



**Kingori & another v Muturi (Environment & Land Case  
91 of 2014) [2022] KEELC 12654 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 12654 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 91 OF 2014**

**JO OLOLA, J  
JUNE 28, 2022**

**BETWEEN**

**FRANCIS KAMAU KINGORI ..... 1<sup>ST</sup> APPLICANT**

**MONICA WANJIRA NDANU ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN NDERITU MUTURI ..... RESPONDENT**

**RULING**

1. On 22<sup>nd</sup> November 2017, this court dismissed the suit herein under Order 17 Rule (2)(1) of the *Civil Procedure Rules*. The circumstances leading to the dismissal of the suit were that the court had issued a notice to the parties, under Order 17 Rule 2(1) of the *Civil Procedure Rules* to show cause why the suit should not be dismissed for want of prosecution. On the date slated for hearing the notice, the parties failed to attend court, consequently, the court dismissed the suit.
2. On 5<sup>th</sup> February 2019, more than 14 months after the suit was dismissed for want of prosecution, the plaintiff/applicants filed the application dated 5<sup>th</sup> February, 2019 seeking to set aside the order made on 22<sup>nd</sup> November 2017 dismissing the suit and praying for reinstatement of the suit. The application is brought under Order 12 Rule 7; Order 17; Order 51 Rule 3 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act*.
3. The application is premised on the grounds that the notice sent by the court did not reach the applicants; that the 1<sup>st</sup> plaintiff/applicant was prevented from prosecuting the suit by illness; that the 2<sup>nd</sup> plaintiff/applicant, who is the 1<sup>st</sup> plaintiff's wife, did not pursue the case on mistaken belief that she needed to act jointly with her husband, the 1<sup>st</sup> plaintiff/applicant; that they learnt about the dismissal of their suit and the circumstances that led to the dismissal of their case sometime in December 2018; that they are ready to pursue the case to its final conclusion if it is reinstated and that no prejudice would be occasioned on the defendant if the orders sought are granted.



4. When the application came up for hearing, counsel for the plaintiffs/applicants informed the court that the defendant did not enter appearance to the suit or file a defence. For that reason, the application is ex parte. He relied on the grounds on the face of the application and the affidavit sworn in support thereof.
5. I have considered the circumstances that led to the dismissal of the plaintiffs/applicants suit; the reasons given for failure to prosecute the suit and to appear in court to show cause after the court issued a notice to show cause why the suit should not be dismissed for want of prosecution. I have also considered the time taken to file the application for setting aside the order dismissing the suit; the time taken from the time the suit was filed and the explanation offered for the delay in filing the application and failing to prosecute the suit.
6. In the case of *Thathini Development Co. Ltd v Mombasa Water & Sewerage Company & another* [2022] eKLR it was stated:-

“....This court on the legal ration of Order 17 (2) (3) of the Civil Procedure Rules, 2010 relies on the decision of “Investment Limited –Versus - G4s Security Services Limited (2015) eKLR where court held :- “This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff. ....”

The circumstances that led to the dismissal of the suit by the Plaintiff are that, the same was filed on 1<sup>st</sup> December 2016 together with an application dated 30<sup>th</sup> November 2016 seeking temporary injunctive orders. On 20<sup>th</sup> March 2018 in the absence of both parties, the court allowed the application restraining the Defendants from trespassing and laying huge pipes on the suit land until the suit is heard and determined.

14. From then on, nothing took place until 7<sup>th</sup> September 2020 which is close to two (2) years when the case came for mention to show cause why the suit should not be dismissed for want of prosecution. Despite of the notices having been served, neither of the party appeared in court. In the given circumstances the Honorable Court was left with no alternative but to have the suit dismissed for want of prosecution.....

It is the duty of court to do justice between the parties, Section 1B of *Civil Procedure Act*, Cap. 21 provides that there should be just determination, effective and timely disposal of proceedings and effective use of judicial time and resources. It is upon this duty of overriding objective does this court, take time and puts in resources to dismiss suits that have been unprosecuted for more than one year to ensure that other active cases have ample time to be determined. The court will not allow matters to be filed and whereby once the parties



obtain interim orders then proceed to keep the file idle. This causes the clogging the justice system and unacceptable for nothing.

16. In the case of Josphat Oginda Sasia – Versus - Wycliffe Wabwile Kiiya [2022] eKLR, the court held “But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites or even court notice boards. (see the cases of Fran Investments Limited vs. G4S Security Services Limited [2015] eKLR and Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR).” .....

18. The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion. ....

### **Conclusion and Disposition.**

23. I have no doubt in my mind that the application dated 13<sup>th</sup> September 2021 ought to be dismissed with costs to the Defendants/Respondents but nonetheless in the interest of Justice equity and conscience to have the Plaintiff/Applicant. First and foremost, the following conditions.

- a. That the Notice of Motion application dated 13<sup>th</sup> September, 2021 be and is hereby allowed but only upon fulfillment of these conditions.
  - b. That the Plaintiff be and is hereby granted ninety (90) days leave to have fixed and had the suit via a Plaint dated 30<sup>th</sup> November, 2016 and filed on 1<sup>st</sup> December, 2018 to be heard and finally determined.
  - c. That Should the Plaintiff fail to have taken the step stated here above Under Clause (b) of this Order on or before 31<sup>st</sup> July, 2022 the Notice of Motion application dated 13<sup>th</sup> September, 2021 will automatically and by operation of law stand dismissed for want of prosecution without any further reference to this court.
  - d. That the costs of this Notice of Motion application to be borne by the Plaintiff to the 2<sup>nd</sup>, Respondent who participated in this application.”
7. In the circumstances of this matter, although I am not satisfied with the explanation offered by the 1<sup>st</sup> plaintiff/applicant for the delay of more than three years in prosecution of the plaintiffs’ case, I note that the 2<sup>nd</sup> plaintiff/applicant had given a different address of service, (the notice to show cause was only served on the 1<sup>st</sup> Plaintiff/applicant and not the 2<sup>nd</sup> plaintiff/applicant), who equally needed to be served with the notice to show cause.
8. For that reason only, I am inclined to exercise the discretionary power vested in this court under Section 3A of the *Civil Procedure Act* in favour of the plaintiffs/applicants. Consequently, I set aside the order made on 22<sup>nd</sup> November, 2017 dismissing the suit herein for want of prosecution and reinstate it for hearing on condition that the plaintiff shall fix it for hearing and determination within six months from the date of delivery of this ruling failing which the suit shall stand automatically dismissed, unless the time hereby given is for good reason extended by the court.

Orders accordingly.



**DATED AND SIGNED AT ITEN THIS 20TH DAY OF JUNE 2022**

**L. N. WAITHAKA**

**JUDGE**

**READ, SIGNED AND DELIVERED AT NYERI THIS 28TH DAY OF JUNE, 2022.**

**J. O Olola**

**JUDGE**

