



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT MERU

ELC SUIT NO. 49 OF 2006

HELLEN KATHUNI MUGA suing as legal representative of the estate of Muga

TWAMBOGO ALIAS M'MUGA M'TWAMBOGO..... PLAINTIFF

VERSUS

JOSEPH MBAE NDUROMO.....1ST DEFENDANT

MOFFAT KIMATHI SAMWEL2ND DEFENDANT

PAUL KINOTI THURANIRA 3RD DEFENDANT

RULING

1. By a notice of motion dated 31/10/2019 brought under order 12 rule 7, order 51 of the civil procedure rules, section 1A, 1B, 3A and 3B of the Civil Procedure Act and Article 159 of the constitution, the applicant/plaintiff is seeking orders to review/set aside the dismissal of the suit and reinstate the same for hearing. The application is based on the grounds on the face of it and on the supporting affidavit of Hellen Kathuni Muga who stated that this matter was slated for hearing on 28/5/2018, however it did not proceed due to the unresolved issue of representation by the defendants. The honorable judge however ordered for the prosecution of the matter within 30 days, otherwise the matter would stand as dismissed. The applicant contends that shortly thereafter, she fell sick and was hospitalized on 2/4/2019. Due to the illness she has been drained financially and unable to give proper instructions to her advocate. However she has now fully recovered and is focused on prosecuting the matter.

2. The issue for determination in respect of this application is **whether to set aside the order made on 28/5/2018 and reinstate the suit?**

3. In the case of **Utalii Transport Company Ltd & 3 Others v NIC Bank & Another (2014) eKLR**, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendants to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In **Ivita v Kyumbu (1984) KLR 441**, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay.

4. This court has taken into account the conduct of the prosecution of this suit from the time of its inception and I have been able to capture two points for analysis; that is **DELAY** and **SERVICE**.

Delay

5. This suit was filed on 7.6.2006 which is a period of over 13 years. The plaintiff appears to have gone a drift in the prosecution of the case such that at some point on 10.7.2015, the matter was listed for notice to show cause as to why the suit could not be dismissed. I deem it necessary to extract the proceedings of that day of 10.7.2015 where it was argued for the plaintiff as follows;

“We are keen to proceed we had problems with getting a date.....”

6. The matter was thereafter mentioned before the Deputy Registrar on 23.9.2015 and at the registry on 14.4.2016. Then nothing happened until the matter was listed before a visiting Judge (Justice E. Cheronu) on 24.5.2017. Thereafter the matter came up before Judge Cheronu severally until 28.5.2018 when Judge Cheronu gave strict directions on the hearing of the matter.

7. One of the cardinal principles in our constitution is **“the expeditious delivery of justice”** –see **Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17th century maxim of **“Justice delayed is justice denied”**. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred.

8. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print “**Sustaining Judiciary Transformation - (SJT) 2017-2021**” where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases which had clogged the justice system for years. The matters identified as falling under this category were cases which were five years old and/or older.

9. Against this background, the Meru ELC undertook the exercise of clearing the backlog very seriously where service weeks were conducted by visiting judges as from the month of May 2017, and throughout year 2018, where parties and their advocates were well aware of this exercise. It is against this background that this matter was listed for hearing before Judge Cherono on 24.5.2017. It was listed again before the same judge on 14.6.2017, 25.9.2017, 6.2.2018, 9.2.2018 and 28.5.2018. In between these dates, the matter was listed before me for one issue or another on 9.11.2017, 1.3.2018 and 11.4.2018 while it was listed before Judge Kemei on 13.3.2018 and the Deputy Registrar on 12.2.2018.

10. Thus by the time Judge Cherono gave his directions on 28.5.2018 to the effect that the matter was to be set down for hearing within 30 days, the plaintiff was in essence put on notice, that the matter was facing imminent dismissal.

11. Against this background, it was not enough for the plaintiff to say that she fell sick. It was incumbent upon the applicant to give further and better particulars as to why she was unable to list the matter down for hearing between 29.5.2018 and 28.6.2018 (when the time lapsed).

12. It is noted that the present application was filed one and a half (1 1/2) years from the time Judge Cherono gave directions on 28.5.2018. The applicant attributes this to her ailment and being financially drained. However, she was apparently admitted in hospital on 2.4.2019, almost a year from the time Judge Cherono gave directions. Thus the delay in filing the present application has not been satisfactorily explained.

13. Going back to the proceedings of 10.7.2015, it is clear that the plaintiff did not embrace her word, that she would prosecute the suit. The challenge she apparently faced was getting a date. However, the analysis above shows that in a span of one year, this matter was listed a record 10 times before Judges, all in an effort to ensure that the case was prosecuted. It turned out to be a futile exercise. I conclude that the delay in the prosecution of the suit and the filing of the current application has been prolonged and inexcusable. Consequently, this court is unable to exercise discretion in favour of the applicant.

Service

14. The issue of service is another factor that paints the applicant unfavorably. Way back on 17.10.2006, the court was informed that 1st defendant had died while 3rd defendant could not be traced. The case against 1st defendant was subsequently withdrawn. However, the proceedings do not indicate whether 3rd defendant was ever served with the pleadings.

15. It is noted that the plaintiff’s case had partially proceeded before Judge Cherono on 25.9.2017. However on 9.2.2018, the Judge set aside the proceedings of 25.9.2017 on the basis of lack of service.

16. The matter was fixed before Judge Kemei on 13.3.2018 when the counsel for the plaintiff/applicant addressed the court as follows;

“This matter has been fixed for hearing prematurely. We have not seen defendants. We cannot trace them. We are not in a position to proceed today with the hearing.....”

17. Finally, when the matter was listed before Judge Cherono on 28.5.2018, the Judge was not satisfied that proper service had been effected upon the defendants. The question is, does the applicant even know whom she has sued, particularly the 3rd defendant!

Decision

18. In conclusion, I make reference to the case of **Mwangi S. Kaimenyi vs Attorney General (2014) eKLR**, where Judge Gikonyo restated the legal considerations on matters reinstatement of a suit as follows;

“When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties..... Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

1) whether the delay has been intentional and contumelious;

2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;

3) whether the delay is inordinate and inexcusable;

4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and,

5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties”.

19. None of the criterion set out in the above case paints the applicant favorably in the eyes of this court. What resonates from the analysis herein is that the applicant has not demonstrated to the satisfaction of this court that even if this matter was to be revived, she would be able to prosecute the same. She had her day in court, but she was unable to seize the moment for the last 13 or so year. I therefore find that the application dated 31.10.2019 is not merited. The same is hereby dismissed with no orders as to costs. **This suit was no more as at 29.6.2018, hence this file is marked as CLOSED.**

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE