



Kendagor & 4 others v Muiu & another; Maendeleo Ya Wanawake Organization (MYWO) & 5 others (Interested Parties) (Civil Case 239 of 2016) [2024] KEHC 12637 (KLR) (Civ) (8 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12637 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 239 OF 2016

AN ONGERI, J

OCTOBER 8, 2024

BETWEEN

**EILEAN KENDAGOR 1ST PLAINTIFF
SUREYA ROBLE 2ND PLAINTIFF
HON. BEATRICE KONES 3RD PLAINTIFF
MARY ODHIAMBO 4TH PLAINTIFF
PHYLLIS POLONG 5TH PLAINTIFF**

AND

**RAHAB MWIKALI MUIU 1ST DEFENDANT
ELIZABETH MAYEKA 2ND DEFENDANT**

AND

**MAENDELEO YA WANAWAKE ORGANIZATION (MYWO) INTERESTED PARTY
GABRIEL OMONDI INTERESTED PARTY
CATHERINE MUTHONI INTERESTED PARTY
WANJIKU MBUGUA INTERESTED PARTY
MARY MURIU INTERESTED PARTY
GIMCO LIMITED INTERESTED PARTY**



RULING

1. The application coming for consideration in this ruling is dated 8/12/2023 brought under Order 12 Rule 7 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil procedure Act and all other enabling provisions of the law seeking the following prayers;
 - i. That this suit HCCC No. 239 of 2016 be and is hereby reinstated.
 - ii. That the order of this honourable court issued on 16th March, 2022 dismissing the plaintiffs'/ applicants' suit herein be set aside and the plaintiffs'/applicants be granted leave to prosecute this suit.
 - iii. That costs of this application be in the cause.
2. The application is based on the following grounds;
 - i. The plaintiffs'/applicants have a good case.
 - ii. The Honourable Court on 16th March, 2022 herein dismissed the Plaintiffs Suit purely for want of prosecution which notice was never served to the Plaintiffs/Applicants nor the Advocates on record.
 - iii. The Honourable Court did not consider the efforts made by the Plaintiffs/Applicants since 2019 to have the suit heard and determined without delay.
 - iv. The Plaintiffs' Advocates were never served with any Notice leading to the said dismissal for want of prosecution.
 - v. The inability of the Plaintiffs/Applicants to prosecute the case as anticipated was as a result of measures that were beyond the Plaintiffs/Applicants control.
 - vi. The Defendants/Respondents and Interested Parties will not be prejudiced at all if the orders sought are granted.
 - vii. The Plaintiffs/Applicants will suffer irreparable loss and damage if the said suit is not reinstated and heard.
 - viii. The Plaintiffs/Applicants will suffer irreparable and unwarranted loss if the Order dismissing the suit is not set aside.
 - ix. Dismissing a cause is a draconian order and in view of this application the court ought to reverse its order.
3. It is supported by the affidavit of Herbert J. Ashiruma sworn on 8/12/2023. In it he stated that the plaintiffs filed this suit on 9/9/2016. The defendants' advocates were served on 12/6/2018 with the plaint which they acknowledged receipt.
4. The defendants filed their statement of defence and counterclaim on 11/7/2018. Through their several letters between 2019 and 2020 the plaintiffs invited the defendants and the interested parties to send their representatives at the court registry for purposes of fixing convenient hearing dates.
5. The suit was fixed for hearing on several occasions as the plaintiffs' advocates never had any intention to delay this matter. Upon receiving instruction from the plaintiffs to fix the suit for hearing sometimes in mid-November 2023, the advocates on perusal of the file noticed that there was an order for the



- dismissal of the suit. They were never served with notice of intention to dismiss the suit for want of prosecution.
6. The application was vehemently opposed by the respondents as follows; that the application was opposed by the 1st defendant's replying affidavit dated 22/5/2024. In it she stated that the plaintiffs from their own admission, did not take any action to prosecute the matter between July 2019 and the filing of this application. The matter was inactive for 53 months.
 7. She stated that plaintiffs have not given a substantive reason for the prolonged and unreasonable delays. She asserted that if the application herein is allowed and the matter is reinstated, the members of the public who benefit from the organization's works will be greatly prejudiced as was the case when the suit was active.
 8. The application was opposed further by the replying affidavit of the 2nd defendant dated 22/5/2024 and the 1st interested party's replying affidavit dated 23/5/2024 which reiterated the position of the 1st defendant.
 9. The parties filed written submissions as follows; the plaintiffs submitted that they were condemned unheard contrary to the rules of natural justice. The plaintiffs argued that they have a good case for the greater benefit of the 1st interested party and it would be in the interest of justice that the same is allowed to proceed to its logical conclusion.
 10. The plaintiffs emphasized that they were never served with notice to show cause why their suit should not be dismissed and if the same were to be served upon them they would have attended court and made their submission against the dismissal of the suit.
 11. The 1st defendant alternatively submitted that the plaintiffs have shown disinterest in the matter through their continued indolence. The 1st defendant further argued that the court not only gave notice by having the matter in the cause list as is required by law, it also served the parties with the notice to show cause. the plaintiffs had a responding duty to appear before the court and have their case heard despite the court giving them sufficient opportunity.
 12. The 1st defendant argued that throughout the period of the suit, the plaintiffs continuously displayed intention to harass the defendants and disrupt the activities of the 1st interested party. Since the suit became dormant the 1st interested party operated smoothly and continued to run effectively. The 1st defendant contended that reinstatement of this suit would thus prejudice the defendants and 1st interested party.
 13. The 1st interested party reiterated the arguments of the 1st defendants in their submissions.
 14. The sole issue for determination is whether this suit should be reinstated for prosecution.
 15. I find that the suit was dismissed on 16/3/2022 and the application seeking reinstatement was filed on 8/12/2023 almost two years after the dismissal of the suit.
 16. The court has the unfettered discretion to reinstate a suit that has been dismissed for want of prosecution.
 17. The guiding provision is Order 12 Rule 7 of the Civil Procedure Rules which provides as follows;

“Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”



18. The factors to be considered for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita v Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated as follows;

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and 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 however satisfy the court that it 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

19. The applicant stated that the notice to show cause why the suit should not be dismissed was not served upon them.

20. The applicant learnt about the dismissal when he went to the registry to set down the suit for hearing.

21. Although the delay in this case is prolonged, there is no dispute that the notice was never served upon the plaintiff/applicant.

22. The defendants were equally under a duty to set down the suit for hearing since they had filed a defence and counter-claim.

23. I reinstate the plaintiff’s suit on the following grounds;

- i. That the plaintiff prosecutes the suit within 120 days of this date.
- ii. That the costs of the application dated 8/12/2023 to abide the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF OCTOBER, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

