



Kasome & 873 others v Njiru Ajria Development (Environmental and Land Originating Summons 607 of 2013) [2023] KEELC 19053 (KLR) (20 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 607 OF 2013**

J OMANGE, J

JULY 20, 2023

BETWEEN

SUSAN MBEKE KASOME PLAINTIFF

AND

DANIEL OUNA OBUONJI OPISI & 872 OTHERS APPLICANT

AND

NJIRU AJRIA DEVELOPMENT RESPONDENT

RULING

1. In the Notice of Motion application dated January 30, 2023 the Applicant seeks the following orders:
 - a. That honourable court be pleased to substitute the applicant herein with the 1st plaintiff Susan Mbeke Kasome.
 - b. Costs of the application
2. The Application was supported by the affidavit of Daniel Ouna Obuonji who deponed that the plaintiffs had granted the 1st plaintiff consent to file a suit on their behalf. Pursuant to the authority granted by the plaintiffs, the plaintiff filed pleadings on behalf of the other plaintiffs. He averred that there have been applications, an appeal and order for stay which have delayed the matter. He further blamed the plaintiff for the delay in prosecuting the suit. Consequently, he asked the court to substitute him with the 1st Plaintiff.
3. The application was opposed by the Respondent who through one of its Directors Waweru Kiratu swore a Replying affidavit in opposition to the Application. In the affidavit the respondent averred that they were the rightful owners of Land parcel LR 13468 and had always been in possession of it. The Respondent contended that the applicant had not received the consent of the other plaintiffs to file the application on their behalf.



4. The Respondent insisted that the delay in prosecuting the matter was due to the fact that the plaintiffs had no interest in prosecuting the case. That the matter has been in court for 9 years and the timing of the application is questionable as it coincided with the hearing of the notice to show cause. The Respondent further questioned the legality of the advocates who had filed the application as there was no notice of appointment on record.
5. The Applicants counsel filed submissions dated June 29, 2023. In response to the issue of the representing counsel they submitted that a Notice of Change of advocates dated October 10, 2022 had been filed and served. Counsel argued that the application had been made in good faith and would not prejudice the respondent.
6. The Respondents counsel submitted that the applicant had failed to prove that they had tried to locate the 1st plaintiff and failed or that she had abandoned the suit and that she is not deceased. They placed reliance on the case of *Kenya Farmers' Cooperative Union Ltd vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate* (2005) eLKR where the court held that a court of law has no jurisdiction to order for substitution where the suit has already been abated by operation of law.
7. Counsel further submitted that the matter has been pending for more than 3 years and hence should be dismissed. They relied on the provisions of Order 17 Rule 2(1) of the civil procedure rules:-

“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”.
8. The Respondent further submitted that pursuant to the provisions of the Civil procedure Rules under order 17 the court in the case of *Kiiru M'mugambi & 39 others Vs Moses Kirima Meenye & Lirima Advocates & 3 others* (2020) eKLR pronounced itself and stated as follows:-

“An applicant ought to be vigilant in prosecution of his case without delay .In this case the applicant took about one year without pursuing prosecution of his application. He stated that the reason was due to technical and unavoidable circumstances which I consider a vague explanation which does not suffice.
9. It was further submitted that the application was an afterthought on the part of the Applicant and that the 872 others remain vague and have never been identified and that the representation is just a cover to continue delaying justice to the respondent. Furthermore, it was submitted that no deed of appointment or any document had been filed in court to support the representation by the plaintiff.
10. The court has considered the application, the Replying Affidavit and the submissions filed by both parties. The issues that the court has identified for determination are:-
 - i. Whether the court should allow the substitution.
 - ii. Whether the court should dismiss the suit for want of prosecution.
11. The Applicants case is that efforts to trace the 1st plaintiff have not been successful. The Respondent on their part insist that the applicant has not detailed the efforts that he has made to trace the 1st Plaintiff. In the absence of clear information as to the whereabouts of the 1st Plaintiff the Respondent argues that it is not possible to tell whether this is a fit case for substitution. Lastly the Respondent takes issue with the fact that the applicant has not attached the authority of the other 872 plaintiffs for him to appear



for them. The Respondent argues that it is possible the other plaintiffs no longer have an interest in the matter. Order 1 Rule 13 states:-

- “(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
- (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

12. It is clear that for a plaintiff to legitimately represent other plaintiffs he must have written authority. *Savala & another v Ndanyi* (Environment and Land Case Civil Suit 248 of 2021) [2022] KEELC 2536 (KLR) (5 July 2022) where the court held that:-

“Despite the clear provisions of the law, which have been alluded to herein before, the 1st Plaintiff herein, did not execute and/or sign any authority to mandate the 2nd Plaintiff to swear the Verifying Affidavit and/or otherwise act on his behalf. In my humble view, the failure to generate, execute and/or sign any such authority, either as required under the law or at all renders the suit filed by and/or on behalf of the 1st Plaintiff herein, fatally incompetent.”

13. In the absence of this authority the application by the applicant is incompetent and cannot stand.

14. Whether the matter should be dismissed for want of prosecution.

Order 17 rule 2(3) provides that any suit that has not been prosecuted for a period of not less than one year, the court ought to in writing give notice as to why the matter should not be dismissed for want of prosecution. In the case of *Utalii Transport Company Limited & 3 others vs NIC Bank Limited & another* (2014) Justice Gikonyo outlined the principles that should guide a court in dismissing a suit for want of prosecution namely;

- i. Whether there has been inordinate delay on the part of the claimants in prosecuting.
- ii. Whether the delay is an abuse of the court process.
- iii. Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the respondent.
- iv. What prejudice the dismissal will occasion the claimant.
- v. Whether the claimant has offered a reasonable explanation for the delay.
- vi. Even if there is a delay, what does the interest of justice dictate?

“The principles above are somewhat inextricable and may not be dealt with distinctively from one another without making prominent reference to or connecting one with the other. But what matters is the overall impression the court makes out of the analysis of the above principles within the circumstances of the case in question, and the general demands of justice. That is why; it is worth repeating, it is all a matter of discretion of the court.”



15. In this case there is no doubt that there has been delay on the part of the plaintiffs in prosecuting the matter. Indeed, this is the reason the court issued a Notice to Show Cause why the suit should be dismissed for want of prosecution. However, in view of the efforts the applicant has made in trying to progress the matter by seeking substitution, I find that in the interest of giving the plaintiff every opportunity to prosecute the matter, it is in the interest of justice that the plaintiffs be granted time to prosecute the matter. Consequently, I will not dismiss the suit at this stage.
16. In the end the court makes the following orders;
 - a. The application dated January 30, 2023 is struck out with costs.
 - b. The plaintiffs should ensure that they are ready to proceed on the hearing date as shall be issued by the court.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF JULY 2023.

JUDY OMANGE

JUDGE

