Mungatana v Standard Limited (Civil Case 1320 of 2005)
[2023] KEHC 23699 (KLR) (Civ) (19 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23699 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 1320 OF 2005

AN ONGERI, J

OCTOBER 19, 2023

BETWEEN

HON. DANSON MUNGATANA ..... PLAINTIFF

AND

THE STANDARD LIMITED ..... DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 18/3/2023 brought under Article 159(2) (d) of the *Constitution* and Order 9 Rule 9 seeking the following prayers

    i. That the firm of Onesmus Mwwangi & Co. Advocates be granted leave to come on record for the plaintiff/applicant.

    ii. That the honourable court be pleased to set aside the orders made on 16th March, 2022 dismissing the plaintiffs' suit.

    iii. That the costs of this application be in the cause

2. The application is based on the ground that it would be fair, expedient and in the best interest to reinstate this suit for hearing.

3. Further that the suit was dismissed on 16/3/2022 for want of prosecution.

4. The reason for dismissal was that the previous counsel for the applicant was not willing to prosecute this case.

5. The application is supported by the affidavit of the applicant sworn on 18/3/2023 in which he has reiterated the grounds stated above.

6. The respondent filed a replying affidavit of Millicent Ngetich dated 26th June 2023 opposing the application in which she stated that a period of 18 years has elapsed since this suit was filed and there has been no further action by the applicant to prosecuted the matter. That a further period of close to a year elapsed before the plaintiff followed up the matter with his advocates on record or at the registry and therefore an inordinate amount of time has passed.

7. She averred that while the applicant purports that his previous advocate on record was not keen to prosecute the matter it was the obligation of the litigant to follow up the matter and keep track of it. That further the applicant is a senior officer of the court with over 25 years of experience and as such he is well aware of the legal provisions and the duty of litigants to diligently and expeditiously prosecute their cases.

8. She deponed that it is the duty of the court, litigants and advocates to ensure that matters are concluded expeditiously and it would be against public interest to reinstate this suit.

9. The parties filed written submissions as follows; the applicant submitted that section 3A of the *Civil Procedure Act* gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 12 rule 7 of the *Civil Procedure Rules* gives the court power to set aside any order made ex-parte and Order 51 Rule 15 of the *Civil Procedure Rules* gives the court the power to set aside any order made *ex parte*. That the threshold for reinstatement for suits is well established in *Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others* [2021] eKLR that quoted Chesoni J in the case of *Ivita v Kyumbu* [1984] KLR 441 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."

10. It was therefore the applicant's submission that the delay to prosecute this matter was never intended as he had instructed the previous advocates on the record and made efforts by reaching out for feedback but all in vain. That as an innocent litigant he should not suffer simply because of the mistake and negligence of the advocates.

11. The respondent submitted that the applicant's suit was last brought before the court in 2005 and over 18 years have passed without any further action taken by the plaintiff. The suit was dismissed in 2022 and a year has since passed before the applicant made any effort to follow up on the matter. The respondent submitted that Article 159 of the *Constitution of Kenya, 2010* encompasses the fundamental basis for expeditious resolution of disputes before courts. It stipulates the following in relation to the conclusion of matters in a timely fashion:

> " In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

... (b) justice shall not be delayed...."

12. It was the respondent's submission that the delay herein is prolonged and inexcusable. That equity is defeated by delay, and in this case, the applicant has not only neglected their rights but is also engaging in a deliberate attempt to misuse and abuse the court system.

13. The respondent maintained that considering the significant lapse of close to 19 years without any progress made towards prosecuting this lawsuit, the applicant will not experience any prejudice. The evident and prolonged delay can be interpreted as a lack of interest on the part of the Plaintiff in pursuing the case.

14. The issues for determination are;

    i. Whether the firm of Onesmus Mwangi should be granted leave to come on record for the applicant.

    ii. Whether the suit should be reinstated for hearing.

15. On the issue as to whether the firm of Onesmus Mwangi & Co. Advocatesshould be granted leave to come on record instead of the firm of Miller & Company Advocates,I find that the application was served upon the former applicant's firm of advocates and an Affidavit dated 28/7/2023 was filed in court.

16. The firm of Onesmus Mwangi& Co. Advocatesis accordingly granted leave to come on record for the plaintiff.

17. On the issue as to whether this suit should be reinstated for hearing, I find that this court has a discretion to reinstate a suit that has been dismissed for want of prosecution.

18. In the case of *Shah v Mbogo & Another* [1967] EA 116 (Harris J), stated as follows on the matters of discretion:

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberatively sought whether by evasion or otherwise to obstruct or delay the course of justice."

19. I find that this case was dismissed due to the fault of the plaintiff's Advocate.

20. The record indicates that the parties had intimated that they wished to settle this matter and they were likely to record a settlement before the suit was dismissed on 16th March 2022.

21. It is in the interest of justice to give the plaintiff a second chance to prosecute his case subject to payment of thrown away costs of Kshs 20, 000.00 to the defendant, before the hearing date, in default of which the reinstatement order shall lapse.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023.

.....

A. N. ONGERI

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant