Maina v Wangu & 3 others (Environment & Land Case 34 of 2020) [2025] KEELC 2933 (KLR) (25 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2933 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 34 OF 2020

NA MATHEKA, J

MARCH 25, 2025

BETWEEN

VERONICA KAGORE MAINA ..... PLAINTIFF

AND

LYDIA NYAWIRA WANGU ..... 1ST DEFENDANT

MOSES NII NORTEI ..... 2ND DEFENDANT

THE REGISTRAR OF LANDS, MACHAKOS LAND REGISTRY .... 3RD DEFENDANT

THE ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. The application is dated 3rd May 2024 and is brought under Article 159(2) (b) of *the Constitution* of Kenya 2010, Sections 1A and 1B of the *Civil Procedure Act* Cap 21, Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;
    1. That this suit be dismissed for want of prosecution.
    2. That the costs of this Application and of the suit be borne by the Plaintiff
2. It is based on the grounds that the matter was last in court on 19th December, 2022 and the Plaintiff's Application dated 21st February, 2022 was dismissed with costs to the Respondents. It has been 16 months since the matter was last before this Honourable Court. The Plaintiff has failed and/or neglected to fix the matter for hearing with no cognizant reasons if any. The Plaintiff has not taken any active steps to follow up on the prosecution of this suit or to take any directions to proceed with the hearing of the suit against the 1st and 2nd Defendants. The delay occasioned by the Plaintiff herein is inordinate and inexcusable and causes grave injustice to the 1st and 2nd Defendants. The Plaintiff is no longer keen and/or has lost interest in prosecuting this suit, which has led to an indefinite abeyance.

The subsistence of the suit in court without its prosecution is highly prejudicial to the 1st and 2nd Defendants and is an abuse of the court process. This Application has been made without undue delay and it is in the interest of justice that the same be allowed as prayed.

3. The plaintiff stated that the delay in prosecuting the matter was inadvertent and due to the mistake of her previous advocate and the mistake should not be visited on her as she is a lay person. That any inquiries she made to her previous advocates she was assured all was in order. Later after failing to trace her previous advocates she went to the registry to peruse the court file only to realize that since 19th December 2022 her advocate has never appeared in court. She then instructed a new firm of advocates to prosecute the matter.

4. This court has considered the application and submissions therein. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:

> " 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."

5. Further Order 17 Rule 2(3) states thus:

> " Any party to the suit may apply for its dismissal as provided in sub-rule 1"

6. The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and others & another (2016) eKLR**,** the court held that;

Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984] KLR 441 espoused that:

> " The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

7. In Argan Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows;

> " The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise

such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

8. In Naftali Opondo Onyango vs National Bank of Kenya Ltd (2005) eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

   However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."

   "... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate."

9. I have perused the court file and find that the matter was last in court on 19th December, 2022 and the Plaintiff's Application dated 21st February, 2022 was dismissed with costs to the Respondents. It has been 16 months since the matter was last before the Court. The Plaintiff has failed and/or neglected to fix the matter for hearing and states that it was an inadvertent mistake on the part of her previous advocate. This being a land matter I find that the delay is excusable. I therefore dismiss this application on condition that the plaintiff fixes a hearing date within 30 days from the date of this ruling. Cost of this application to be in the cause.

   It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2025.

N.A. MATHEKA

JUDGE