



REPUBLIC OF KENYA



**Nafwa v Barasa (Environment & Land Case 56 of 2017)  
[2023] KEELC 21676 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 56 OF 2017**

**BN OLAO, J**

**NOVEMBER 22, 2023**

**BETWEEN**

**JAMES WESONGA NAFWA ..... PLAINTIFF**

**AND**

**JANEPHER MAROTI BARASA ..... DEFENDANT**

**RULING**

1. The Plaintiff's suit was dismissed on 3<sup>rd</sup> July 2023 for want of prosecution having last been in Court on 12<sup>th</sup> September 2018 for taxation of the Defendant's costs following the dismissal of the Plaintiff's application for an order of temporary injunction.
2. The Plaintiff has now moved to this Court vide his Notice of Motion dated 10<sup>th</sup> August 2023 seeking the following orders:
  1. The order dismissing his suit on 3<sup>rd</sup> July 2023 be set aside and this suit be reinstated to hearing.
  2. Costs of the application be in the cause.
  3. The Court do make any other order it may deem fit.
3. The application is premised under the provisions of order 17 rule 2(6) of the *Civil Procedure Rules* and is based on the ground set at therein. It is also supported by the Plaintiff's affidavit dated 10<sup>th</sup> August 2023.
4. The gist of the application is that while this suit was still pending in this Court, the Plaintiff had moved to the Court of Appeal in Kisumu vide Civil Appeal No 32 of 2019 seeking to reverse the ruling of Kaniaru J delivered on 23<sup>rd</sup> July 2018 (not judgement as wrongly indicated in the order of that Court issued on 18<sup>th</sup> July 2023). That appeal was on 18<sup>th</sup> July 2023 and with the consent of the parties marked as settled with no orders as to costs. The parties were then directed to pursue this suit which is still pending.



5. It is the Plaintiff's case that his appeal in the Court of Appeal remained un-determined for more than 5 years and when he came back to this Court's registry on 28<sup>th</sup> July 2023 following the consent in the Court of Appeal, he found that this suit had been dismissed on 3<sup>rd</sup> July 2023 for want of prosecution.

6. Annexed to the application are the following documents:

1. The order issued on 18<sup>th</sup> July 2023 in Court of Appeal Civil Appeal No 32 of 2019 marking the same as settled with no orders as to costs.
2. Copies of the Notices of dismissal issued to the parties that the suit would be dismissed on 3<sup>rd</sup> July 2023.

The application is opposed and the Defendant has filed a replying affidavit dated 18<sup>th</sup> September 2023 raising the following issues. Firstly, that the application is an afterthought and an abuse of the process at this Court. Secondly, that the Plaintiff has filed numerous cases on the same subject matter and all have been dismissed and the Defendant already has the title to the suit land. Thirdly, that the application has no basis and should be dismissed.

7. The parties are acting in person and no submissions were filed. The Court directed that it would determine it on the basis of the parties respective affidavits.

8. I have considered the application and the rival affidavits.

9. Order 17 rule 2(1) of the [Civil Procedure Rules](#) empowers this Court to dismiss any suit in which no action has been taken for one year.

10. The Court however retains the power to reinstate a dismissed suit. In doing so, this Court will be guided by the decision in [Ivita v Kyumbu](#) 1984 KLR 441 where Chesoni J (as he then was) said:

“So 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 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 and that justice can still be done to the parties notwithstanding 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. Where the Defendant satisfies the Court that there has been prolonged delay and the Plaintiff does not give sufficient reason for the delay, the Court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.”

Order 17 Rule 2(1) of the [Civil Procedure Rules](#) also uses the words the Court “may dismiss the suit”. That means that dismissal is not mandatory but is optional.

11. I have considered the explanation by the Plaintiff. It is confirmed by the record herein that the Plaintiff was engaged pursuing an appeal against the ruling of Kaniaru J delivered on 23<sup>rd</sup> July 2018. That appeal was only resolved on 18<sup>th</sup> July 2023 at the Court of Appeal in Kisumu. Then 10 days later, the Plaintiff visited this Court's registry only to discover that the suit had been dismissed on 3<sup>rd</sup> July 2023.



12. Whereas the Plaintiff ought to have been following up on this case and appraising the Court about the progress of his appeal, and whereas he also ought to have come to Court on 3<sup>rd</sup> July 2023 when notices for dismissal of this suit were served, I nonetheless find his explanation satisfactory. The fact that he was pursuing another remedy in a superior Court is a reasonable and acceptable explanation to enable this Court indulge him.
13. The Court also takes into account the fact that the Defendant has not suggested that the delay in prosecuting this suit has prejudiced him in any way. I have not heard him say that he is unable to mount a good defence to the Plaintiff's claim due to lapse of time. If anything, his replying affidavit seems to suggest that the Plaintiff's claim is infact res judicata. That is an issue which he can pursue at the trial or through a Preliminary Objection. He has referred to a ruling in case No 125 of 2014 as well as an award by the Busia Land Dispute Tribunal although no pleadings or judgment have been annexed.
14. Further, the Plaintiff moved to this Court as soon as the Court of Appeal determined the appeal before it. He does not appear to me like a person who is trying to delay this case through dilatory tactics.
15. The up-shot of all the above is that the Court makes the following orders in respect to the Notice of Motion dated 10<sup>th</sup> August 2023:
  1. The order of this Court issued on 3<sup>rd</sup> July 2023 dismissing the Plaintiff's suit is set aside and the case is reinstated to hearing.
  2. The matter shall be mentioned before the Deputy Registrar for the parties to confirm that they have complied with the provisions of order 11 of the Civil Procedure Rules on 22<sup>nd</sup> January 2024 after which they will be given a hearing date.
  3. Costs in the cause.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2023**

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2023.**

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2023**

