suit that probably abated years ago! That is the tragedy of this kind of inordinate delay. The delay in prosecution of the suit is inordinate. The period of delay as well as explanation thereof are key considerations in an application of this nature. A party must not be seen to presume on the court's discretion.

15. The Court of Appeal in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] eKLR succinctly addressed the argument of delay as follows; -

    > "The law does not set out any minimum or maximum period of delay. All it states is that any delay should be explained, hence a plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There have to be valid and clear reasons, upon which discretion can be favourably exercisable……"

16. Here, it is not available to the Plaintiffs to cite lack of notice, despite the express provisions of Order 17 Rule 2(5) *CPR*, and their unexplained delay spanning two decades . While the Plaintiffs were entitled to be heard on the merits of their case that right cannot be stretched to the detriment of the parties they dragged to Court. It is now 23 years since the cause of action arose, and 20 years since the suit was filed. The explanation offered by the Plaintiffs cannot stand. Besides, re-opening the matter will be prejudicial as it is doubtful whether a fair trial can be held after such a long hiatus and admittedly the demise of the majority of the original Defendants. At a time when courts are deluged with heavy caseloads, they cannot allow parties to litigate at leisure.

17. In *Rajesh Rughani v Fifty Investments Limited & Another* [2016] eKLR the Court of Appeal stated that: -

    > "The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita v Kyumbu* (1984) KLR 441). The test was expressed as follows:
    >
    > > The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the plaintiff and the 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; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff."

18. As observed in *Ivita case* above, extended delay impacts adversely on the possibility of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. Notwithstanding the fact that pre-trial directions have been taken on the matter, it is the court's considered opinion that allowing the reinstatement of the Plaintiffs' suit in the present circumstances would run afoul of the overriding objective in Section 1A and 1B of the *CPA*, in addition to working prejudice against the remaining Defendants. Consequently, the Court finds no merit in the Plaintiffs' motion, and it is hereby dismissed with no orders as to costs, the remaining Defendants not having participated in the motion.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 18TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff/ Applicants: Mr. Munyori

For the Defendant/ Respondents: N/A

C/A: Erick