



REPUBLIC OF KENYA



Wachira & 2 others v Swis Port Cargo Services Co. & 4 others (Civil Case 317 of 2011) [2024] KEHC 12666 (KLR) (Civ) (8 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12666 (KLR)

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

CIVIL

CIVIL CASE 317 OF 2011

AN ONGERI, J

OCTOBER 8, 2024

BETWEEN

ERASTUS MAINA WACHIRA 1ST PLAINTIFF

HENRY MURIUKI KAMAKU 2ND PLAINTIFF

JOHN KILUVA MUTUKU 3RD PLAINTIFF

AND

THE SWIS PORT CARGO SERVICES CO. 1ST DEFENDANT

TANDU ALARM SYSTEMS 2ND DEFENDANT

THE COMMISSIONER OF POLICE 3RD DEFENDANT

AMOS OYUGI 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The application coming for consideration is the one dated 3/7/2023 seeking reinstatement of this suit which was dismissed for want of prosecution on 24/3/2017.
2. It is based on the following grounds;
 - i. The Applicants was previously engaged firm of Naikuni, Ngaa & Miencha Company Advocates (herein after "Law firm") to represent them in prosecution of the matter.
 - ii. The law firm always answered the Applicants that the suit was active and the Applicants would be notified as and when they hearing came up.



- iii. Fast forward, on the Applicants visited the law firm and were told the suit was alive. The law firm subsequently asked the applicant to pay some legal fees and the Applicants paid Ksh.20.020/= on the said 23-8-2023 and payment receipt was issued.
 - iv. Months passed by without any notification from the law firm and the Applicants made a decision and engaged the law firm of Omondi Odegi & Co. Advocates (herein after "new law firm) in the month of December, 2022 to take over the matter and represent them.
 - v. That upon logging into the Judiciary E-Filing portal the new law firm realized that the suit had long been dismissed for want of prosecution.
 - vi. The law firms engaged and signed a consent to come on record. However, it was until early 2023 that the file was released to the Applicants in person.
 - vii. It is evident (even from the legal fees paid as recent as 2021) that the Applicants had been misled to believe that the suit was alive in court.
 - viii. The Applicant is desirous to prosecute the claim on merit and request that the same be reinstated.
 - ix. The Mistake of the Advocate ought not to be visited upon the Applicants.
 - x. That the circumstances leading to the dismissal were most unfortunate and are highly regretted.
 - xi. The Applicants have within a reasonable time since learning of the dismissal preferred this Application to reinstate the suit.
3. The application was opposed by the 3rd, 4th and 5th respondents who filed grounds of opposition as follows:
- i. That there has been an inordinate and inexcusable delay in making instant Application which is contrary to the equity maxim "Equity aids the vigilant not the indolent".
 - ii. That no sufficient cause has been shown by the Applicants/Plaintiffs as to why the orders sought should be granted.
 - iii. That non-compliance with timelines is not a technicality that can be cured by the provisions of Article 159 (2) of the Constitution
 - iv. That this Application herein has not met the threshold for reinstatement of a suit.
 - v. That the application is an abuse of the Court process.
 - vi. That the application is misconceived, incompetent, bad in law and fatally defective and contrary to the mandatory legal provisions.
 - vii. That the orders sought are untenable and an abuse of the court.
4. The parties filed written submissions as follows; the applicant submitted that the court has unlimited discretion to set aside an order of dismissal of a suit for want of prosecution. The reasons advanced by the Applicants is that they were not aware that the matter had been dismissed since their advocates on record made them to believe the matter was still active so much so that they were still paying legal fees. They contend that the Advocates mistake should not be visited upon them.



5. The respondents alternatively submitted that the applicants have not provided any evidence to show that they had actively followed up on their suit except for a receipt of payment of legal fees that was done only once. The respondent argued that the court before dismissing this matter had considered that there had been inordinate delay in prosecution of the matter and it was against this backdrop that the suit was dismissed.
6. The sole issue for determination is whether this suit should be reinstated for hearing.
7. The court has a discretion to reinstate suits on certain conditions. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

“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.”

8. In the current case, the suit was dismissed on 24/3/2017 and it is not in dispute that the law firm on record failed to inform the plaintiff applicant of the same.
9. The plaintiff stated in affidavit that he instructed another Advocate to take over the matter and upon logging into the Judiciary E-Filing portal the new law firm realized that the suit had long been dismissed for want of prosecution.
10. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court of appeal held that;

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

11. It is not in the interest of justice to punish a party for the mistakes or omissions of his Advocate.
12. In the case of *Mwai v Murai* No. 4 (1982) KLR Madan JA said as follows;

“A mistake is a mistake, it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by Senior Counsel though in the case of Junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”



13. Again in the case of *Philip Kelpto Chemwoto & Another v Augustine Kubende* (1986) KLR 492, the Court of Appeal was categorical that;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits”..... I think the broad equity approach to this matter is that unless there is fraud or intention to overreach there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purposes of deciding the rights of the parties and not for the purpose of imposing discipline”.

14. The respondent has not stated what prejudice they would suffer if the application is granted.

15. I allow the application dated 3/7/2023 on the following conditions;

- (i) That the plaintiff pays the defendant thrown away costs of Kshs.30,000/= within 30 days of this date.
- (ii) That the plaintiff prosecutes the suit within 120 days of this date.
- (iii) The hearing date to be taken within 30 days of this date.

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

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiffs

..... for the 1st Defendant

..... for the 2nd Defendant

..... for the 3rd, 4th, 5th Defendants

