



Kaoyeni Community Self-Help Group & 3 others v Rama 8 others (Land Case 78 of 2019) [2023] KEELC 20306 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20306 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 78 OF 2019
EK MAKORI, J
SEPTEMBER 28, 2023**

BETWEEN

KAOYENI COMMUNITY SELF-HELP GROUP & 3 OTHERS PLAINTIFF

AND

RICHARD PREMCHARD RAMA 8 OTHERS DEFENDANT

RULING

1. The application dated 12th February 2023 brought by the 1st defendant/applicant seeks the dismissal of the current suit for want of prosecution. It is supported by the annexed affidavit of one Conrad A. Atiang – advocate for the applicants deposed on 12th February 2023.
2. The application is partially supported by the 5th Defendant vide replying affidavit deposed by one Alfred Wanga – advocate for the 5th defendants and opposed by the Plaintiff and the 2nd, 3rd, and 4th Defendants who have equally sworn affidavits to that effect.
3. The applicant averred that this suit was filed sometime on 27th September 2019, simultaneously with an application for injunctive orders dated on the even date. The application was delayed and stood unprosecuted until 11th March 2021. The application remains unprosecuted despite some of the parties filing written submissions.
4. The pendency of the suit without prosecution has occasioned unnecessary anxiety on the 1st defendant for fear of increased costs. The delay also evinces the lack of interest on the part of the plaintiff necessitating that it ought to be dismissed for want of prosecution by dint of Article 159 (2) of the Constitution and Section 1A and 1B of the Civil Procedure Act.
5. The 5th defendant supports the move and states that despite the demise of the 5th defendant due to COVID-19, the plaintiff has never informed the parties of the progress in the matter hence it ought to be dismissed for want of prosecution



6. The Plaintiffs, through one Katana Thoya stated that the pendency of the suit has been occasioned firstly, by the COVID-19 restrictions and the death of the 5th defendant due to that pandemic necessitating the delay for want of substitution. All along there has been communication to the parties as shown by the attached correspondences and the record will show that some of the parties particularly the 5th defendant have been seeking more time to file submission on the pending application. The 3rd 4th and 5th defendants concede that they have occasioned the delay and significant being the 5th defendant due to the COVID-19 scourge which took his life.
7. The issue to determine is whether this suit should be dismissed for want of prosecution with the attendant costs. The test for dismissal of a matter for want of prosecution is as laid in the case of *Thatbini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR:

“It is the duty of court to do justice between the parties, Section 1B of *Civil Procedure Act*, Cap. 21 provides that there should be just determination, effective and timely disposal of proceedings, and effective use of judicial time and resources. It is upon this duty of overriding objective does this court, takes time and puts in resources to dismiss suits that have been unprosecuted for more than one year to ensure that other active cases have ample time to be determined. The court will not allow matters to be filed and whereby once the parties obtain interim orders then proceed to keep the file idle. This causes the clogging of the justice system and unacceptable for nothing.

16. In the case of *Josphat Oginda Sasia – Versus - Wycliffe Wabwile Kiiya* [2022] eKLR, the court held “But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites, or even court notice boards. (see the cases of *Fran Investments Limited vs. G4S Security Services Limited* [2015] eKLR and *Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others* [2018] eKLR).”
17. The Counsel for the Plaintiff/Applicant has pleaded in the supporting affidavit that the parties have been negotiating with the aim of settling the suit out of court. However, they have been looking for the file to take a mention date but released the same was dismissed for want of prosecution. In the case of “*Ivita – Versus - Kyumbu* [1984] KLR 441, the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It 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 the lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is



prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time”.

8. I have reviewed the application and considered the reasons for the delay. The pending application for injunctive orders, as seen from the record, has been occasioned by lawyers acting for the parties. As of 8th February 2021, the 5th Defendant had not filed submissions and more time was sought. On 20th April 2021, Mr. Wanga for the 5th Defendant informed the court his client had died due to COVID-19 complications. The matter was then marked - SOG (stood over generally). The court retrieved the file for mediation on 26th October 2022. On 21st February 2023, the application for dismissal was filed.
9. Rereading the record shows that the delay has been much due to the lawyers representing the parties, COVID-19 restrictions, the demise of the 5th defendant due to the said disease and failure to substitute, and lack of proper active case management from the court's end.
10. As held in the leading decision in *Ivita v Kyumbu* [1984] KLR 441:

“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;”
11. The circumstances of this case are that the plaintiff is not the one to solely blame – but all the parties. The upshot of the foregoing is that the application dated 12th February 2023 is hereby dismissed with no order as to costs.
12. To actively manage this file, a mention date be issued forthwith to fix a hearing date.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2023 IN THE ABSENCE OF ALL PARTIES WHO HAD BEEN NOTIFIED VIA EMAIL

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E. K. MAKORI
JUDGE

