



**Nyahoro v Nyahoro (Environment & Land Case 2 of 2014)  
[2023] KEELC 21608 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21608 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 2 OF 2014  
LA OMOLLO, J  
NOVEMBER 16, 2023**

**BETWEEN**

**DANIEL MAINA NYAHORO ..... PLAINTIFF**

**AND**

**WANYEKI NYAHORO ..... DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect to the Plaintiff's application dated 16<sup>th</sup> January, 2023. The Plaintiff/Applicant seeks the following orders:
  - a. That the orders for dismissed with costs on 29<sup>th</sup> September, 2022 be reviewed and the same be set aside. (sic)
  - b. That the suit herein be reinstated for hearing in the interests of justice. (sic)
  - c. The costs of this application be in the cause

**Factual Background**

2. The Plaintiff commenced this suit vide a plaint dated 8<sup>th</sup> August, 2014. In the plaint, he prays for judgment against the Defendant for the following orders:
  - a. Sub-division of all that parcel of land known as Title No. Nakuru/Rare/Gichobo/317 into two equal portions of five (5) acres and have the Plaintiff registered as the sole and exclusive proprietor of five (5) acres of the same.
  - b. In the alternative, the Deputy Registrar of the High Court Nakuru do sign all the necessary legal documents to effect sub-division and registration of the Plaintiff and the Defendant as the owners of five (5) acres each



- c. Costs of and incidental to this matter.
- d. Any other relief this court deems fit to grant to prevent miscarriage of justice.
3. The Defendant filed his statement of defence on 22<sup>nd</sup> October, 2014 wherein he denied the Plaintiff's allegations in the plaint and sets out his defence.
4. Vide a notice to show cause dated 25<sup>th</sup> May, 2022 parties were served to appear and show cause why the suit should not be dismissed for want of prosecution.
5. The record shows that the Defendant's Counsel received the notice on 14<sup>th</sup> June, 2022.
6. On 20<sup>th</sup> September, 2022, the court after satisfying itself that the notice had properly been effected upon the parties, made an order dismissing the suit for want of prosecution and awarded costs to the Defendant.
7. Subsequently the Plaintiff filed the instant application which now forms the basis for this ruling.

### **Plaintiff's Contention.**

8. The Plaintiff through his advocate contends that the dismissal of the suit by the court on its own motion is regrettable.
9. He contends that the Plaintiff and Defendant are brothers who live in the suit property measuring 10 acres together with their families. He adds that the same caused the matter to be referred to mediation on 6<sup>th</sup> February, 2020.
10. He further contends that on 6<sup>th</sup> February, 2020 the suit was scheduled for hearing and that he was ready with his client but the Defendant was absent.
11. He further contends that the delays in advancement of the case was as a result of the disruption by the covid-19 pandemic.
12. The Plaintiff contends that it is unfortunate that the notice to show cause for dismissal of the suit was issued yet the mediation process had not been finalized.
13. He further contends that the Plaintiff is elderly and his claim is for the 5 acres due to him from the 10 acres.
14. It is his contention that the dismissal was unfair and irregular and that the Defendant ought to have assisted the court see the need to sustain the suit. It is further his contention that at the time the matter was being dismissed, the same was done virtually and he had technical challenges logging into the court session but his client was in court. He adds that the ripple effect of covid-19 as well as his poor health contributed to non-prosecution the matter.
15. In conclusion, the Plaintiff urges this court to find that it would be in the interest of justice for the suit to be reinstated and fast tracked.

### **Defendant/respondent's Response.**

16. The Defendant filed his grounds of opposition dated 17<sup>th</sup> April, 2023 in response to the application. The grounds are as follows:
  - a. That this Honourable Court issued orders on 10th June, 2015, 22<sup>nd</sup> October, 2015 and on 26th April, 2017 stating that before the Plaintiff can venture into this case in one way or the other, he should first exhaust all his remedies in Nakuru H.C. Succession Cause No.141 of 1987.



- b. That the Plaintiff was on 26th April, 2017 ordered to pay Court Adjournment Fees of Kshs.2000/= and the Defendant's costs of Kshs.3000/= before he can have the case listed down for mention and or any directions. To date he has not complied with those orders.
  - c. That there is no judicial utility of reinstating this case because the reliefs being sought here are the very same reliefs being sought by the Plaintiff against the Defendant in Nakuru H.C. Succession Cause No.141 of 1987.
17. The Defendant urges this court to dismiss the application with costs.

