



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 806 OF 1997 (OS)**

**FRANCIS MJUMBA ALUHA.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**WYCLIFF JIRONGO MWANGIRANI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**-VERSUS-**

**JOSEPH MWADZIWE MWINGA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPHINE NYEVU WINGA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiffs/applicants herein have taken out a Notice of Motion dated 20<sup>th</sup> December, 2018. The said Motion is supported by the grounds set out on its face and the affidavit sworn by *Rachel W. Watitu*. The applicants are seeking a reinstatement of their suit which was dismissed on 27<sup>th</sup> June, 2016.
2. In her aforementioned affidavit, *Rachel W. Watitu* stated on behalf of the applicants that inter alia, between the years 2013 and 2018, attempts were made to have the suit set down for hearing but that throughout, the response from the registry was that the court file had gone missing and that the applicants' advocate severally wrote to the deputy registrar in this regard.
3. That it was not until the respondents' advocate served the advocate for the applicants with the dismissal order on 24<sup>th</sup> September, 2018 that they came to learn of the dismissal of the suit, but that the court file could not be traced to enable them file an application for reinstatement at the earliest opportunity. The deponent added that in any case, the applicants were never served with a notice to show cause. The deponent also asserted that the court file was eventually traced at the Supreme Court archives.
4. In her replying affidavit, the 2<sup>nd</sup> respondent stated that the applicants have not taken any active steps to prosecute their suit and that no reasonable explanation has been given for the same.
5. The 2<sup>nd</sup> respondent also averred that the notice to show cause was issued to the parties but that neither of them appeared, leading to the dismissal of the applicants' suit.
6. It is worth noting at this point that the 1<sup>st</sup> respondent is said to have passed away sometime in 2003, though there is no evidence in the record to support this.
7. The Motion was canvassed through written submissions. The applicants in their submissions reiterated the averments in the Motion but went ahead to argue that they will be greatly prejudiced if the suit is not reinstated, with careful reference to relevant judicial authorities.
8. The respondents in their submissions restated that upon filing of the suit, no reasonable steps were taken by the applicants in ensuring its prosecution, and that the delay has not been sufficiently explained. On the issue of the notice to show cause, the respondents took the position that the law does not require service of the same, as long as notice has been given.
9. It is as well the respondents' contention that the reinstatement of the suit will prejudice the 2<sup>nd</sup> respondent in the sense that she will continue to be deprived of the use of the subject property, in addition to the argument that the applicants have not sought to reinstate the suit until now.
10. I have carefully considered the facts articulated in the Motion and its supporting affidavit, the contents in the reply in opposition thereto

and the rival submissions together with the relevant authorities cited.

11. Whether or not to reinstate a suit is a matter of the court's discretion. Needless to say, the dismissal of a suit pursuant to *Order 17, Rule 2(1)* of the *Civil Procedure Rules* presupposes that a suit has been inactive for over one (1) year, as was the case here.

12. In addressing the length of the delay in the matter, I am persuaded by *Susan Gachambi Kanuri & another v British American Insurance Co. Ltd [2014] eKLR* cited by the respondents wherein reference was made to *Rowe v Tregaskes (1968) 3 All ER 447* in this way:

**“...We have said on many occasions that we consider all delay, not only the delay after writ, but also the delay before it. The delay in the first two or three years is often the most prejudicial of all...”**

13. I turn to the record, which indicates that the matter was last in court on 12<sup>th</sup> June, 2012 during which time the applicants' current firm of advocates filed a Notice of Change of Advocates, which happens to be close to four (4) years prior to the dismissal of the suit. In my humble view, this amounts to a prolonged delay, especially given the age of the matter.

14. Moreover, the application has been brought close to three (3) years since the dismissal of the suit, thereby increasing the length of the delay even further.

15. This brings me to the reason for the said delay. The applicants' advocates gave the explanation that soon after coming on record for the said applicants, they were unable to prosecute the suit for the reason that the court file went missing and that this equally explains the delay in bringing the application for reinstatement.

