



Ndumi v Mwangi & another; Ngiri (Interested Party) (Civil Case 4068 of 1986) [2023] KEHC 21785 (KLR) (3 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 4068 OF 1986
CW MEOLI, J
AUGUST 3, 2023**

BETWEEN

MBUGUA NDUMI PLAINTIFF

AND

MUGO MWANGI 1ST DEFENDANT

STEPHEN NGIRI MUGO 2ND DEFENDANT

AND

MARGARET WANJIRU NGIRI INTERESTED PARTY

RULING

1. At the onset, Mbugua Ndumi (hereafter the Plaintiff) filed the present suit against Mugo Mwangi and Stephen Ngiri Mugo (hereafter the 1st and 2nd Defendants) vide the plaint dated October 29, 1986 and amended on March 9, 1992. Seeking injunctive and declaratory orders in respect to the property known as Kiambaa/Mucatha/T. 32 (the subject property).
2. The Defendants entered appearance and filed their joint statement of defence denying the key averments made in the amended plaint. The suit was dismissed for want of prosecution vide the court order made on March 31, 2003. Following an application by the Plaintiff seeking to have the dismissal order set aside and the suit reinstated, the court by an order made on December 19, 2020 set aside the dismissal order on the condition that the Plaintiff prosecutes the suit within 120 days therefrom, failing which the suit would stand dismissed. The Plaintiff did not comply with the order and consequently, the suit stood dismissed at the expiry of the time granted for prosecution.
3. The Plaintiff thereafter moved the court by way of the instant Notice of Motion dated October 6, 2021 seeking review and/or setting aside of the earlier order and reinstatement of the suit. The Motion is



expressed to be brought inter alia under Order 44, Rules 1, 2 and 3, and Order 51, Rules 1 and 8 of the Civil Procedure Rules and Section 3 and 3A of the *Civil Procedure Act*.

4. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the Plaintiff's advocate Edna Gesare Oginda, averring that the delay in prosecuting the suit was through no fault of the Plaintiff since the progress in the matter was hindered partly by the global Covid-19 pandemic which temporarily paralyzed court operations and partly by the fact that attempts by the Plaintiff's advocate to secure an early mention/hearing date in the suit were unsuccessful. The advocate further averred that the matter was part heard, the Plaintiff having testified and that sufficient reasons have been given to warrant the orders sought.
5. When the parties attended court on April 24, 2023 it was agreed by consent that Peter Gichinga Mbugua and Stephen Kungu Mbugua (hereafter the personal representatives) be substituted in place of the Plaintiff, now deceased. It was also agreed by consent that Margaret Wanjiru Ngiri (hereafter the Interested Party) be enjoined in the suit as an Interested Party.
6. It appears the Defendants are long deceased. However, the Interested Party swore an affidavit on November 28, 2022 to oppose the Motion. Therein, she stated that the subject property was initially owned by the 1st Defendant who then transferred it to his son, the 2nd Defendant, who was also her husband and that upon the demise of the latter, ownership of the said property was transmitted to her and her son (Francis Kamau Ngiri) by way of succession. The Interested Party stated that she and her son are now the registered owners of the subject property. It was stated that both the Plaintiff and the Defendants in the suit are now deceased and that no action took place in the suit for many years.
7. The Interested Party averred that she filed a separate case against the Plaintiff's personal representatives before the Chief Magistrate's Court at Kiambu, namely Kiambu ELC No 58 of 2019, seeking their eviction from the subject property, which suit is still pending before the relevant court. She also averred that the instant Motion has not been brought in good faith and is purely intended to frustrate the hearing of the above-cited case in Kiambu. That the Motion has no merit and the orders sought therein should not be granted.
8. The Motion was canvassed through oral arguments, although it was noted that the Defendants were not represented at the hearing. In urging the court to allow the Motion, the advocate for the Plaintiff by way of his brief submissions argued that in view of the substitution, it would be proper for the court to reinstate the suit. The advocate further confirmed the existence of the suit filed by the Interested Party in Kiambu.
9. Counsel for the Interested Party largely echoed the averments made in the replying affidavit sworn by his client on November 28, 2022 save to add that no proper reasons have been given to explain the delay in the suit and that in view of the death of the main parties herein, the suit had abated therefore leaving no room for reinstatement. The court was therefore urged to dismiss the Motion with costs.
10. The court has considered the material canvassed in respect of the Motion. The events leading up to the instant Motion have been set out hereinabove. Before delving into the merits thereof the court will first address the issue arising from the Interested Party to do with whether the suit has abated by operation of the law, upon the death of the Plaintiff.
11. It is not in dispute that the Plaintiff herein died, though the exact date of his death was not disclosed to this court, nor any credible material tendered to that effect. Suffice to say that Order 24, Rules 1 and 3 of the CPR 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.”

