



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 160 OF 2015**

**DANIEL KIRUMBI NJOROGE.....APPLICANT**

**VERSUS**

**CHRISTOPHER KANGETHE KIGWE.....RESPONDENT**

**RULING**

1. The late **Daniel Kirumbi Njoroge (the deceased)** initiated this suit through a notice of motion dated 24/2/2015 in which he sought an order extending the time for filing an originating summons against Christopher Kangethe Kigwe, to enforce a land sale agreement dated 19/11/1998. The motion came up for hearing before Okongo J on 9/2/2017 and was dismissed for non-attendance.
2. Subsequent to that, the deceased brought a notice of motion dated 13/2/2017 in which he sought an order reinstating the dismissed motion. The said application dated 13/2/2017 came up for hearing before Eboso J on 17/12/2018 and was similarly dismissed for non-attendance. It does emerge from the materialS before court that Mr Daniel Kirumbi Njoroge subsequently died on 4/3/2019.
3. Arising from the above, the deceased's widow, Eunice Mukami Ndungu Njoroge, brought a notice of motion dated 10/9/2020 seeking: (i) an order substituting her in place of her deceased husband; and (ii) an order reinstating the application dated 13/2/2017, among other prayers. The said application was supported by the applicant's affidavit sworn on 28/8/2020 and was canvassed in the virtual court on 9/11/2020. The application is the subject of this ruling.
4. The applicant's case is that her husband (**the deceased**) died on 4/3/2019. Prior to that, the deceased had engaged on advocate, Paul Mugwe, and had given him full instructions to handle this case. The advocate, however, failed to attend court on 17/12/2018. At that time, the deceased had fallen ill and subsequently died. She urged the court to reinstate the suit.
5. The respondent opposed the application through his replying affidavit sworn on 6/11/2020. His counsel, Ms Mutinda made oral submissions in opposition to the application on 9/11/2020. The case of the respondent is that the application is incompetent because it was filed by a stranger. He contends that, without leave of the court granting substitution, the applicant does not have *locus standi* to bring the suit. Secondly, the respondent contends that the applicant having previously filed a similar application which is dismissed on 17/12/2018, the present application is incompetent on account of the doctrine of *res judicata*.
6. Thirdly, the respondent contends that no proper explanation has been tendered for non-appearance on 17/12/2018. Fourthly, the respondent contends that there is inordinate delay in bringing the application. Lastly, it is contended that the cause of action in the intended suit was statute-barred under **Section 7** of the **Limitation of Actions Act**. The respondent and his counsel urge the court to dismiss the application.
7. I have considered the application, the response thereto, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. Three key questions fall for determination in the application. The first question is whether the applicant has satisfied the criteria upon which an order of substitution is granted under order 24 rule 7(2) of the Civil Procedure Rules. The second question is whether there is a proper basis for exercising jurisdiction under **Order 24 rule 7 (2)** of the **Civil Procedure Rules** to set aside the dismissal order made on 17/12/2018. The third question is whether this is the right court to exercise jurisdiction to set aside the dismissal order of 9/2/2017. I will make brief sequential pronouncements on the three questions in the above orders.
8. The applicant is acting in person. She is a lay person. Looking at the nature of the application, she is urging the court to exercise jurisdiction under **Order 24 rule 7(2)** of the **Civil Procedure Rules**. She is the widow of the late Daniel Kirubi Njoroge who died on 4/3/2019. By the time the deceased passed on, the suit had been dismissed for non-attendance. The subsequent application which sought reinstatement of the suit had similarly been dismissed for non-attendance. The court can therefore only deal with the present application within the framework of Order 24 rule 7(2) of the Civil Procedure Rules.

9. The applicant has exhibited a death certificate indicating that the deceased died on 4/3/2019. Further, she has exhibited a copy of a grant of letters of administration issued by Ruiru Senior Resident Magistrate Court on 7/7/2020 in relation to the deceased's estate. In the circumstances, the court is satisfied that the applicant has *locus standi* to be substituted in place of her deceased husband and to apply for an order setting aside the dismissal order made on 17/12/2018 within the framework of order 24 rule 7 (2) of the Civil Procedure Rules.

10. The second question is whether there is a proper basis for exercising jurisdiction to set aside the dismissal order of 17/12/2018 under **Order 24 rule 7 (2)** of the **Civil Procedure Rules**. The applicant has explained that the deceased had retained an advocate whom he gave full instructions. She has further explained that the deceased fell sick and subsequently died during the material period when the suit was dismissed.

11. The guiding principle in the court's exercise of judicial discretion of this kind was articulated in **Mbogo & Another Vs Shah EALR 1908** at page 13. The court's discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.

12. In the case of **Belinda Murai & Others Vs Amoi Wainaina (1978)**, **Madan j** set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of a court of justice on account of a mistake.

*“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....”*

13. **Apaloo JA** outlined the following approach to a similar question in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**.

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. 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 purpose of deciding the rights of the parties and not the purpose of imposing discipline”.*

14. In my view, the explanation tendered by the applicant satisfies the above criteria. The respondent will be indemnified through a modest award of costs. My finding on the second issue therefore is that the applicant has satisfied the criteria upon which our courts exercise discretionary jurisdiction to set aside a dismissal order under **Order 24 rule 7 (2)** of the **Civil Procedure Rules**.

15. The last question is whether this is the proper court to exercise jurisdiction to set aside the earlier dismissal order made on 9/2/2017. The said order was made by Okongo J who is still in the Station. In my view, Justice Okongo is the proper Judge to review or set aside the order of 9/2/2017.

16. Counsel for the respondent contended that the present application was *res judicata* because a preceding application had been dismissed for non-attendance. I do not think the doctrine of *res judicata* applies in the circumstances of the present application which merely seeks reinstatement of dismissed applications. Neither of the two preceding applications were heard and determined on merit. Consequently, I reject that ground.

17. In light of the foregoing, I make the following disposal orders in relation to the notice of motion dated 10/9/2020:

*a) Eunice Mukami Ndungu Njoroge is hereby substituted as the applicant in this suit, in her capacity as the administrator of the estate of Daniel Kirumbi Njoroge.*

*b) The notice of motion dated 13/2/2017 is hereby reinstated for hearing and determination.*

*c) Because the said application seeks to set aside a dismissal order made by Okongo J, this matter shall be mentioned before the Deputy Registrar on 3/12/2020 for the purpose of fixing a mention dated before Okong J for directions on the disposal of the notice of motion dated 13/2/2017.*

*d) The estate of Daniel Kirumbi Njoroge shall pay the respondent throwaway costs of Kshs 15,000 in relation to the present application. The same is to be paid within 30 days from today. In default, the reinstatement order herein shall stand vacated.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF NOVEMBER 2020.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Eunice Mukami-Applicant present in person.

Ms Mutinda - advocate for the respondent.

Court Clerk - June Nafula