



REPUBLIC OF KENYA



**Kiuna v Mwenje & 4 others (Environment & Land Case 5 of 2023)  
[2023] KEELC 21344 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21344 (KLR)

**FORMERLY CIVIL SUIT NO. 986 OF 2003**

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 5 OF 2023**

**AA OMOLLO, J**

**OCTOBER 26, 2023**

**BETWEEN**

**NGUGI KIUNA ..... PLAINTIFF**

**AND**

**NELLY WANJIKU MWENJE ..... 1<sup>ST</sup> DEFENDANT**

**MARY WANJIKU MWENJE ..... 2<sup>ND</sup> DEFENDANT**

**MILKA WANJIRU MWENJE ..... 3<sup>RD</sup> DEFENDANT**

**CHIEF LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**ALICE WANGUI WAWERU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 4<sup>th</sup> Defendant moved the court *vide* the Notice of Motion application dated 5<sup>th</sup> April, 2023 seeking for orders;
  - i. That the court be pleased to make an order striking out the suit for want of prosecution.
  - ii. Costs of the application be provided for.
2. The application was premised on the following grounds;
  - a. On 8<sup>th</sup> February, 2019 the Court of Appeal in Civil Appeal No. 117 of 2008 *Ngugi Kiuna v Alice Wangui Waweru & Others* made an Order for this suit to be remitted to the Environmental and Land Court for hearing and determination.
  - b. It has been more than a year since the Order was made, and the Plaintiff/Respondent herein is yet to remit the suit in the Environmental and Land Court.



- c. The Application is meritorious, as the law provides that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the Application seeking dismissal of the said suit.
- d. The more the suit remains unresolved the more it prejudices the Applicant/Respondent herein.
3. The plaintiff opposed the application through a replying affidavit of Johnson Dedan Murimi, Counsel. He deposed *inter alia* after the delivery of the judgment in Civil Appeal No. 117 of 2008, he instructed his court clerk to follow up with the High Court registry so that the file is transferred to the ELC as ordered by the Court of Appeal.
4. That his clerk made several visits to the High Court registry and they complied with what was asked as explained in the annexures JDM 1, 2 and JDM 3. Mr. Murimi advocate deposed further that his firm received a certificate of loss of file dated 7<sup>th</sup> November, 2022 from the Deputy Registrar High Court, Civil Division on 18<sup>th</sup> November, 2022 (annex JDM 4). That he immediately prepared an application dated 30<sup>th</sup> November, 2022 for reconstruction of the court file and which application was heard on 28<sup>th</sup> March, 2023 by Hon Onger J. who allowed the application on the same day.
5. I have considered the grounds for and against the present application. I have also read the submissions by the 4<sup>th</sup> Defendant/Applicant dated 7<sup>th</sup> June, 2023. The 4<sup>th</sup> Defendant/Applicant relied on the case of *Ngugi Kiuna & another v Alice Wangui Waweru* where the court made a finding that the plaintiff was a vexatious litigant for filing multiple suits touching on the same subject matter.
6. The Applicant also submitted that litigation ought to come to an end and this matter remains unresolved since the year 2003. The Applicant also relied on the findings in *Nzoia Sugar Company Ltd v West Kenya Sugar Limited* [2020] eKLR thus;
- “....Balancing the position of the two parties, I take the view that delay of two years in prosecuting a matter is inordinate and unreasonable. The plaintiff has not explained it. The mere fact that the defendant has not demonstrated prejudice is not sufficient to sustain a suit that the plaintiff has shown no interest in prosecuting for the two years before the application for dismissal was made. It would appear that the suit was filed for the sole purpose of obtaining injunctive orders, and once the same were denied the plaintiff lost interest in the matter.”
7. The application is premised on the ground that the plaintiff has not taken steps to prosecute his suit. In rebuttal, the plaintiff explained the various steps he had taken from the time the judgment in the Court of Appeal was delivered giving directions on the way forward in the matter. At the time this application was filed, the matter already had a mention date before this court of 11<sup>th</sup> May, 2023.
8. This file was transferred to this court after the reconstruction of the file pursuant to the order of 28<sup>th</sup> March 2023 by the High Court. Thus, it began a new life in the Environment and Land Court in April 2023, just at the time the application for striking it out was filed. Considering the time of its registration in the Environment and Land Court, the application seeking to have it dismissed for want of prosecution is premature.
9. I am also persuaded by the explanation given by the Plaintiff on the steps taken in the matter. Therefore, I am of the opinion which I so hold that the plaintiff has not contravened the provisions of Order 17



rule 2 of the *Civil Procedure Rules* as one year has not lapsed without any steps being undertaken. For instance, the filing of an application to reconstruct a file is by itself an action.

10. The new issues raised in the submissions such as abuse of the court process and vexatious litigation were not raised in the application for which the plaintiff could respond to. I decline the invitation to consider dismissing the suit on the said grounds as accepting the same would condemn the plaintiff unheard.
11. Consequently, it is my finding that the application dated 5<sup>th</sup> April, 2023 is without merit. It is dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023**

**A. OMOLLO**

**JUDGE**

