



**M'itwamwari v Abwithia (Environment & Land Case E024 of 2021)  
[2024] KEELC 218 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 218 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E024 OF 2021**

**CK NZILI, J**

**JANUARY 24, 2024**

**BETWEEN**

**ANTHONY MUTHURI M'TWAMWARI ..... PLAINTIFF**

**AND**

**MARKO KIAMBI ABWITHIA ..... DEFENDANT**

**RULING**

1. On 27.7.2023, this court dismissed the suit for non-compliance and non-prosecution. By an application dated 18.8.2023, the applicant prays for setting aside the order of dismissal and reinstatement for the hearing of the suit on merits. The reasons are that the plaintiff's counsel on record was present before the court and gave a sufficient reason why substitution of the defendant had not occurred.
2. In his supporting affidavit sworn on 4.10.2023, Anthony Muthuri M'Itwamwari, the applicant, avers that after the defendant died on 18.11.2022, he made efforts to obtain the death certificate leading to leave to substitute the deceased on 26.1.2023. Further, he says he filed citation proceedings in Githongo SPMCC No. 9 of 2023 against the beneficiaries of the deceased estate, which came up for hearing in that court on 26.6.2023. The applicant avers that the lower court gave the beneficiaries 90 days to file and obtain a grant ad litem. He attached copies of the death certificate, application for citation, orders of the lower court made on 26.6.2023, and an affidavit of service upon the beneficiaries to come to court as annexures marked AMM 1-4, respectively.
3. The applicant avers that even though his affidavit of service was prepared on time, it was not placed on the court file. He avers factors beyond his control occasioned the dismissal of the suit; otherwise, he has been eager to prosecute the suit.
4. The factors to consider on an application for reinstatement of suits were addressed in *Ivita v Kyumbu* (1984) KLR 44; Chesoni J observed that the test is whether the delay is prolonged, inexcusable and



- whether justice can still be done despite such delay. Muchemi L. J in *Jim Rodgers Njeru v Alhussein Motors Ltd & others* (2018) eKLR, observed that in an application for dismissal of the suit for want of prosecution, the reason why the suit was dismissed should be considered.
5. In *Shah v Mbogo & another* (1967) EA 116, the court observed that the discretion is intended to avoid an injustice or hardship resulting from an inadvertent or excusable mistake or error but is not designed to aid a litigant who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
  6. Adding his views to the debate, Warsame J, as he then was in *Mobile Kitale Service Station v Mobile Oil (k) Ltd & another* (2004) eKLR, said courts are under pressure from backlogs and increased litigation; therefore, it is in the interest of justice that litigation must be conducted expeditiously and efficiently, so that injustice caused by delay would be a thing of the past.
  7. In *Leiyagu v IEBC & others* (2013) eKLR, the court observed that the right to a hearing is a well-protected right and should be upheld in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.
  8. Order 24 Rule 4 of the *Civil Procedure Rules* provides that it is the legal representative of a deceased who can be made a party to a suit. Section 2 of the *Civil Procedure Act* defines a legal representative as a person duly authorized to step in and represent the estate of a deceased person. From annexure marked AMM "1," the defendant passed on on 18.11.2022. The law requires a substitution within a year; otherwise, the suit shall abate.
  9. As of the filing of this application, no one had been authorized to represent the defendant's estate. The application, as it were, is made against no one in law. As of 18.11.2023, this suit had abated by operation of law, against the estate of the deceased defendant. Even if the court were to reinstate the suit or find the explanation genuine, reasonable, or the delay excusable, the court would still be acting in vain.
  10. As much as the applicant took action to compel the beneficiaries to take out letters of administration, that information was brought to the court's attention on 8.5.2023. More time was extended to the applicant until 27.7.2023. On 27.7.2023, counsel who was present and the applicant did not seek an extension or give a plausible explanation different from what was before the court on 8.5.2023. The affidavit of service being alluded to was not before the court. The court merely struck out the suit. There was no dismissal order of the suit. As and when the plaintiff is ready to prosecute the suit against a bona fide legal representative, he can still re-institute proceedings. To reinstate the suit when there is no bonafide defendant on record would be an action in futility. It will amount to a waste of precious judicial time and resources. The application dated 18.8.2023 is hereby dismissed with no orders as to costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 24<sup>TH</sup> DAY OF JANUARY 2024**

In presence of

C.A Kananu/Mukami

Anthony in person

Mukaburu for plaintiff

Respondent

**HON. CK NZILI**

**JUDGE**

