



**Mbondo (Suing on her own behalf as an Administrator of the Estate of Elijah Mbondo Ntheketha & 3 others v Athi Garden Limited & 3 others; Mutisya & 9 others (Interested Parties) (Environment & Land Case 137 of 2019) [2022] KEELC 14926 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 14926 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE 137 OF 2019**  
**CA OCHIENG, J**  
**JUNE 27, 2022**

**BETWEEN**

**ALICE MWELU MBONDO (SUING ON HER OWN BEHALF AS AN ADMINISTRATOR OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA) ..... 1<sup>ST</sup> PLAINTIFF**  
**ROSE MBINYA MWANIKI ..... 2<sup>ND</sup> PLAINTIFF**  
**DAMARIS MWIKALI NGOMBA ..... 3<sup>RD</sup> PLAINTIFF**  
**JANE MUTIO MWIKALI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**ATHI GARDEN LIMITED ..... 1<sup>ST</sup> DEFENDANT**  
**EVERTON EZEKIEL TERIGIN ..... 2<sup>ND</sup> DEFENDANT**  
**GEORGE KIPKETER CHANGWONY ..... 3<sup>RD</sup> DEFENDANT**  
**REGISTRAR OF TITLES ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**MARTIN MUTISYA ..... INTERESTED PARTY**  
**PETER MUTISYA ..... INTERESTED PARTY**  
**RICHARD MUEMA MBONDO ..... INTERESTED PARTY**  
**SERAH MUTHIO MBONDO ..... INTERESTED PARTY**  
**EVERGREEN CROPS LIMITED ..... INTERESTED PARTY**  
**VIMAL KANTARIA ..... INTERESTED PARTY**  
**BERNARD NTHEKETHA MBONDO ..... INTERESTED PARTY**



**ROSE MUENI MUTUA ..... INTERESTED PARTY**  
**JOSEPHINE NTHUKA MUSYOKA ..... INTERESTED PARTY**  
**TABITHA MUTILE MBONDO ..... INTERESTED PARTY**

## **RULING**

- 1 What is before Court for determination is the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants notice of motion application dated the May 13, 2021 brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* as well as order 2 rule 15; order 17 rule 2(1), (2), (6) and order 51 of the *Civil Procedure Rules*. The Applicants seek the following orders:
  1. That the Court be pleased to strike out the suit herein.
  2. That the costs of this application and of the cause be borne by the Plaintiffs.
- 2 The Application is premised on the grounds on the face of it and the Supporting Affidavit of the 2<sup>nd</sup> Defendant Everton Ezekiel Terigin, where he confirms that on February 21, 2017, the Court issued grant of letters of administration intestate to Alice Mwelu Mbondo, Richard Muema Mbondo, Serah Muthio Mbondo and Bernard Ntheketha Mbondo jointly to administer the estate of the late Elijah Mbondo Ntheketha. He contends that the four administrators are the only persons entitled, together and jointly to commence any proceedings touching on or affecting the estate. He insists the subject matter of this suit relates to the aforementioned estate but has not been commenced by the four administrators. Further, that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs not being administrators of the estate have no *locus standi* to commence and or maintain these proceedings. He reiterates that the Plaintiffs herein have no *locus (either jointly or severally)* to commence and or maintain the instant proceedings at all. He avers that the Plaintiffs have not taken any steps to prosecute this matter for more than one-year, which delay is unexplained or inordinate. He reiterates that the Plaintiffs' suit is incompetent, frivolous, vexatious, null and void *ab initio*.
- 3 The Plaintiffs filed Grounds of Opposition dated the 24<sup>th</sup> September, 2021 where they claim the Application dated the 13<sup>th</sup> May, 2021 is incompetent, bad in law and an abuse of the Court process. Further, that it is misconceived and an attempt to waste the court's judicious time. They contend that the application is premature and fails to meet the threshold for dismissal for want of prosecution as mandated by section 15 of the *Civil Procedure Amendment Rules 2020* which provides for a two (2) years statutory period. They aver that the Defendants' herein seek to remove them from the seat of justice by having the case determined summarily without all parties being heard meritoriously. They state that the Defendants have filed their statement of defence raising triable issues and it is only just, fair as well as fit and in the interest of justice if this matter was heard and determined on merit.
- 4 In opposition to the instant application, the 1<sup>st</sup> Plaintiff Alice Mwelu Mbondo filed a Replying Affidavit where she explains that the Applicants are in breach of the court orders issued prohibiting them from interfering or altering the suit properties being land reference number 204605/7 or any subdivision therefrom, and hence should not be granted an audience. She avers that the instant application is draconian in nature as it seeks to strike out a suit on technical grounds contrary to article 159(2) (d) of the *Constitution*. She states that the Applicants' in an attempt to confuse and compound the real issues for determination, claims this suit offends the provisions of the Succession Act and insists this is misplaced and a misapprehension of the law. Further, that the instant Application is misconceived, ill advised, *mala fide* as the issue before the Court is not a succession matter but one touching on



