



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 300 OF 1989**

**NDATHO M'NKONDI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MISCHECK MURIUNGI MEME.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JUDITH MAKENA NJOROGE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In his application dated and filed on 27.4.2015, plaintiff/applicant is seeking for the reinstatement of this suit, which was dismissed on 27.3.2014. Applicant avers that he has an arguable case with high chances of success and that it is in the interest of justice that the suit be reinstated.

2. Applicant has sworn an affidavit filed on 27.4.2015 in support of the application, where he avers that he is a feeble octogenarian. That is why he used to send his sons to his advocate to find out the status, of the suit. It is only in January 2015 that he learnt from his son that the suit had been dismissed.

3. The respondent (defendant) died on 18.2.2016 and is yet to be substituted. The application to have him substituted was filed on 17.1.2018 but it could certainly not take off as there was no suit. Nevertheless, advocate Kitheka has been appearing for this respondent.

4. The court gave directions for the application to be canvassed by way of written submissions.

5. I have considered the record of the court as well as the rival submissions.

6. It is submitted for the plaintiff that the mistake in failing to prosecute this matter was occasioned by his then advocate and this mistake should not be visited upon him. Applicant avers that his advocate never updated him of the status of his case. He also submits that he is of advanced age. In support of his case applicant relies on the case of **“Mwangi S. Kimenyi vs A.G & another (2014) eKLR”** and the case of **Ivita vs Kyumbu (1984) KLR 4L1**.

7. It has been submitted for the respondent that applicant has not been keen to prosecute this matter. It is averred that a court of law should not hesitate to dismiss a suit for want of prosecution where it strongly feels that the sustenance of the suit will only breed prejudice to the defendant. In support of submissions of respondent the following authorities have been proffered:

- **Austin Securities vs North gate and English stores Ltd (1969) 1 WLR, 529.**
- **Nairobi HCCC No. Utalii Transport Company Limited & 3 others vs NIC Bank & another (2014) eKLR**
- **Naftali Onyango vs National Bank of Kenya (2005)eKLR.**

8. The provisions of **order 17 rule 2 of civil procedure rules** provide that:

**(1) 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.**

**(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.**

**(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.**

**(4) The court may dismiss the suit for non-compliance with any direction given under this order.**

9. Reinstatement of a suit is a discretion of the court. Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) eKLR. Kimaru J stated thus;

**It behoves the litigant to always follow up his case and check its progress. He cannot come to court and say that he was let down by his advocate when a decision adverse to him is made by the court due to lack of diligence on the part of his advocate. I think it has been ruled by the Court of Appeal that where an advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant.”**

10. In the case of Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & another C.A Civil Application No. NAI 121 of 2005 (6/05NYR) (unreported) Waki J.A, held that;

**“ With respect, I think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation....”.**

11. In Simion Waiti Kimani & Three others vs Equity Building Society (2010) Koome J stated as follows;

**“The courts have discretion generally to reinstate a suit which is dismissed for non-attendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay....”.**

12. In the case of Fran Investments Limited Vs G 4 S Securities Limited [2015] eKLR, Gikonyo J. expressed himself as follows;

**“Again, if the Applicant was as vigilant as he claims to be, it is irreconcilable that they discovered the suit had been dismissed on 17<sup>th</sup> day of February 2014 – four years since the defence had been struck out. Such delay is not inadvertent as alleged by the Applicant; it is deliberate, as a party is expected to prosecute their cases without delay. The delay has not been satisfactorily explained and is a source of prejudice to the Respondent as well as to the fair administration of justice. These are sufficient reasons to refuse to reinstate the suit and let it lie in peace in its judicial grave. The amount of time which has passed by will not allow any, and is not conducive to having a fair trial in this matter”.**

13. This suit was filed way back on 9.10.1989. It must hold the dubious position of being one of the oldest matters or perhaps it is the oldest matter in this court. I have perused the record and I find that the suit marked time for a period of 24 years in court before it was dismissed on 27.3.2014. During this 24 year period, there was little or no activity on the file and such period of dormancy can be sampled as follows;

- 18.7.2000 – 15.4.03 (three years)
- 16.12.2003 – 28.11.2005 (two years)
- 28.11.2005 – 12.1.2007 (two years)
- 7.6.2007 – 27.2.2014 (seven years)

14. When the matter was being activated on 27.2.2014, it was not because plaintiff had moved the court. It was a notice to showcause which had been issued and was extended to 27.3.2014.

15. The aforementioned record clearly shows that applicant has not been a vigilant litigant even if he now old, he must have filed his suit when he was youthful. But he let it stay in limbo. He cannot now turn around and blame his advocate.

16. As stated in the case of Ivita vs Kyumbu (supra), the test is **“whether the delay is prolonged and inexcusable.....”**. This is a case where even defendant has died. I find that the delay in the prosecution of the case was certainly prolonged and inexcusable. It would be prejudicial to the family of respondent to revive the suit at this stage.

**17. I find no merits in the application. The same is dismissed with costs to the respondent. I also direct that this file be taken to the archives.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28<sup>TH</sup> NOVEMBER, 2018 IN THE PRESENCE OF:-**

C/A: Kananu

Rimita holding brief for Kithinji for plaintiff

**HON. LUCY. N. MBUGUA**

