



REPUBLIC OF KENYA



KENYA LAW
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Kuria (Suing as the administrator of Gladys Nyokabi Ngugi) v Ngugi (Environment and Land Case Civil Suit 255 of 2017) [2022] KEELC 2778 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 255 OF 2017**

EK WABWOTO, J

JUNE 30, 2022

BETWEEN

FRANCIS MUHINDI KURIA APPLICANT

SUING AS THE ADMINISTRATOR OF GLADYS NYOKABI NGUGI

AND

RUTH WANJIRU NGUGI RESPONDENT

RULING

1. The Application is premised on the dismissal of the suit on 28th October 2021 for want of prosecution due to failure by the Plaintiff to attend court and canvass the notice to show cause on why the suit should not be dismissed. The Plaintiff moved the Court vide a Notice of Motion dated 10th January 2022 and a Supporting Affidavit sworn by counsel for the Plaintiff's counsel Samson Mbutia Kinyanjui.
2. In respect to the said Application, the Plaintiff sought the for orders that the dismissal of the suit by this court on 28th October 2021 be set aside and the suit be reinstated.
3. On 2nd February 2022 when the Application came up for hearing, Counsel for the Applicant submitted orally and urged the Court to allow the Application as prayed. Counsel argued that the Plaintiff was not aware of the Notice to Show Cause and that the Plaintiff had always been active in the matter. It was submitted that this matter involved a dispute between family and being a land matter, it is for the interest of justice that the suit be reinstated so that the parties can be heard.
4. Counsel submitted that no prejudice would be suffered by the Defendant since she already owns half of the property and that it is the Plaintiff who would suffer more should the suit not be reinstated.
5. Learned Counsel Mr. Daachi appearing for the respondent opposed the application. He relied on the relying affidavit sworn by the Defendant herein. Counsel submitted that the Defendant's Advocate on



record was aware of the Notice to Show Cause and that no sufficient reasons have been offered by the Plaintiff as to why the suit should not be reinstated. It was further submitted that the Plaintiff has not attended any court proceedings since 25th March 2020. On 22nd September 2021, they had directed the Plaintiff to fix the matter for hearing and the Plaintiff was not keen in doing so. The Notice to Show Cause was subsequently issued by the court sometimes in October 2021 and on the day of the Notice to Show Cause both parties never attended court.

6. Counsel for the defendant further argued that the Plaintiff was merely seeking the reinstatement of the suit to frustrate the proceedings before the Business Premises and Rent Tribunal. On the issue of prejudice, Counsel submitted that the Defendant is an old lady and the if the suit is reinstated, the pendency of the same will continue to cause anguish. It was contended that each party already occupies a portion of the property and in the premises, the application ought to be dismissed.
7. I have carefully considered the application as presented and the oral submissions made by counsel for the Plaintiff and the Defendant. In my view, the only issue for determination is whether the plaintiff has satisfied this court to move it to reinstate the suit. The dismissal was made pursuant to the provisions of Order 17 Rule 2 of the [Civil Procedure Rules](#), which provides that:

“2. 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.”

8. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In [Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat & 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 v Kyumba](#) [1984] KLR 441 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. 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.”

9. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the Plaintiff or the Defendant will be prejudiced by reinstatement of the suit.
10. The Court is also guided by Order 12 Rule 7 of the [Civil Procedure Rules](#) which expressly provides as follows:

“...Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”
11. In the instant case and having considered the facts of the case and in a view of rendering substantive justice, I think it will be just and expedient for the Plaintiff’s suit to be reinstated for it to be heard on merit but this will be subject to payment if throw away costs to the Defendant. I will allow the application dated 10th January 2022 and set aside my order dismissing the suit for want of prosecution and order that the suit be reinstated for hearing and determination on the merits.
12. For this reason, the Court so orders that:
 - i. The order of dismissal given on 28th October 2021 is hereby set aside and the suit is reinstated.
 - ii. The Plaintiff to pay the Defendant throw away costs of Ksh 20,000/- within the next 30 days from today.
 - iii. Save for the throw away costs payable to the Defendant, the other costs of the application shall be reserved to abide the determination of the main suit.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Lekiru holding brief for Mr. Kinyanjui for the Plaintiff/Applicant

Mr. Daache for the Defendant/Respondent.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

