



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 321 OF 2013

KANYUA JOHN GITHUNGURI.....PLAINTIFF

VERSUS

EUNICE WAIRIMU MUROKI.....DEFENDANT

RULING

1. On 24/1/2022, this case was listed for a Notice to Show Cause why this suit should not be dismissed for want of prosecution. In showing cause, the plaintiff filed an Affidavit by **Mr. Kinyua John Githunguri**, the Plaintiff herein sworn on 02/02/2022.

2. The Plaintiff deposed that the matter was initially scheduled to proceed for formal proof hearing on 31st March 2020. However, the same did not proceed since the Court's operations had been scaled down due to the covid pandemic. Subsequently thereafter he had tried reaching his Advocates on record for several times to inquire on the status of the matter but all was in vain. He requested the Court to give him another chance for his case to be heard since he was still desirous in prosecuting the suit.

3. In view of the foregoing, Counsel urged that Cause had been shown and that the suit should not be dismissed for want of prosecution.

Order 17 Rule 2 of the Civil Procedure Rules provides: -

“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. In **Argan Wekesa Okumu vs Dima College Limited & 2 others [2015] eKLR**, the court observed: -

“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.”

6. From the foregoing, it is clear that there is discretion in deciding whether or not to dismiss a suit that has remained unprosecuted for a period exceeding one year. The court must however, consider the reasons advanced for the delay or failure to prosecute the suit. The delay must be excusable, reasonable and with just cause.

6. In an application or Notice for dismissal of a suit for want of prosecution, the court should be slow to dismiss the suit if the suit can be continued and be finalized without delay. If it is shown that the defendant will not suffer hardship and there has been no flagrant inactivity on the part of the Plaintiff, the suit should not be dismissed.

7. In **Naftali Opondo Onyango vs National Bank of Kenya Ltd [2005] eKLR**, it was held: -

“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.”

8. Further, in Utalii Transport Company Limited & 3 Others Vs NIC Bank & Another, [2014] eKLR, the court stated: -

“The plaintiff’s inertia runs contra to the overriding objective of the court stipulated in section 1A, 1B, 3A of the CPA.

The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party, but the law prohibits a court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution a view which is undergirded by the fact that dismissal of a suit without hearing the merits is a draconian act which drives the plaintiff from the judgment seat. It is, therefore, a matter of discretion by the court.

9. In Ivita v Kyumbu [1984] KLR 441, Chesoni J held: -

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay ... 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.”

10. In view of the foregoing, it is clear that even where there is delay but is properly explained, the court should lean towards saving the suit. In the present case, I am satisfied that Plaintiff has explained the reasons for the delay in prosecuting the suit. The Court also takes judicial notice that during the covid pandemic several proceedings of all courts were scaled down as a measure in taking precaution against the pandemic.

11. Accordingly, I am satisfied that the plaintiff has satisfactorily shown cause why the suit should not be dismissed for want of prosecution. In the circumstances, I will direct that the plaintiff takes steps to list the matter for trial at the earliest available date.

12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MARCH, 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Mandala for the Plaintiff

N/A for the Defendant.

Court Assistant; Caroline Nafuna.