



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. 604 OF 2005**

**PHOEBE WANGUI GAKUI.....PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPHINE NG'ANG'A.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COSMAS NZIOKA .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**NAIROBI CITY COUNCIL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Phoebe Wangui Gakui, the Plaintiff/ Applicant, took out a Notice of Motion dated 13<sup>th</sup> February, 2018 in which she sought for the following orders inter alia:

- i. THAT the Application be certified as urgent and service thereof be dispensed with and the same heard forthwith ex-parte in the first instance and be fixed for inter-parties hearing thereafter.***
- ii. THAT the Honourable Court be pleased to set aside the orders made on the 26<sup>th</sup> February, 2015 dismissing the Plaintiff/Applicant's suit for want of prosecution and all other consequential orders thereto.***
- iii. THAT the firm of Chege Kariuki & Associates be granted leave to come on record and have conduct of the matter in place of Kinoti & Kibe Company Advocates.***
- iv. THAT the Honourable Court be pleased to order the re-instatement of the Plaintiff/Applicant's suit and the same be fixed for inter-party hearing.***
- v. THAT the costs of this Application be in the cause.***

2. The motion is supported by the affidavit of the Plaintiff/ Applicant sworn on 12<sup>th</sup> February, 2018 in which she averred that neither she nor her advocates on record at the time received the notice to show cause as to why her matter should not be dismissed hence their non-attendance in court. She averred that the delay occasioned in seeking the reinstatement of this suit was due a long term illness that has kept her in and out of hospital from 2012 to date. She averred that she is now ready to pursue this suit to its conclusion. She urged this court to reinstate the suit in the interest of justice.

3. The motion is opposed by the 3<sup>rd</sup> Defendant/Respondent. The 3<sup>rd</sup> Defendant/Respondent averred that the Plaintiff/Applicant did not adduce sufficient evidence to prove that the case was not proceeding prior and after the dismissal of the suit. The 3<sup>rd</sup> Defendant/Respondent averred that the delay in seeking to reinstate this suit after its dismissal was deliberate, inordinate and inexcusable. The Defendants have stated that they stand to suffer serious prejudice if the matter is reinstated. The 3<sup>rd</sup> Defendant/Respondent averred that the application lacked merit and is an abuse of the court process and urged the court to dismiss it with costs.

4. I have considered the grounds stated on the face of the motion plus the facts deponed in the affidavits filed in support of the motion and the grounds filed to oppose the motion filed by the 3<sup>rd</sup> Defendant/Respondent. The court issued a notice to the Plaintiff/Applicant to show cause why this suit should not be dismissed. The notice was not responded to and consequently the suit was dismissed under Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 on 26<sup>th</sup> February, 2015.

5. The Plaintiff/Applicant has asked this court to reinstate the suit since it is an arguable case with high chances of success.

6. The 3<sup>rd</sup> Defendant/Respondent relied on the case of **Peter Bekyibe Langat V Recho Chepkurui Mosonik & Another [2014] eKLR** in which Lady Justice L. Waithaka has echoed the view of Justice L. Kimaru in **Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) eKLR** which is to the effect that:

***“The applicant must satisfy this court that she has good reasons why she failed to attend court when the said application for dismissal was heard and determined in her absence .... In the first place, she cannot blame her counsel who was then on record for failing to attend court when the said application was listed for hearing”.***

7. Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 provide that:

***“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.”***

8. This court finds that there are two issues for determination: whether the delay was deliberate and inexcusable; and whether prejudice will be visited upon by either party. The Plaintiff/applicant has stated that she was not aware of the notice to show cause prior and after the dismissal of the suit. However, the Plaintiff/Applicant has demonstrated by way of adducing evidence to show that she had a valid reason for failing to attend court as required owing to her ill health.

9. Justice F. Gikonyo in **Patrick Ayisi Ingoi & another v Madhav Bhalla t/a Taibjee & Bhalla Advocates & 2 others [2014] eKLR** stated:

***“It is now trite that even where delay is proved, the Court can still excuse the same if the interest of justice so dictates.”***

10. Justice Gikonyo in the above case made reference to the case of **Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited [2014] eKLR:-**

***“No doubt the court has discretion to excuse a delay as long as it has been explained to the satisfaction of the Court. The satisfaction will come from the explanation given and the fact that the delay causes no substantial prejudice to fair trial or one of the parties or other or both. Therefore, the fact of delay per se does not seal the fate of the case. Other factors should be considered by the Court such as; whether the delay***

***1) is inordinate and inexcusable; and***

***2) will cause substantial prejudice to the fair trial of the case. The latter involves a delicate balancing act of the prejudice the dismissal of the case would cause on the plaintiff on the one hand, and real hardships to the Defendant on the other. ..., the Court will seek to be told of the actual hardships, loss and prejudice the defendant has suffered and will suffer by the delay; here it will be incumbent upon the Defendant to show the prejudice is substantial and results to, impediment of fair trial, aggravated costs, or specific hardships. There must be some additional prejudice that has worsened the position of the Defendant. These factors answer to a higher constitutional principle of justice to serve substantive justice and Articles 48, 50 and 159 of the Constitution are the relevant guide here.”***

11. The Court of Appeal in **Ivita vs. Kyumbu [1975] eKLR** held inter alia: -

***“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 ... The Defendant must however satisfy the court that he 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.***

12. The Defendants/Respondents failed to file a replying affidavit to controvert the averments set out in the affidavits deposed by the Plaintiff/Applicant and therefore, they failed to demonstrate that the notice to show cause was served upon either the Plaintiff/Applicant or her advocates on record. The Plaintiff/Applicant has averred that the suit has high chances of success if reinstated. The Defendants/Respondents did not demonstrate the prejudice that they are likely to suffer in the event the suit is reinstated.

13. In the end, I am convinced the motion dated 13<sup>th</sup> February, 2018 is meritorious. It is allowed as follows:

***i. The firm of Chege Kariuki & Associated is granted leave to come on record in place of the firm of Kinoti & Kibe & Co. Advocates for the Plaintiff/Applicant.***

***ii. The order dismissing this suit made on 26<sup>th</sup> February, 2015 is set aside.***

***iii. The suit is reinstated.***

*iv. The Notice To Show Cause why the suit should not be dismissed for want of prosecution is reinstated and is fixed for hearing on 27<sup>th</sup> July, 2018.*

*v. Costs of the motion to abide the outcome of the suit.*

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of July, 2018.

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**J.K. SERGON**

**JUDGE**

In the presence of:

..... For the Plaintiff

..... For the Defendant