



REPUBLIC OF KENYA



**Birithia v Mshila & another (Environment & Land Case 292 of 2018)
[2023] KEELC 20107 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 292 OF 2018
NA MATHEKA, J
SEPTEMBER 28, 2023**

BETWEEN

STANLEY THINE BIRITHIA PLAINTIFF

AND

CLEMENT MWAKIO MSHILA 1ST DEFENDANT

ELNORA MKIWO 2ND DEFENDANT

RULING

1. The application is dated April 4, 2021 and is brought under article 40, 50(1) & 159 (2) of *the Constitution* 2010. Order 12 rule 7, order 51 rule 1 of the *Civil Procedure Rules* and Sections 1A, 1B and 34 of the *Civil Procedure Act*, 2010 seeking the following orders;
 1. That this application be certified as urgent and the same be heard ex parte in the first instance.
 2. That directions be given as to an early hearing date in respect of prayer 3 herein below.
 3. That the Honourable Court be pleased to set aside the order made on 13th March 2023 dismissing the Plaintiff case for want of prosecution.
 4. That the Honourable Court be pleased to reinstate the suit herein and fix the same for hearing of the main suit.
 5. That the costs of this application be provided for.
2. It is based on the grounds that the Applicant counsel Mr. Kaburu was indisposed when the matter herein came for mention on March 13, 2023 before Honourable Lady Justice Matheka. That unfortunately the advocate on record for the Applicant did not seek counsel to hold his brief in the matter herein in view of his condition which had lasted for days. That due to the said mistake of the advocates on record for the Applicant the court proceeded to dismiss the matter for want of



prosecution. That the Applicant was not aware as to what had happened to his case until on or about 20th day of March 2023 when he went to the court and was informed that the matter was dismissed on March 13, 2023. The Applicant has always been ready and willing to prosecute the present suit herein and seeks to be allowed to do so. The dispute between the parties herein involves land and occupation and it is in the interest of justice that the matter be heard on its merits for justice to be met and the court to adjudicate on the matter. It is fair and in the interest of justice that the Plaintiff's suit be reinstated so as to be heard and determined on merit. No prejudice will be suffered by the Respondents if this application is allowed.

3. This court has considered the application and the submissions therein. In the case of *Mwangi S. Kimenyi vs Attorney General and another*, Civil Suit Misc. No. 720 of 2009, the court restated the test as follows;

“ 1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

4. In the case of *Ivita vs Kyumbu* (1984) KLR 441 the court held as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay”.

5. I have perused the court record and find that on the September 20, 2022, the matter was to proceed and there was no appearance from the Plaintiffs and the Court dismissed the suit for want of prosecution. The Applicant stated that Applicant counsel Mr. Kaburu was indisposed when the matter herein came for mention on March 13, 2023. That unfortunately the advocate on record for the Applicant did not seek counsel to hold his brief in the matter herein in view of his condition which had lasted for days. That due to the said mistake of the advocates on record for the Applicant the court proceeded to dismiss the matter for want of prosecution. That the Applicant was not aware as to what had happened to his case until on or about 20th day of March 2023 when he went to the court and was informed that the matter was dismissed on March 13, 2023. I find that the reasons given for his absence excusable and this application was brought without undue delay bearing in mind the medical report. I find this application is merited and I grant the same. Parties are advised to comply with order 11 and take a hearing date in this matter. Costs of this application to be in the cause.

6. It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