fraudulent including illegal acquisition of title. She contends that it is the Environment and Land Court suited to handle this matter as the fulcrum of the dispute herein revolves around a parcel of land. She reiterates that the arguments by the Applicants that the suit is bad in law as it is not jointly instituted by all the Administrators is neither here nor there as the fulcrum of the dispute herein revolves around the alleged transfer of land by the other Administrators to the exclusion of herself as an Administrator. Further, that the other Administrators are already parties to this suit as the 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties together with Bernard Ntheketha. She states that this suit is more informed by the Civil Suits Numbers ELC 888 of 2014 and ELC 889 of 2014 which were withdrawn by consent of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants together with the 5<sup>th</sup> and 6<sup>th</sup> Interested Parties, when the other members of the families decided to challenge the purported sale transactions of the estate properties. She reiterates that the Defendants continue to disregard the Orders issued by this Court. Further, to raise an issue for dismissal for want of prosecution is not only in bad faith but mischievous on the part of the Applicants as no directions have been given by the court on account of the failure by the Defendants and other Interested Parties to file their responses. She reaffirms that the first ground of the Application on failure to institute this suit without the other Administrator jointly is an issue that can be addressed by an amendment.

5 The application was canvassed by way of written submissions.

### Analysis and Determination

6 Upon consideration of the Notice of Motion Application dated the May 13, 2021 including the respective affidavits, grounds of opposition and rivaling submissions, the only issue for determination is whether this suit should be struck out with costs.

7 The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in their submissions reiterated their averments as per the Supporting Affidavit and insisted the Plaintiffs have no *locus standi* to bring proceedings on behalf of the Estate of Elijah Mbondo Ntheketha. They claim the Defendants stand to be prejudiced due to the delay in prosecuting this suit. To support their arguments, they relied on the following decisions: [Troustik Union International & another v Jane Mbeyu & another](#) (1993) eKLR; [Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama](#) (2014) eKLR; [Tabitha Ntibuka Mboroki v Julius Gitonga M'Marete](#) (2016) eKLR; [Ecobank Ghana Limited v Trion Petroleum Co. Limited & 5 others](#) (2018) eKLR and [Mwangi S. Kaimenyi v Attorney General & another](#) (2004) eKLR

8 The 4<sup>th</sup> Plaintiff filed submissions and insists since the Defendants filed their Defence, this matter should be heard on merit. Further, that the instant application is draconian as the Applicants seek to rely on technicalities. She reiterates that the issue before Court is not a succession matter but on fraudulently and illegally acquired titles. She contends that this Court has jurisdiction to deal with the issue in dispute. To support her arguments, she relied on the following decisions: [Jefitah Muchai Mwai v Peter Wangio Thuku](#) (2015) eKLR; [Owner of Motor Vessel Lillian 'S' v Caltex Oil \(Kenya\) Ltd](#) (1989) KLR 1; [Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others](#) Application No. 2 of 2011 and [In the matter of Interim Independent Electoral Commission](#) (2011) eKLR

9 On striking out of pleadings, the legal provisions governing the same are contained in order 2 rule 15(1) of the [Civil Procedure Rules, 2010](#) which provides *inter alia*:-

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or



(d) it is an abuse of the process of the court.”

