Mukungi v Attorney General & another; Mwanthi (Interested Party) (Environment and Land Judicial Review Case 11 of 2020) [2025] KEELC 3479 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3479 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 11 OF 2020

NA MATHEKA, J

APRIL 29, 2025

BETWEEN

KOMU MUKUNGI .... APPLICANT

AND

THE HON ATTORNEY GENERAL .... 1ST RESPONDENT

THE PRINCIPAL SECRETARY MINISTRY OF LANDS & PHYSICAL PLANNING .... 2ND RESPONDENT

AND

DANIEL MUSYOKA MWANTHI .... INTERESTED PARTY

RULING

1. The application is dated 25th October 2024 and is brought under Order 12 Rule 7, Order 40 Rule 1, 2, 3, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* 21 Article 159(2) of *the Constitution* of Kenya 2010 seeking the following orders;

    1. That the Application be certified urgent and heard ex parte in the first instance.
    2. That the Defendant/Respondent be and is hereby restrained from in any manner alienating or transferring or selling or disposing off, or leasing or charging or otherwise dealing with or party with possession or occupation of land parcel 759 Kyua Adjudication Section pending hearing and determination of this Application.
    3. That the Honourable Court be pleased to set aside the Orders issued on 23rd October, 2024 dismissing the Applicant's Application dated 4th day of March, 2020.
    4. That the Application dated 4th day of March, 2020 be reinstated for hearing on merits.
    5. Costs of the Application be provided for.

2. It is supported by the Affidavit of Komu Mukungi Ex parte the Applicant and based on the following grounds that the substantive motion was scheduled for mention on 23rd October, 2024 when the Applicant's counsel did not appear. That the motion was scheduled for mention on the said date for direction after the Applicant had already filed submissions which forms the basis of argument in the hearing of the matter where all the parties were to attend or further courts directions. When the matter came up for mention the counsel on record had connectivity challenges on the virtual platform where his connection did not go through. That indeed the Advocates on record had made effort to serve all the parties on record and filed a return of service showing interest on the matter. That informing all the other parties on record it's a show that the Applicant is serious in prosecuting his claim and indeed he made a positive step. That the Applicant requests the court to allow him prosecute his claim on merit after hearing the parties' version of the facts of the matter. That dismissing the substantive motion is closing out the Applicant from litigating his claim.

3. This court has considered the application and submissions therein. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:

> 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."

4. Further Order 17 Rule 2(3) states thus:

> Any party to the suit may apply for its dismissal as provided in sub-rule 1"

5. The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and others & another (2016) eKLR , the court held that;

> 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 espoused that:
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> "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. 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."

6. In Argan Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows;

> The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this

case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita –vs-Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

7. In Naftali Opondo Onyango vs National Bank of Kenya Ltd (2005) eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

> However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."
>
> … Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate."

8. I have perused the court file and find that the matter was dismissed on 23rd October, 2024 for want of prosecution. The applicant stated that the substantive motion was scheduled for mention on 23rd October, 2024 when the Applicant's counsel did not appear. That the motion was scheduled for mention on the said date for direction after the Applicant had already filed submissions which forms the basis of argument in the hearing of the matter where all the parties were to attend or further courts directions. When the matter came up for mention the counsel on record had connectivity challenges on the virtual platform where his connection did not go through. That indeed the Advocates on record had made effort to serve all the parties on record and filed a return of service showing interest on the matter. I find the reasons given acceptable. I therefore grant prayer (3 and 4) only of this application on condition that the applicant fixes a hearing date within 30 days from the date of this ruling. Cost of this application to be in the cause.

   It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29 TH DAY OF APRIL 2025.

N.A. MATHEKA

JUDGE