



REPUBLIC OF KENYA



KENYA LAW
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**Mumbo & 19 others v Cabinet Secretary of Lands, Housing and Urban Development & 6 others
(Environment & Land Case 72 of 2015) [2022] KEELC 2970 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 72 OF 2015**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

KALUME DERI MUMBO & 19 OTHERS APPLICANT

AND

**CABINET SECRETARY OF LANDS, HOUSING AND URBAN
DEVELOPMENT 1ST RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 2ND
RESPONDENT**

LAND ADJUDICATION OFFICER, KILIFI 3RD RESPONDENT

DISTRICT SURVEYOR, KILIFI 4TH RESPONDENT

REGISTRAR OF LAND, KILIFI 5TH RESPONDENT

THE HON. ATTORNEY GENERAL 6TH RESPONDENT

JUSTIN NYIRO NYOKA 7TH RESPONDENT

RULING

1. This ruling is in respect of a notice of motion dated October 8, 2021 by the plaintiff/applicants seeking the following orders:
 - a) Spent
 - b) That to avert this application and the subsequent proceedings being rendered nugatory, this honourable court be pleased to order stay of execution of its ruling and orders issued on the March 28, 2019 dismissing the plaintiffs/applicants suit for want of prosecuting and all the consequential orders made thereof and thereafter pending the hearing and determination of this Application.



- c) That this honourable court be pleased to review and/ or set aside its orders issued on the March 28, 2019 dismissing the plaintiff/applicants suit for want of prosecution and all the consequential orders made therein and further reinstate the suit.
 - d) That the costs of this application be in the cause.
2. Counsel agreed to canvas the application vide written submissions which were duly filed

Plaintiff/applicants' case

3. The applicants relied on the grounds on the face of the application together with the supporting affidavit of Kalume Deri Mumbo dated October 8, 2021 where he deponed that they filed this suit vide a paint dated May 11, 2015 seeking a declaration that the suit land Mwapula/Magogoni/458 is reserved for the plaintiffs exclusively
4. That on the March 28, 2019 this honourable court dismissed the suit for want of prosecution due to non-attendance of both the plaintiffs in person and their legal representative.
5. He further deponed that the effect of the ruling was that the plaintiffs would be evicted and their land subdivided in a dispute which dates way back from 1888 without having been accorded an opportunity to be heard by court.
6. It was the applicant's averment that he only learnt of the dismissal through a letter dated September 28, 2021 indicating that a survey team shall visit their suit property on October 13, 2021 for the purposes of subdivision.
7. The applicant urged the court to allow the application as they will suffer irreparable loss and harm of being evicted from the suit land.

7TH Defendant/respondent's Case

8. The 7th defendant opposed the application vide a replying affidavit sworn on the November 2, 2021 and deponed that the suit is a non-starter since the application was brought too late in the day as the same was dismissed more than two years ago, that the same deponent filed an application dated May 11, 2015 which was dismissed and after the dismissal, the matter last came up on June 12, 2017 and since then, the Plaintiffs have been disinterested in the matter for more than two years.
9. The respondent further deponed that the suit herein is private land matter and the 1st plaintiff has not been honest with this Honourable court as he clearly lost interest in this suit when the court declared that the Minister's decision ought to be complied with in JR No. 9/ 2013 where the parties are similar to the present suit. The respondent urged the court to dismiss the application with costs to the respondent.

Applicants' Submissions

10. Counsel submitted on the law on reinstatement of a suit dismissed for want of prosecution and stated that a court has general discretion to set aside any order issued by it ex parte so long as sufficient cause has been shown for exercise of such discretion.
11. Counsel stated that in exercising the general discretion in such applications courts have to be satisfied that there was no inordinate delay and that the delay is inexcusable and cited the cases of *CMC Holdings Limited versus Nzioki* (2004)1 KLR 173 and *Philip Chemowolo & another versus Augustine Kubende*, (1982 – 1988) 1 KAR 103.



