



REPUBLIC OF KENYA



Matata (Suing as administrator and legal representative of the Estate of Abdallah Salim Mwanazuri) v Changoma & 4 others (Civil Suit 75 of 2011) [2024] KEHC 7878 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 75 OF 2011
DKN MAGARE, J
JUNE 27, 2024**

BETWEEN

JUMA ABDALLAH MATATA (SUING AS ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF ABDALLAH SALIM MWANAZURI) PLAINTIFF

AND

**ALI CHANGOMA 1ST DEFENDANT
KHALID MUSA 2ND DEFENDANT
MOHAMUD MUSA 3RD DEFENDANT
NAHID MOOSAQ AHMED ALWY 4TH DEFENDANT
EUROTRUCKS & TRAVELLERS LIMITED 5TH DEFENDANT**

RULING

1. This is a Ruling on an Application dated 21/3/2024 seeking to reinstate the suit following dismissal for want of prosecution on 20/7/2015 and on 24/2/2024.
2. The Application is stated to be brought under the provisions of Order 10 Rule 10 of the [Civil Procedure Rules](#) and is supported by the Affidavit of Juma Abdallah Matata on the following grounds:
 - a. The suit was dismissed on 15/7/2015 and on 24/2/2024 for want of prosecution.
 - b. The dismissal was due to mistake of the Plaintiff's advocate.
 - c. The advocates of the Plaintiff were not served with the notice of dismissal of the suit.



- d. The Plaintiff's advocates had applied to reinstate the suit vide Application dated 27/2/2019 but the said Application was not prosecuted.
 - e. The court file had been misplaced and was found at the end of 2023.
 - f. The suit property is the only inheritance for the Plaintiff.
3. The Application was opposed materially on the ground that the Applicant was not keen on prosecuting the matter and Applicant's move was an afterthought brought long after the suit was dismissed in April, 2023 and was not genuine.

Submissions

4. Parties filed submissions. I have perused the submissions. The Applicant reiterated the averments in the Application and Supporting Affidavit.
5. The Applicant submitted that the Advocate's mistakes ought not to be visited upon the innocent client. It was also submitted for the Applicant that the Applicant had made a case to deserve the exercise of the court's discretion to reinstate the suit. Reliance was placed on *Patriotic Guard Limited v James Kipchichir Sambu* [2018] eKLR.
6. It was also submitted that the Plaintiff would suffer prejudice if the suit remained dismissed. I have not had sight of the Respondents' submissions.

Analysis

7. I have considered the Application and the Submissions filed in support thereof.
8. The issue is whether the Applicant has demonstrated grounds that would warrant this court to reinstate the suit.
9. It is conceded by the Applicant that the initial order dismissing this suit for want of prosecution was issued on 20/7/2015, about 9 years ago. Similarly, that there was an Application for reinstatement of the suit dated 27/2/2019 but which was never prosecuted.
10. The suit has been in court for 13 years. It appears that the Plaintiff would not have moved the court were it not for the court's action. Nevertheless, the delay of 9 years has not been satisfactorily explained. The Plaintiff's application is outrightly an abuse of the court process as there is a similar application dated 27/2/2019 pending and which was never prosecuted.
11. Notwithstanding, in our court system, delay is usually documented. Without documentation, it never happened. For example, a lost file where there is no record of follow up, is not lost. There is no evidence to prove that the Applicant was a passionate litigant who noticed of the dismissal in time and applied to set aside the dismissal order reasonably in time or immediately.
12. The setting aside of dismissal orders under Order 17 is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated in the case of *Shah v Mbogo* [1979] EA 116 quoted with approval in the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR:

".....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person



who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

13. There also has to be sufficient cause. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Supreme Court stated that:-

“Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

14. The Plaintiff had the primary obligation to prosecute the suit and it is clear that the Plaintiff has no interest in the matter. The Application is indeed an afterthought filed owing to the dismissal orders. In the case of *Utalii Transport Co. Ltd and 3 Others v N.I.C. Bank and 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 defendant to court.”

15. Therefore, parties have the obligation and duty to assist the court to adjudicate on the matters brought before it expeditiously as was held in *Gideon Sitelu Konchella v Daima Bank Limited* [2013]eKLR where the court while citing the case of *Mobil Kitale Service Limited vs Mobil Oil Kenya Limited*, held that:-

“It is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiouslythe overriding objection of this Act and Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.



16. The decision to dismiss was made interpartes over 9 years ago. There is no mistake made. Parties have obligation to prosecute files they have brought to court. There are stale claims that I find the Applicant not interested in prosecuting this suit. I decline to reinstate the suit. This being the determination, the application lacks merit.

Determination

17. In the circumstances, I make the following orders:
- a. The Application dated 21/3/2024 is dismissed.
 - b. For the avoidance of doubt, the application dated 27/2/2019 stands dismissed.
 - c. There shall be no order as to costs.
 - d. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the parties.

Court Assistant - Jedidah

