



Case Number:	Environment and Land Case 104 of 2014
Date Delivered:	17 May 2018
Case Class:	Civil
Court:	Environment and Land Court at Nyeri
Case Action:	Ruling
Judge:	Teresia Mumbua Matheka
Citation:	Zakayo Kamau Theuri v Moses Kinini Theuri [2018] eKLR
Advocates:	Ms Mwikali h/b for Mr. Wachira for the applicant/plaintiff
Case Summary:	-
Court Division:	Land and Environment
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 104 OF 2014**

**ZAKAYO KAMAU THEURI.....PLAINTIFF**

**-VERSUS-**

**MOSES KININI THEURI.....DEFENDANT**

**RULING**

1. The applicant/plaintiff filed the application dated **5<sup>th</sup> December, 2017** seeking an order to set aside the orders made on 22<sup>nd</sup> November, 2017 dismissing the suit for want of prosecution and non-attendance.

2. The application is premised on the grounds that this suit was dismissed despite an affidavit by the applicant's advocate been on record explaining the delay in prosecuting the suit; that although at the very moment the suit was been dismissed, his counsel was not in court, the applicant was present in court but did not know what was going on. He urges the court to set aside the dismissal order and reinstate the suit.

3. The application is supported by the affidavit of Zakayo Kamau Theuri sworn on **5<sup>th</sup> December, 2017** where the grounds in the application are reiterated.

4. The application is opposed vide the replying affidavit by Moses Kinini Theuri sworn on **5<sup>th</sup> March, 2018**. It is his contention that this suit was filed in 2001 but the plaintiff has failed to set the matter down for hearing as he has lost interest in the case. He admits that counsel for the applicant was in court on the date the matter came for hearing of the notice to show cause but the advocate walked out of the court before the matter was called without the permission of the court and never returned. He acknowledges the applicant remained in court alone and did not respond when his name was called out.

He urged the court not to reinstate the suit as reinstating the suit will only cause more suffering to him.

5. In a rejoinder, the applicant filed a supplementary affidavit sworn on **13<sup>th</sup> March, 2017** in which he deposes that the applicant has no business opposing the application as he did not attend court on the date the application was dismissed and had no knowledge of what transpired in court on that date; that the respondent did enter appearance or file his defence.

6. I have considered the application, affidavits and oral submissions by the respective parties in this case. I find the sole issue for determination to be whether the applicant has satisfied the principles for rein- statement of a suit

7. This suit was dismissed by this court on its own motion under **Order 17 Rule 2 (1)** of the Civil Procedure Rules 2010 as no action had been taken on the matter since 2014. A party seeking to have the suit reinstated must demonstrate good faith and bring the application for reinstatement without unreasonable delay as held in the case of **Simion Waitim Kimani & Three others vs Equity Building Society (2010) eKLR** where **Koome J** (as she then was) in Paragraphs 4 and 5 held;

4. **“The courts have discretion generally to reinstate a suit which is dismissed for nonattendance 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. This suit was filed on 12<sup>th</sup> March 2002 and since 29<sup>th</sup> November, 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the**

year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years.”

5. Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation .....

8. Applying the above principles to the circumstances of this case, it is noteworthy that the instant motion was filed on 5<sup>th</sup> December, 2017 barely two weeks after the suit was dismissed. It is also noteworthy that after the plaintiff was issued with a notice to show cause why the suit should not be dismissed he filed an affidavit on 13<sup>th</sup> November, 2017 explaining the delay in not setting down the suit for hearing.

9. I have considered the circumstances of this case and I am convinced that the applicant is still interested in prosecuting his case. The applicant has demonstrated this through his affidavit filed on 13<sup>th</sup> November 2017, explaining the reason for delay in prosecuting the suit; he filed the instant application within 2 weeks of dismissal of the suit and personally attended court on the day his suit was dismissed.

10. For the reasons given, I allow the application as prayed and order the plaintiff to set the matter down for pretrial within 60 days from the date hereof.

**Dated, signed and delivered in open court at Nyeri this 17<sup>th</sup> day of May, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Ms Mwikali h/b for Mr. Wachira for the applicant/plaintiff

Zakayo Kamau Theuri – plaintiff

Moses Kinini Theuri – respondent/defendant



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