16. The record does not seem to bear any information regarding the disappearance of the file, save for two (2) correspondences from the applicants' firm of advocates to the deputy registrar dated 21<sup>st</sup> September, 2018 and 19<sup>th</sup> December, 2018 respectively, in relation thereto. It is noteworthy that the letters are only recent. In addition, it remains unclear when; if ever; the court file went missing and when it finally resurfaced. In addition, the abovementioned correspondences do not bear the court's stamp, thereby making it impossible to tell whether the deputy registrar was genuinely made aware of the supposed missing file.

17. The annexures accompanying the Motion also disclose that the applicants' advocates had previously sent out invitation letters to the respondent's counsels with the aim of fixing dates at the registry. It is my observation that only one (1) of the said invitation letters was issued prior to the suit's dismissal.

18. It cannot be rehashed enough that the duty of prosecuting a case ultimately lies with the party that instituted the same, in this case, the applicants. This was appreciated by the court in *Susan Gachambi Kanuri & another* (supra) cited by the respondents with reference to the renowned case of *Mukisa Biscuit Manufacturing Company v West End Distributors Limited (1969) EA 696* as follows:

**“It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this primary duty....”**

19. Having said so, I am aware that much as the case belongs to the applicants, their advocates on record were expected to play an active role in ensuring progress in the matter on behalf of their clients and more so where the court file went missing as claimed. The said advocate ought to have diligently followed up on the matter at all times but it would seem this did not happen. In such an instance, it would not be proper for the inadvertence of the counsel to befall the client.

20. The applicants also argued that they were oblivious to the dismissal of the suit since they were never served with a notice to show cause. My response on this is two-fold: on the one hand, the courts have held that the law does not require physical service of a notice to show cause, so long as there is evidence that notice has been given. This was the court's position in *Fran Investments Limited v G4S Security Services Limited [2015] eKLR* cited by the respondents in that:

**“Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word “give notice”. The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules.”**

21. Having stated the above position, I also cite with approval the case of *Ibrahim Athman Said v Ibrahim Abdille Abdullah & another [2014] eKLR* with reliance to *Associated Warehouse Co. Ltd & Others v Trust Bank Ltd HCCC NO. 1266 of 1999* (unreported) where the following reasoning was taken:

**“Rule 2 (1) of Order 16 (repealed Civil Procedure Rules) presupposes service before dismissal. It is also clear under this rule that even where cause is not shown, dismissal is not mandatory as the rule is permissive...”**

22. Upon perusal of the court record, I have not come across any copies of the notices to show cause. In the premises, I am unable to tell when the same were issued. Furthermore, given that neither of the parties attended court to show cause on the scheduled date, it is probable that the parties were completely unaware that the matter was coming up in court for notice to show cause.

23. From the foregoing, I am satisfied that there is nothing to indicate the applicants were accorded a fair opportunity to explain why their suit should not be dismissed, notwithstanding the delay in its prosecution.

24. I deem it necessary to also address the prejudice that will befall the parties. I recall the 2<sup>nd</sup> respondent's argument that she will be

deprived of use of her property. As far as I am aware, the suit is premised on a land/property-ownership dispute which is yet to be determined. That being the case, I am not convinced that the 2<sup>nd</sup> respondent stands to be prejudiced in the manner claimed. On their part, the applicants stand to suffer the risk of not having their case heard on its merits and in this sense, suffering prejudice.

25. At the end of the day, the essence of this court's discretion is to ensure justice to the parties. The circumstances before me point towards inadvertence on the part of the applicants' advocates, coupled with the apparent non-service and/or issuance of the notices to show cause. It would therefore not do well to keep the applicants locked out of the seat of justice.

26. Consequently, the Motion is allowed as prayed on condition that the applicants prosecute their suit within 120 days from this day, failing which the same shall stand dismissed. The respondents shall have the costs of the application.

**Dated, signed and delivered at NAIROBI this 4<sup>th</sup> day of April, 2019.**

.....

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

.....for the Plaintiffs/Applicants

.....for the Defendants/Respondents