



Kongo v City Council of Nairobi; Kenya Anti-Corruption Commission (Interested Party) (Civil Case 933 of 2000) [2023] KEHC 21035 (KLR) (Civ) (21 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21035 (KLR)

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

CIVIL

CIVIL CASE 933 OF 2000

CW MEOLI, J

JULY 21, 2023

BETWEEN

DAVID KIMANI KONGO PLAINTIFF

AND

CITY COUNCIL OF NAIROBI DEFENDANT

AND

KENYA ANTI-CORRUPTION COMMISSION INTERESTED PARTY

RULING

1. The court is tasked to determine two (2) applications. The first is the Notice of Motion dated November 22, 2022 (hereafter the first application) brought by Nancy Wanjiku Kimani (hereafter the Applicant) supported by the grounds laid out on its face and the depositions in the affidavit of the Applicant. Seeking an order of substitution of David Kimani Kongo (hereafter the Plaintiff) with the Applicant and Penina Nduta Kimani being the personal representatives of the estate of the Plaintiff, now deceased; and a further order for leave to file an application to reinstate the suit and to file a substituted witness statement.
2. In her supporting affidavit, the Applicant stated that the Plaintiff commenced the present suit seeking inter alia, general, and special damages arising out of an alleged breach of a lease agreement; that before the suit could be heard, the Plaintiff was diagnosed with cancer and passed away on February 5, 2022; and that the Applicant together with her daughter Penina Nduta Kimani were thereafter appointed as personal representative's ad litem in respect of the estate of the deceased Plaintiff.
3. The Amended Notice of Motion dated March 7, 2023 constitutes the second application, similarly brought by the Applicant herein and anchored on the grounds set out on its body and the supporting affidavit of the Applicant. Therein, the Applicant sought an order to set aside the dismissal orders made



by Njuguna J on August 1, 2017 and a further order reinstating the Plaintiff's suit. The Applicant equally sought the extension of time within which prosecute the suit.

4. In her supporting affidavit, the Applicant deposed that she is the widow of the Plaintiff and reiterated her depositions made in support of the first application regarding the health challenges and eventual demise of the Plaintiff. The Applicant also stated that during the illness of the Plaintiff, her family was unable to follow up on the progress of the case and that upon his death she inquired from her advocates, only to discover that the suit had been dismissed for want of prosecution on August 14, 2017 under Order 17, Rule 2(1) of the Civil Procedure Rules (CPR). It was averred that the Plaintiff's former advocates were not served with the notice to show cause prior to the dismissal and that it is in the interest of justice that the orders sought be granted and that the Defendant does not stand to be prejudiced in the circumstances.
5. From the record, it is apparent that on February 23, 2022 the court directed that the two applications be heard together and further granted City Council of Nairobi (hereafter the Defendant) leave to file a response to the two (2) applications. However, as at the time of writing this ruling, there was no response on record by the Defendant.
6. The parties filed and exchanged written submissions. In respect to the first application, counsel for the Applicant anchored his submissions on Order 24, Rule 3(1) and (2) of the CPR and the decision in *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR to argue that in view of the death of the Plaintiff herein and the fact that the cause of action arising out of the claim potentially survived him, the court could extend time for the requisite application for substitution to be brought, where such timelines had lapsed. Counsel argued that in the present instance, the deceased died on February 5, 2022 whereas the first application was filed on November 22, 2022 which is well within the statutory timelines for bringing an application of such nature. That the first application has met the threshold for substitution and the court ought to exercise its discretion by allowing it.
7. Regarding the second application, seeking reinstatement of the suit, the Applicant through her counsel anchored the submissions on the decisions in *Ivita v Kyumbu* (1984) KLR 441 and *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 5 others* [2019] eKLR which set out the principles for consideration by a court in setting aside a dismissal order and reinstating a suit.
8. On the question of delay, counsel submitted with reference to the case of *Jackson Ngungu Kaguae v Attorney General & 595 others* [2016] eKLR that although there has been a delay between the time of dismissal of the suit and the bringing of the application for reinstatement, such delay has been explained by the Applicant who detailed the illness of the Plaintiff preceding his death, coupled with the inadvertence of the Plaintiff's advocate at the time.
9. Counsel cited the decision in *Andrew Mbare v Attorney General & 11 others* [2021] eKLR and *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR in advancing the argument that the dismissal of suits ought to be an action of last resort and that the courts have a duty to do substantive justice to parties even in the midst of prolonged delay in the prosecution of cases to obviate prejudice. For the foregoing reasons, the court was urged to allow both the first and second applications.
10. On the part of the Defendant, counsel anchored his submissions on the above-cited Order 24, Rule 3 of the CPR as well as the decision in *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR. He asserted that upon dismissal, the suit became non-existent and hence the first application was incompetent. Counsel argued that the Applicant lacks the locus standi to bring the first application in view of the pending application for reinstatement of the suit.



11. Concerning the second application, it was the submission by counsel it was made after inordinate delay of 23 years in the prosecution of the suit, since its inception. Pointing out that the Plaintiff had previously changed his legal representation on two separate occasions and yet the suit did not proceed for hearing, prior to its dismissal. Citing decisions in *Bains Construction Co. Ltd v John Mizare Ogowe* [2003] eKLR and *Tana & Arthi Rivers Development Authority v Jeremiah Kimigho Makio & 3 Others* [2015] eKLR inter alia, counsel contended that while the laxity on the part of the Plaintiff's former advocates possibly contributed to the delay in the suit, the Plaintiff was granted ample time and opportunity to demonstrate an interest in the suit by ensuring its progress, prior to the dismissal order.
12. Counsel further cited the decision in *Egal Mohamed Osman v Inspector General of Police & 3 others* [2015] eKLR in urging the court to consider the rules of natural justice, and especially the fact that if the suit is reinstated, the Defendant who has endured the prolonged pendency of the matter will be disadvantaged due to challenges in procuring evidence and witnesses to give evidence in support of its case. Counsel concluded by submitting that the threshold set out in *Ivita v Kyumbu* (1984) KLR 441 has not been met. Consequently, the court was urged to dismiss both the first and second applications, with costs.
13. Kenya Anti-Corruption Commission (hereafter the Interested Party) did not participate at the hearing of the two applications.
14. The court upon considering the material canvassed in respect of the first and second applications, will first address the first application which as earlier mentioned, is seeking an order of substitution and a further order for leave to file an application to reinstate the suit and consequently, to file a substituted witness statement.
15. Concerning the order for substitution, Order 24, Rules 1 and 3 of the CPR which was earlier cited by the respective parties stipulates that:

“Rule 1

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

...

Rule 3

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.”

16. Undeniably, the Plaintiff herein died on February 5, 2022. The Applicant annexed a copy of the death certificate to the first application, to confirm this fact. The first application was brought within one year



of the Plaintiff's death, sometime on or about the November 22, 2022 and hence the Applicant did not require an extension of time to apply for substitution. Furthermore, from a consideration of the cause of action upon which the suit is founded, the court is satisfied that the suit would survive the Plaintiff and hence his death alone would not result in abatement, pursuant to Order 24, Rule 1 (supra).

17. In addition, the Applicant annexed a copy of the limited grant of letters of administration ad litem issued on August 3, 2022 to support her averments that she together with her daughter Penina Nduta Kimani hold the grant of letters ad litem in respect of the estate of the Plaintiff. In view of the foregoing circumstances, the court is satisfied to grant the order for substitution.
18. Regarding the prayer seeking leave to reinstate the suit, it is apparent that an application for reinstatement has already been made, namely the second application. Consequently, the court is of the view that this particular prayer is now spent. Suffice it to say that the prayer seeking leave to file a substituted witness statement will be dependent on the outcome of the second application.
19. In respect to the second application, as earlier mentioned, therein the Applicant is seeking the setting aside of the order made on August 14, 2017 and consequently, the reinstatement of the suit.
20. The record shows that the Plaintiff's suit was dismissed for want of prosecution on August 14, 2017 pursuant to Order 17, Rule 2(1) of the CPR. The dismissal order was made in the absence of the parties. Order 17, Rule 2 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.”
21. Whilst it is trite that the discretion of the court to set aside a dismissal order is unfettered, a successful applicant is obligated to tender credible material upon which the court should exercise its discretion in his or her favor. In the case of *Shah v Mbogo & Another* [1967] E.A 116 the rationale for the discretion was spelt out in the following manner:

“The discretion to set aside an ex-parte 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.”
22. The principles enunciated in *Shah v Mbogo* (supra) were further amplified by the court in *Bouchar 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 force in this matter.



