



**M'twaruchiu v Gichuki & another (Environment & Land Case
3 of 2007) [2018] KEELC 4899 (KLR) (7 December 2018) (Ruling)**

Timothy Mworia M'twaruchiu v Stephen Mundia Gichuki & another [2018] eKLR

Neutral citation: [2018] KEELC 4899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 3 OF 2007
EC CHERONO, J
DECEMBER 7, 2018**

BETWEEN

TIMOTHY MWORIA M'TWARUCHIU PLAINTIFF

AND

STEPHEN MUNDIA GICHUKI 1ST DEFENDANT

LUCY WANGUI MUNDIA 2ND DEFENDANT

RULING

1. The applicant filed this application on 9th October 2018 under order 12 rule 7 order 51 rule 1 CPR and all enabling provisions of the law seeking to reinstate this suit which was dismissed on 12th June 2017. The applicant has filed an affidavit in support in which he stated that he was not notified of the hearing date by his advocate. The application is opposed with a replying affidavit sworn by the 1st defendant/respondent on 9th November, 2018.

Applicants Case

2. According to the affidavit evidence in support of the application, the applicant dwelt on the merits of the case and not the reasons for not attending court during the hearing date.
3. The applicant finally stated that it is fair that the suit be heard on merits and all parties be given a hearing as no one will be prejudiced by allowing the application.

Respondent's Case

4. The respondents vehemently opposed the application and deponed that the plaintiffs advocate was notified of the hearing date but failed to attend court together with the applicant. The respondents also stated that this case has been in court since 2007 which is a long period of time. The respondents also



stated that they stand to suffer prejudice as they will be subjected to endless litigation if the application is allowed. The respondents also deposed that the applicant has not advanced any good reason why the suit should be reinstated.

Applicants Submissions

5. The applicant through the firm of G.M Wanjohi & Co advocates submitted the averments contained in the supporting affidavit are not controverted. He cited the following case:
6. Professor Mwangi S. Kimenyi vs The Hon. Attorney General & Kenya institute for public policy research and analysis Misc Civil Application no. 720 of 2009 (Nairobi – unreported).

Respondents Submissions

7. The respondents through the firm of Charles Kariuki and Kiome associates submitted that the applicant has not shown any reasonable cause why this case should be reinstated back for hearing and why it took him more than one year to file the instant application for reinstatement. The respondent submitted that the delay to prosecute this suit and file the application to reinstate the suit is inordinate and that the same should not be entertained.
8. The learned counsel also submitted that the legal basis for dismissal for want of prosecution is the requirement of expediency in the prosecution of civil suits under article 159 92) (b) of *the constitution* sections 1A 1B and 3A *Civil Procedure Act* which gives the courts un limited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court.

The learned counsel also cited the following authorities:

1. ET Monks & Company Ltd Vs Evans (1983) 584
2. Ivita vs Kyumba (1984) KLR 441
3. Order 17 rule 2 (3) CPA

Decision

9. I have considered the notice of motion dated 9th October 2018, the supporting affidavit and the replying affidavit by the applicant and the respondents. I have also considered the submissions by the advocates and the applicable law.
10. The facts of this case are simple. This suit was coming up for hearing on 12th January 2017. Only the defendant and his advocate were present. There was no attendance by the plaintiff and his advocate. The matter was called out but there was no response by the plaintiff and his advocate.
11. After being satisfied that the plaintiff was properly served with the hearing notice, the court in the exercise of its powers donated under order 17 rule 3 dismissed the suit for non-attendance and for want of prosecution. On 12th October 2018, almost two years later, the applicant filed the present application under certificate of urgency. However the advocate appearing for the applicant has not sworn an affidavit stating why he failed to attend court with the applicant for the hearing of this case on the hearing date. The superior court has pronounced itself on the principles of setting aside a dismissal of suit for want of prosecution. First the court must be satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties.
12. The plaintiff must also demonstrate that the application has been made without unreasonable delay and that no prejudice will be occasioned to the opposite party. I also hasten to add that the incorporation of an overriding objective in section 1A and 1B of the *Civil Procedure Act* Miscellaneous



Amendment Bill no. 6 of 2009 has provided this court with a new impetus to facilitate the just, expeditious, proportionate and affordable resolution of disputes between parties.

13. In the absence of any reasons by the advocate who was duly served with the hearing notice it will be difficult for this court to exercise discretion in favour of the applicant.
14. In the case of Mradula Suresh Kantaria and Surech Nanillal Kaptaria civil appeal no. 277 of 2005 (unreported), the court observed as follows:

“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all of us in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained”.
15. I find that the application of 9th October has not been brought without undue delay and no excusable explanation given.
16. The applicant’s advocate has not offered any explanation by way of an affidavit evidence why he received the hearing notice but failed to attend court together with his client. The applicant took more than one year to bring this application for reinstating this suit. A period of one year in my view is inordinate.
17. I agree that the defendant shall be prejudiced if this suit is reinstated. It will also be against public policy to reinstate this suit. In the result the application dated 9th October 2018 lack merit and the same is hereby dismissed with costs to the defendant/respondent.

READ, DELIVERED AND SIGNED AT MERU THIS 7TH DAY OF DECEMBER, 2018.

BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA

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In the presence of:

Mr. Mutuma for plaintiff

M/s. Wambugu holding brief for M/s. Kiome for defendant

CC: Janet