12. In the present instance and as earlier mentioned, the substitution of the Plaintiff with the personal representatives was allowed by consent of the parties. From a study of the pleadings on record, it is apparent that the nature of the dispute is tied to ownership and/or transfer of the subject property and/or breach of contract. In the absence of any credible evidence or material to indicate that a claim of such nature would not survive a deceased person, and in view of the substitution which has already been undertaken, there is no basis upon which the court can conclude that the suit abated.
13. On the merits of the Motion, the setting aside of a dismissal order involves judicial discretion fettered by certain legal conditions. From a glance of the record, it is not in dispute that the Plaintiff's suit initially suffered a dismissal vide the order made on March 31, 2003 following inaction since June 22, 1988. The record shows that the Plaintiff brought an application 16 years later, on October 29, 2019 seeking to have the dismissal order set aside. The application was considered by the court and by way of a conditional order made on February 19, 2020, the suit was reinstated subject to prosecution within 120 days, failing which the suit would stand dismissed. It is clear from the record that no further action was taken in the suit until the year 2021 when the Plaintiff brought the instant Motion, which clarifies the position that the suit stood dismissed for non-compliance on the part of the Plaintiff.
14. The applicable provisions here are Order 17, Rule 2 of the Civil Procedure Rules and the provisions of Section 3A of the *Civil Procedure Act*, the latter which reserves the inherent power of the court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”. The former provision on its part 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.”
15. Whereas it is acknowledged that the discretion of the court to set aside a dismissal order is unfettered, a successful plaintiff is obligated to adduce credible material upon which the court should exercise its discretion in his or her 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-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.”
16. The principles enunciated in *Shah v Mbogo* (supra) were further amplified by the court 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 force in this matter.
17. Going by the Plaintiff’s affidavit material, the delay in prosecuting the suit within the timelines directed by the court on February 19, 2020 was attributed firstly to the closure of court operations following the outbreak of the Covid-19 pandemic, and secondly, to the lack of response from the registry on allocation of a suitable date. The Interested Party dismissed the explanation as inadequate.
18. The court is alive to the impacts of the Covid-19 pandemic since March, 2020 not just on the court operations but on the entire global system. However, the scaling down of the court operations was only temporary and steps were quickly taken to ensure that matters proceeded as effectively as was reasonably possible, despite the global challenges. This entailed migration to online platforms.
19. The Plaintiffs annexed various correspondences addressed by his advocate to the Deputy Registrar-High Court (Civil Division) and dated August 10, 2020; June 7, 2021; July 8, 2021; and July 21, 2021. However, there is no evidence that the correspondence was delivered to the court, in the absence of the official court stamp. Besides, it is apparent from the record that at the time of the correspondences, the 120 days’ timeline had already lapsed. The Plaintiffs have not demonstrated that active steps were taken in obtaining a mention or hearing date in the matter preceding the closure of the courts which happened later in March, 2020.
20. The record shows that the matter is part heard. It is also not in doubt that a plaintiff is entitled to be heard on the merits of his or her case. However, that right cannot be extended to accommodate parties who are lax in prosecuting their cases and even so, without any reasonable explanation. The suit was filed in the year 1986 and 37 years have elapsed since. Ultimately, the court is of the view that no reasonable or satisfactory explanation has been offered in the affidavit material tendered on behalf of the Plaintiffs, for the delay in prosecuting the suit even after being granted an opportunity following the reinstatement of the suit in the year 2020.
21. Additionally, the court cannot overlook the likely prejudice that would befall the other parties herein in the event of reinstatement, given the nature and circumstances of the suit and the passage of time. Indeed, both the original plaintiff and defendants are now deceased and there is a separate suit pending before the court in Kiambu between the Interested Party and the Plaintiff/the personal representatives



in respect to the subject property. It appears likely that the instant motion was prompted by the suit brought by the Interested Party seeking the eviction of the successors of the original plaintiff. Litigation must come to an end.

22. The court in *Ivita v Kyumbu* [1984] KLR 441, observed 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. In the court's view, to allow the reinstatement of the Plaintiff's suit in view of the present circumstances would be akin to running afoul of the overriding objective in section 1A and 1B of the *Civil Procedure Act*.
23. 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.”

24. In the circumstances, the court is not persuaded of the merits of the notice of motion dated October 6, 2021 which is hereby dismissed with costs to the Interested Party.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicants: N/A

For the Interested Party: Mr. Gichachi

C/A: Carol

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