### **Issues For Determination.**

18. The Plaintiff filed his submissions on 19<sup>th</sup> June, 2023. He gives a background of the case and identified the following issues for determination:
- a. Whether the court should exercise its discretion to set aside and review the said orders issued on 29<sup>th</sup> September, 2022 and/or reinstate the dismissed suit.
  - b. Whether the Plaintiff/Applicant deserves a right to be heard and present his case before this court to be heard and determined on merit.
19. On the first issue for determination, the Plaintiff while submitting in the affirmative relies on the judicial decision in Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of [2002] KLR 470; [2001] 2 EA 460 and Gold Lida Limited V NIC Bank Ltd & 2 Others [2018] eKLR.
20. On the second issue, the Plaintiff relied on Article 50 of the Constitution on the right to be heard and the judicial decisions in John Nahashon Mwangi v Kenya Finance Bank Limited [2015] eKLR, Nchapi Leiyagu v IEBC & 2 others Civil Appeal No. 18 of 2013 [2013] eKLR, Essanji & Another v Solanki [1986] EA 218 and Mwangi S. Kimenyi v Attorney General & Another [2014] eKLR. He submits that the Plaintiff has the right for his case to be heard on merit.
21. In conclusion, the Plaintiff submits that he has made a case for reinstatement of the suit. He submits that due to the nature of the suit, the court ought to give him a chance to prosecute his case by allowing the instant application.
22. The Defendant did not file submissions.

### **Analysis And Determination.**

23. Upon perusal of the Application, Grounds of Opposition and Submission filed in respect of this Application, it is my considered view that only one issue is for determination:

#### **a. Whether or not this suit ought to be reinstated.**

24. This suit was dismissed on 20<sup>th</sup> September, 2022 by an order of the court for want of prosecution.
25. The dismissal was pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, which provides as follows;
1. 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.



2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
  3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
  4. The court may dismiss the suit for non-compliance with any direction given under this Order.
26. The power to dismiss a suit for want of prosecution is at the court's discretion. In the judicial decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* [2016] eKLR, the court stated as follows:
- “ 11. Nonetheless, Article 159 of the *Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita vs Kyumba* [1984] KLR 441 which espoused that:
- “The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay (Emphasis is mine). Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”
27. The Learned Judge in *Kestem Company Ltd v Ndala Shop Limited & 2 others* [2018] eKLR was of the view that dismissal for want of prosecution does not require service of notice. It was stated thus;
- “ Order 17 Rule 2 (1) of the *Civil Procedure Rules* does not require service of notice; it uses the word ‘give notice’. The court may give notice of dismissal through its official website or through the cause-list.
- I do find that the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court, was adequate notice to the parties.”
28. In the instant case, it is not in dispute that the last time the matter was in court was on 6<sup>th</sup> February, 2020. This is when the court referred the matter to mediation and ordered that it be mentioned before the mediation Deputy Registrar in 19<sup>th</sup> February, 2020
29. The court record shows that on 19<sup>th</sup> February, 2020 the matter was placed before the mediation Deputy Registrar but both parties failed to attend. The mediation Deputy Registrar ordered that parties be served with a mention notice for 16<sup>th</sup> March, 2020.
30. The record also shows that previously a notice to show cause dated 27<sup>th</sup> December, 2019 had been issued in this suit. Both counsels received it on 14<sup>th</sup> February, 2020.



31. It is not disputed that both parties were served with the notice to show cause dated 25<sup>th</sup> May, 2022. The advocates received them same on 13<sup>th</sup> and 14<sup>th</sup> June, 2022.
32. The matter came up for hearing and only the Defendant's advocate was present. He informed the court that the Plaintiff did nothing for almost 8 years except fixing the suit for mention for pretrial directions.
33. The court proceeded to dismiss the suit for want of prosecution.
34. The Plaintiff has attempted to blame the delay in prosecuting this matter on the Covid-19 Pandemic, ill health of his counsel and the mediation process, which I note he never attended. There is no evidence of illness of himself or his Counsel.
35. The judicial decisions cited above offer guidance on factors that need to be taken into consideration in allowing or disallowing an application for dismissal for want of prosecution. They are as follow;
  - a. Whether the delay is prolonged and inexcusable.
  - b. Whether justice can be done despite the prolonged delay, if the court is satisfied with the Plaintiff's excuse for the delay, and that justice can still be done to the parties.In the event of (a) above, the suit shall be dismissed but in the event of (b) above, the suit shall not be dismissed but it shall be ordered that it be set down for hearing.
36. In dismissing this suit, this court took into consideration the fact that the suit had been filed in 2014 and that no steps had been taken to set it down for hearing since 6<sup>th</sup> February, 2020.
37. The Plaintiff despite being served with the notice to show cause, failed to attend court or file an affidavit in response of the notice to show cause. No explanation has been offered on the to failure to attend court to answer to the notice to show cause. It is also not true that this suit stalled on account of the mediation process. As shown earlier, the Plaintiff did not attend mediation.
38. It has been stated on numerous occasions and I do so again; justice delayed without explanation is justice denied and delay defeats equity - *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs. MD Popat and others & another (Supra)*

### **Disposition.**

39. In the result, I find that the court properly exercised its discretion in issuing the orders of 20<sup>th</sup> September, 2022 which orders dismissed the suit for want of prosecution.  
Consequently, the application dated 16<sup>th</sup> January, 2023 is hereby dismissed with costs to the Defendant/Respondent.
40. For the avoidance of doubt, this suit stands dismissed.
41. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff/Applicant.



Karanja Mbugua for the Defendant/Respondent.

Court Assistant; Ms. Monica Wanjohi.