23. The Applicant swore that no notice to show cause had been served upon the Plaintiff's former advocates prior to the dismissal order being made, and that sometime in the year 2020 the Plaintiff was diagnosed with a terminal illness which eventually claimed his life on 5th February, 2022. That it is only upon his death that the Applicant discovered through her current advocates that the suit had been dismissed back in the year 2017. By way of its submissions, the Defendant opposed a grant of the order sought on the argument that there has been an inordinate and inexcusable delay in the prosecution of the suit, and that it stands to be prejudiced in the event that the suit is revived, given the passage of time since its inception.
24. The court having taken the liberty of perusing the dismissal order alongside the record before it, did not trace a copy of the actual notice to show cause issued and scheduled for hearing on August 14, 2017 or the affidavit of service. The proceedings of the day however indicate that a notice to show cause had been issued and served, and that both parties were absent. Be that as it may, it is apparent from the record that the Plaintiff had previously changed advocates on about two (2) occasions but despite the suit having been filed in the year 2000, it had not proceeded to a hearing by the date of dismissal.
25. This inaction likely prompted the Defendant to file an application dated May 29, 2015 seeking the dismissal of the suit for want of prosecution. Upon hearing the parties on the said application and upon considering the explanation by the Plaintiff that he had been in custody for 3 years coupled with financial limitations, the Court dismissed the application vide the ruling delivered on November 20, 2015. However, there was no progress in the suit since then, leading up to its dismissal in 2017. The court notes that the Applicant while asserting that the Plaintiff was ailing between 2020 until his death in 2022, did not offer any explanation for the inaction in the suit between 2015 and the time of its dismissal.
26. The Applicant faulted the Plaintiff's former advocates for their failure to keep her informed and/or following up on the progress of the suit. While it is true that ordinarily the inadvertence and/or mistake of an advocate ought not to be visited upon the client, the court equally acknowledges the legal principle that ultimately, the suit belongs to the client, and it is therefore upon the client to follow up on the progress of his or her case with his advocate. Of course, the said advocate was not approached to swear any affidavit in this instance, and as often happens, is blamed wholesale for the Applicant's troubles.
27. As held in *B1-Mach Engineers Ltd v James Kahoro Mwangi (2011) eKLR* :-

“The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erst while advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty for the client to pursue his matter. If the client was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate.”
28. The Applicant did not demonstrate any steps taken by the Plaintiff in proactively following up on his case prior to its dismissal and even after the suit survived dismissal in 2015. The delay of two (2) years between the last time the matter was in court and its dismissal in 2017 has not been explained at all. It is not in doubt that a plaintiff was entitled to be heard on the merits of his or her case. However, that right cannot be extended to accommodate parties who show no desire to expeditiously prosecute their cases, and total disregard of the overriding objective in section 1A and B of the Civil Procedure Rules and the self-evident prejudice arising from delay, caused to the parties they dragged to Court.



29. This suit was filed in the year 2000, some 23 years ago. No reasonable or satisfactory explanation has been offered in the Applicant's affidavit material for the inordinate delay in prosecution of the suit. Additionally, the court concurs with the sentiments by the Defendant that re-opening the matter will be prejudicial given the nature of the suit and the passage of time. As stated in *Ivita v Kyumbu* [1984] KLR 441, that 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.
30. In the court's view, the Applicant is not deserving of the discretion of the court. To allow the reinstatement of the suit in the present circumstances would not only run afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act* but also amount to a travesty of justice. The Court of Appeal stated the following in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09:
- “The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”
31. Consequently, the court will dismiss the second application with costs to the Defendant. However, the motion dated November 22, 2022 is allowed only in terms of the prayer seeking the substitution of David Kimani Kongo, the deceased Plaintiff herein, with Nancy Wanjiku Kimani and Penina Nduta Kimani being his personal representatives. The parties will bear their own costs in that respect.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Letuya

For the Respondent: Ms. Nyamuma

C/A: Carol

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