10 Further, the legal provisions governing dismissal of a suit for want of prosecution is contained in order 17, rule 2 of the Civil Procedure Rules which stipulates thus:

(1) 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.”

11 The Court of Appeal in Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others [2005]eKLR provided parameters on striking out of pleadings and stated thus:

12 In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in Dt Dobie & Company (kenya) Ltd. v. Muchina [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

13 In this instance, I note the fulcrum of the dispute herein revolves around title to land and allegations of fraud in respect to acquisition of the said land.

14 In the case of UCB v Mukoome Agencies (1982) HCB22 it was held as follows:

That where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit.”

15 The Applicants contend that the Plaintiffs do not have *locus standi* to file this suit as there are other administrators of the deceased Estate. The 1<sup>st</sup> Plaintiff has explained the circumstances under which this suit was filed without the co administrators and insist they fraudulently disposed of the deceased estate to third parties sued herein without involving her as one of the Administrators. The Plaintiffs further insist that since the Applicant failed to comply with the Orders of this Court prohibiting them from adversely dealing with the suit land, hence they should not be granted an audience. On perusal of the title of the Plaintiff, I note the 2<sup>nd</sup> to 4<sup>th</sup> Plaintiffs are suing as beneficiaries of the Estate of Elijah Mbondo Ntheketha while the 1<sup>st</sup> Plaintiff is the only one who has sued as the Administrator of the Estate of Elijah Mbondo Ntheketha. I further note that the suit land herein formed part of the Estate of Elijah Mbondo Ntheketha and orders had been issued therein restraining any party from interfering



with the suit land. Further, in the instant suit, the suit land has since been disposed to third parties who are not beneficiaries of the said Estate. I further note that there are related succession proceedings in respect to the suit land herein. It is trite that Administrators of the Estate are personal representatives of a deceased person and are meant to hold the deceased property in trust for the beneficiaries until the Estate is finally distributed. However, in this instance, one Administrator and other beneficiaries are challenging the alleged fraudulent disposal of the suit land to third parties without their involvement. It is further trite that where there are allegations of fraud, the suit has to heard on merit. To my mind, I find that this suit raises triable issues which cannot be determined at an interlocutory stage as sought by the Applicants. Further, that the issues raised are procedural technicalities; it is my considered view that the issue of the 1<sup>st</sup> Plaintiff having filed a suit as a sole administrator can be cured by an amendment. Further, I find that by dint of section 13 of the *Environment and Land Court Act*, this court has jurisdiction to deal with this matter as it relates to title to land. In the circumstance, I will decline to strike out the suit on this point. I further direct that the Applicants do comply with the injunctive orders which were issued herein and desist from dealing with the suit property adversely. I further advise the Plaintiffs to institute proceedings in the succession cause to compel the three other Administrators to render accounts in respect to the suit properties they allege to have been disposed off, to third parties without their consent and present the decision to this court. On the issue of dismissal of suit for want of prosecution, I wish to refer to the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR where it was held that:

- 16 Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that; 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”
- 17 In the current scenario and from the court records, I note that this matter has been in court on various dates in 2020 and 2021 where the Court issued directions in respect to the pending Application. Order 17 rule 2(5) of the *Civil Procedure Rules* provides that ‘A suit stands dismissed after two years where no step has been undertaken’. Based on the facts as presented while relying on the legal provisions cited above and associating myself with the quoted decision, I do not find any inordinate delay in prosecuting this matter as claimed by the Applicants who I note also took time to file their respective responses. Further, article 50 of the *Constitution* grants a party a right to be heard. In the circumstance, I will decline to dismiss this suit for want of prosecution.
- 18 It is against the foregoing that I find the notice of motion application dated the May 13, 2021 unmerited and will dismiss it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27<sup>TH</sup> DAY OF JUNE, 2022**



**CHRISTINE OCHIENG**

**JUDGE**

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