**Getecha v Njagi (Civil Case 269 of 2018)**
**[2024] KEHC 11691 (KLR) (Civ) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11691 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 269 OF 2018**

**AN ONGERI, J**

**SEPTEMBER 25, 2024**

**BETWEEN**

**FRANCES WANJIRU GETECHA ..... PLAINTIFF**

**AND**

**EDWIN KIRUNJA NJAGI ..... DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 3/11/2023 seeking for reinstatement of this suit which was dismissed on 16/12/2022.

2. The application is based on the following grounds;

   i. This matter came up for Notice to show cause why it should not be dismissed for want of Prosecution on 16 December 2022.

   ii. The court reinstated the suit and directed that it should be set down for hearing with 120 days.

   iii. On 21 December 2022 counsel for the Plaintiff received a text message from the Judiciary advising that the matter had been fixed for approval by the DR on 17 April 2023.

   iv. On 17 April 2023 we attend court virtually and we were advised that the Deputy Registrar was not sitting and the court assistant issued new dates.

   v. Upon informing the court assistant that this matter was coming up but it not listed but we would be willing to take another date, she advised us to follow up with the registry.

   vi. On the same day 17 April 2023 counsel for the Plaintiff wrote a letter to the Deputy Registrar requesting for a hearing date noting that the said approval was an administrative action.

vii. Counsel for the Plaintiff has since been following up with Court Registry officials to obtain a hearing date but the same was in vain.

viii. That we have since received a notification from the judiciary again that the matter has strike out and file closed.

ix. Counsel for the Plaintiff has demonstrated above that indeed there were steps taken to prosecute this matter.

x. The Plaintiff should not be made to suffer due to mistake of their counsel.

xi. The Plaintiff will suffer irreparable harm due to denial of her constitutional rights.

xii. It is in the interest of justice that the prayer sought be granted.

3. The application is supported by the affidavit of Cecilia Naliaka Manyonge in which she deposed that she was the advocate on record tor the Plaintiff herein hence fully conversant with the facts of this case and therefore competent to swear this Affidavit.

4. That on 16th December 2022 she attended court before Justice Sergon this matter was coming up for Notice to Show Cause why it should be dismissed for want of prosecution.

5. That on the same day 16th December 2022 the court directed that this matter be reinstated and plaintiff to prosecute within 120 days.

6. That on 21 December 2022 she received a text message from the Judiciary indicating that the matter had been fixed for approval by the Deputy Registrar on 17 April 2023.

7. That she diarized the date and attended court on that said date but the Deputy Registrar was not sitting and therefore the court assistant was fiving new dates.

8. That upon follow up with the court assistant she was advised to visit the registry because approval was an administrative action.

9. That she wrote a letter to the Deputy Registrar on the same day 18 April 2023 explaining that they thought that date was a mention for approval to take a hearing date and requested for a hearing date on a priority basis.

10. That she dispatched the letter on the same day via the court email which is civdates@court.go.ke forwarding the letter dated 17 April 2023.

11. That she has several times visited the court registry to follow up on the date but the response has always been that the file is not available.

12. That on 2 November 2023 she received a text message advising that this matter has been strike out and file closed.

13. That failure to prosecute this matter within 12O days was not deliberate and was not occasioned by any failure on her part.

14. That the plaintiff shall suffer substantial prejudice if the plaint dated 27 November 2018 is not reinstated.

15. The applicant also filed a replying affidavit sworn on 11/11/2022 stating that she is the Plaintiff herein hence competent to swear this affidavit.

16. That currently, she is a director at Royal International academy situated along Kamiti Road.

17. That she has been shown the text message from Judiciary advising my previous advocates on record Ms/ Ngugi and Company Advocates listing this matter for Notice to show cause why this suit should not be dismissed and wish to respond as follows; -

18. That this matter was listed for hearing on 11th May 2021 but it was taken out and parties were advised to fix a hearing date at the registry.

19. That she was shocked that since 2021 her advocates on record has not obtained a hearing date despite constant follow up via phone call in which she was always advised that the matter was well handled and that a date will be shared.

20. That her Advocates on record Ms/ Naliaka and Associates Advocates have advised her that it is a trite principle in law that mistake of counsel should not be visited upon the client and she requests the court not to punish her for the mistakes of her previous advocates on record.

21. That she is ready and willing to prosecute this matter and have it concluded at the earliest time possible.

22. The respondent filed a replying affidavit opposing the application stating that he is the Defendant/ Respondent herein fully conversant with the matters herein thus competent to swear this affidavit.

23. That he is an advocate of the High Court of Kenya practicing as such in the name and style of E. K Njagi & Co. Advocates.

24. That he has seen the Plaintiffs/ Applicant's Notice of Motion Application together with its supporting Affidavit all dated 13th November 2023 and in response wishes to state as follows;

25. That to begin with, the application as drawn and filed is fatally defective and an abuse of the court process for inter alia the following reasons:-

    i. The law firm of Naliaka & Associates Advocates purporting to act for the Plaintiff/Applicant is not properly on record for not having filed and served either Notice of Appointment and or Notice of change of Advocates from the Law firm currently on record on behalf of the plaintiff.

    ii. The law firm of Naliaka & Associates Advocates have effected service of the instant application upon the wrong party of E. K Njagi Co. Advocates whereas the Defendant has an advocate on record by the name Rose W. Njeru & Co. Advocates.