12. Counsel submitted that the applicants were not aware of the date when the matter was slated for mention or for hearing hence were not able to attend.
13. On the issue of time and/or delay in bringing the application, counsel submitted that the plaintiffs/ applicants learnt about the dismissal on the October 7, 2021 and moved the court on October 8, 2021 having received a letter dated September 28, 2021 indicating that a survey team shall visit their suit property on the October 13, 2021 for purposes of subdivision. He stated that there was no inordinate delay in bringing the application and urged the court to allow the application as prayed.

7TH Defendant's Submissions

14. Counsel filed submissions and highlighted the decision of Justice Angote in JR No. 9 of 2013 *Kalume Deri Mumbo vs District Surveyor Kilifi and Others* where the subject matter was similar as in the present case, the same parties and the same issues where in dismissing the plaintiff's suit h The Judge indicated that the only options available to the applicant therein after the decision of the Minister was to file an appeal by way of an ordinary suit or by praying for the quashing of the said decision.
15. Counsel further submitted that the application was brought too late in the day as the case was dismissed more than two years ago and that the applicants cannot purport to state that their Advocate messed up yet he has various Advocates who appeared in different matters during that period and in particular, the 1st plaintiff swore an affidavit on October 23, 2018 in ELC No. 8 of 2012 *Kuta Kiringi Lunganzi and another versus Pande Mkauma* wherein he deponed that he was within the court premises on September 26, 2018.
16. That the court in the above case declined to allow the application to set aside the orders dismissing the suit for want of prosecution on the grounds that they did not deserved the exercise of the court's discretion in their favour.
17. Ms Mwangi submitted that the applicants have never shown interest in the case since their application was dismissed on March 11, 2016 and the last time the plaintiffs were represented was on June 12, 2017 and urged the court to dismiss the application with costs to the 7th defendant/ respondent.

Analysis and Determination.

18. The issues for determination in an application for reinstatement of a suit that has been dismissed for want of prosecution are as to whether the application has been brought without inordinate delay, whether there are sufficient reasons to reinstate the suit and whether the Respondent will suffer any prejudice if the application is allowed.
19. In the case of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR the court laid down the principles for reinstatement of dismissed suits and held that:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the



proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.”

20. It is on record that on March 11, 2016 the court dismissed the plaintiff’s application dated May 11, 2015 and on 21st March 2017, the 7th defendant moved the Registry to have the matter set down for pretrial hearing whereby the same was set for 12th June, 2017. When the matter came up on the 12th June, 2017, both parties were present in court and they both agreed to have the matter placed before the Honourable Judge.
21. The matter was fixed for hearing on March 28, 2019 when the same was dismissed for want of prosecution. The Applicants have told this court that they only learnt of the dismissal of their suit through a letter dated September 28, 2021 that was served upon them on the 7th of October, 2021 indicating that survey team shall visit their suit property for purposes of subdivision.
22. In the case of *Ivita vs. Kyumbu* (1984) KLR 441 the court laid down the principles to be considered in an application for reinstatement. First, the court has to consider whether the delay is prolonged and inexcusable and secondly, whether justice can be done despite the delay.
23. The jurisdiction of the court to review or set aside its decisions is wide and unfettered. *In Shah v Mbogo and another* [1967] EA 116, the Court of Appeal of East Africa held that: -

“ This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
24. The first issue is that this matter was dismissed on March 28, 2019 and this application was filed October 8, 2021 and no plausible explanation has been advanced to show why there was such a delay in filing the application after the suit had been dismissed. The reason that the applicants attributed the delay to was that they did not know that the case had been dismissed is not sufficient because the case belongs to the plaintiffs and it is incumbent upon them to follow up with their lawyer or the court to find out what is happening.
25. Three years is a long time to pack a case in court as a plaintiff without finding out the progress of the case. Litigants should be proactive in the management of their cases and should even have a bring up system to track their cases, otherwise their advocates who have many cases might forget to take action.
26. From the evidence on record, this is a case where the plaintiffs lost interest in prosecuting or pursuing the case and the court has only one option which is to dismiss the application with costs to the 7th respondent. The court has not been persuaded to exercise its discretion in favour of the applicant which discretion has to be exercised judiciously

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave



of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

