



**Kiboi (Suing as administrator and legal representative of the Estate of Catherine Wambui Matu (Deceased) v ICEA Lion General Insurance Co Ltd (Civil Suit 81 of 2018) [2024] KEHC 9121 (KLR) (16 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 81 OF 2018  
DKN MAGARE, J  
JULY 16, 2024**

**BETWEEN**

**CHARLES MATU KIBOI (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF CATHERINE WAMBUI MATU (DECEASED) ..... PLAINTIFF**

**AND**

**ICEA LION GENERAL INSURANCE CO LTD ..... DEFENDANT**

*(Suing as administrator and legal representative of the Estate of CATHERINE WAMBUI MATU (Deceased))*

**RULING**

1. This is a ruling on an application dated 23/3/2023 seeking to reinstate the suit following dismissal for want of prosecution on 20/1/ 2023.
2. The application is stated to be brought under the provisions of Order 17 Rule 2 and Order 12 Rule 7 of the *Civil Procedure Rules* and is supported by the affidavit of the Applicant.
3. The application was opposed materially on the ground that the Applicant was not keen on prosecuting the matter and Applicant's move was an afterthought.
4. Parties filed submissions. I have perused the submissions. The Applicant reiterated the averments in the Application and Supporting Affidavit.

**Analysis**

5. I have considered the application and the submissions filed in support thereof.



6. The issue is whether the Applicant has demonstrated grounds that would warrant this court to reinstate the suit.
7. It is conceded by the Applicant that the order dismissing this suit for want of prosecution was issued on 20/1/2023, about 3 months before filing the application.
8. The Ruling of court dated 20/1/2024 dismissed the suit for want of prosecution on the ground that the suit stood dismissed for want of prosecution as at 26/2/2022.
9. The setting aside of dismissal orders is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated the case of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

10. There also has to be sufficient cause. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Supreme Court stated that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

11. The Plaintiff had the primary obligation to prosecute the suit and it is clear that the Plaintiff has no interest in the matter. The Application is indeed an afterthought filed owing to the dismissal orders.



In the case of *Utalii Transport Co. Ltd and 3 Others -vs- N.I.C. Bank and Another* (2014) eKLR, the court held that:

“It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court.”

12. Therefore, parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in *Gideon Sitelu Konchella vs Daima Bank Limited* (2013)eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously ....the overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

13. Stemming from the ruling dated 20/1/2024, I note the Plaintiff filed no appeal or review on the said Ruling. The position remains that the suit stood dismissed by 22/2/2022.
14. I am consequently unable to exercise my discretion in favour of the Plaintiff.
15. For the reasons stated above, I decline to reinstate the suit. This being the determination, the application lacks merit.

#### **Determination**

16. In the circumstances, I make the following orders:
- i. The Application dated 23/3/2023 is dismissed.
  - ii. There shall be no order as to costs.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16<sup>TH</sup> DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:-

Mr. Bosire for the Plaintiff

No appearance for the Defendant

Court Assistant – Jedidah

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