26. That on the basis of the above two reasons alone, this application should be dismissed with costs to the defendant.

27. That he is aware as a fact that the instant suit was dismissed due to the inordinate delay by the plaintiff to prosecute the same and as such the instant application is belated and a waste of courts precious time.

28. That as it stands, the suit was long dismissed and any attempts to revive the same will be against the rules of natural justice and greatly prejudicial to the defendant.

29. That no valid reason or at all has been advanced to justify why the suit should be reinstated.

30. That in any event, the application is premised on an affidavit of an advocate instead of the plaintiff who should have deponed the reasons as to why she wants the case revived.

31. That the plaintiff is a vexatious litigant having filed so many suits and cases against the defendant all of which have been dismissed and or the defendant being acquitted.

32. That in any event, the Advocate has clearly admitted at her ground number 10 that it is her mistake as a counsel and thus the plaintiffs claim should be as against the said counsel.

33. The parties filed written submissions as follows; the applicant submitted that Ms Naliaka Advocate's mistake should not be visited in the applicant and in support the applicant cited *Mugure Mahindi v Ali Mohammed Farah* [2016] eKLR in which Justice Nambuye quoted with approval her ruling in *Catherine Njuguini Kanya 2 Others Versus Commercial Bank of Africa Ltd*. Civil Application No Nai 366 of 2009 where the following observation was made at page 5;

> "As correctly observed by the learned judge, Litigants place a Lot of trust in the good workmanship of their agents but sometimes this fails and where there has been apparent failure on the part of the advocate in the Performance of that role, a court of law has to play a balancing act so not visit the sins of such advocate on to his client. "

34. On whether the application is defective on account that it was supported by an affidavit sworn by an advocate the applicant submitted that the facts deponed to by Ms. Naliaka in the supporting affidavit are facts known to her in support the applicant cited *Mahendra Kumar Shah V National Bank of Kenya Limited* [2009] eKLR where the Honourable Justice Okwengu when considering an issue similar to this held that;

> "I have considered the supporting affidavit which was sworn by M. Jevanjee. I am satisfied that the matters deponed to by the counsel are matters which are all within the counsel's knowledge having Participated in the matter in his capacity as the applicant's counsel Matters deponed to in Paragraph 4, 5 8, 9, & 10 of the supporting affidavit are all matters within counsel's personal knowledge and counsel has disclosed this in paragraph 13 of the affidavit. The supporting affidavit therefore complies with Order XVIII Rule 3 of the *Civil Procedure Rules*. I find further that the jurat in the affidavit complies with Section 5 of the *Oaths and Statutory Declaration Act* The annextures to the affidavit have not been properly identified as they have been marked as a bundle. That however is a mere irregularity which cannot vitiate the whole document. For that reason, I overrule the Preliminary objection and order that the hearing of the notice of motion dated 25th November, 2008 shall proceed on a date to be fixed in the registry."

35. The sole issue for determination is whether this suit should be reinstated.

36. The court has discretion to reinstate a suit on certain terms. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni J), where the court stated:

> "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time."

37. On the 16/12/2022, the plaintiff was granted a grace period of 120 days to prosecute the suit.

38. The period of 120 days expired on 21/4/2023 and the suit stood automatically dismissed on that date.

39. I have considered the affidavits filed herein together with the rival submissions by the parties.

40. I find that it is not in dispute that it is the mistake of the plaintiff's Advocate that a date was not taken within the 120 grace period granted by the court.

41. The respondent stated in the replying affidavit that in any event, the Advocate clearly admitted at her ground number 10 that it is her mistake as a counsel and thus the plaintiffs claim should be as against the said counsel.

42. I find that it is not in the interest of justice to punish a party for the mistakes or omissions of his Advocate.

43. In the case of *Mwai V Murai* No. 4 (1982) KLR Madan JA said as follows;

> " A mistake is a mistake, it is no less a mistake because it is an unfortunate slip. It is no less pardonable because it was committed by Senior Counsel though in the case of Junior counsel, the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

44. Again in the case of *Philip Kelpto Chemwoto & Another V Augustine Kubende* (1986) KLR 492, the Court of Appeal was categorical that;

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits"..... 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 purposes of deciding the rights of the parties and not for the purpose of imposing discipline".

45. The respondent has not stated what prejudice he would suffer if the application is granted.

46. I allow dated 3/11/2023 and I reinstate this suit on the following conditions;

    i. That the plaintiff pays the defendant thrown away costs of Kshs. 20,000/= within 30 days of this date.

    ii. That the plaintiff prosecutes the suit within 60 days of this date.

    iii. Hearing on 26/11/2024 before any other court in the civil Division.

    iv. Mention on 15/11/2024 before the Deputy Registrar for pretrial conference.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2024.**

**A. N. ONGERI**

**JUDGE**

**In the presence of:**

..... for the Plaintiffs

..... for the Defendant