



Nairobi City County v National Land Commission & 3 others; Dafur Dupoto Welfare Group & 3 others (Interested Parties) (Environment and Land Constitutional Petition 781 of 2015) [2022] KEELC 3002 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3002 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 781 OF 2015
OA ANGOTE, J
JUNE 23, 2022

BETWEEN

NAIROBI CITY COUNTY PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

DAFUR DUPOTO WELFARE GROUP INTERESTED PARTY

MUKURU MLOLONGO SELF HELP GROUP INTERESTED PARTY

KATULO LIMITED INTERESTED PARTY

DIZZYLAND LIMITED INTERESTED PARTY

RULING

1. Before this court for determination is the application dated March 16, 2020 brought pursuant to the provision of section 1A, 1B and 3A of the [Civil Procedure Act](#) and order 17 rule 2(3) of the [Civil Procedure Rules](#), seeking for the following orders;
 - a) The petitioners' petition herein be dismissed for want of prosecution.
 - b) The costs of the application together with the petition herein be borne by the petitioner.



2. The application is based on the grounds on the face of the motion and supported by the affidavit of the 2nd respondent's advocate. It was his deposition that the petitioner filed the present petition on August 5, 2015, seeking for compensation with respect to phase 1 of the standard gauge railway project.
3. It was deponed that the project has since been completed and the compensation process finalized; that the petition has been overtaken by events and is subsequently moot; that the last time the matter was in court was on January 24, 2018 when it came up for delivery of a ruling on the petitioners' interlocutory application, which application was dismissed and that following the delivery of the ruling aforesaid, no further action was taken by the petitioner.
4. The 2nd respondent's advocate deponed that the fact that a period of two years lapsed without any action being undertaken by the petitioner clearly demonstrates his disinterest in the matter; that the continued existence of the suit is not only prejudicial but is causing the 2nd respondent huge losses arising from the need to defend the petition and that the interest of justice dictates that the suit be dismissed with costs to the respondents.
5. Vide a replying affidavit, the petitioner's advocate deponed that the petitioner has been vigilant in prosecuting the suit and has made efforts to have the suit set down for hearing save for the period the file was taken to Thika law courts to await a decision by Justice Gacheru; that the petitioner was unable to locate the file due to its transfer aforesaid and that the file was re-transferred to Nairobi without notice to the parties.
6. It was deponed that the petitioner has a meritorious case which involves a huge amount of public funds which it seeks to protect from being unlawfully spent by the 2nd respondent and that in the circumstances, it will be unjust to dismiss the suit.
7. The petitioner, through its county solicitor, filed another replying affidavit in which he deponed that the petitioner instructed the firm of Koceyo and Company Advocates to file the petition on August 6, 2015 seeking conservatory orders restraining the respondents from paying out from the public funds on account of the petitioner's suit land Kshs 2,502,914,500 being compensation for the construction of the standard gauge railway.
8. It was deponed that after the filing of the petition, interim orders were granted pending inter-partes hearing thereof; that the respondents and the interested parties duly filed their responses and that numerous interlocutory applications were thereafter filed by the respondents which derailed the petition.
9. According to the deponent, the firm of Koceyo and Company Advocates which had the conduct of the petition showed disinterest in representing the petitioner and finally fell out with the petitioner without having taken any step to prosecute the suit; that the said firm only released the file in the year 2021 after which the petitioner appointed new counsel and that the petition has not been overtaken by events as the petitioner is yet to be compensated.

Submissions

10. The 2nd respondent's counsel submitted that dismissal of suits for want of prosecution is governed by order 17 rule 2 of the *Civil Procedure Rules* and that the same is a discretionary power as expressed by the court in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat and Others & Another [2016] eKLR*.
11. It was submitted that the principles governing the dismissal of suits for want of prosecution have been established by numerous authorities; that the considerations include whether the delay is prolonged



and inexcusable and if so, whether justice can be done despite such delay. Reliance in this regard was placed on the cases of *Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR* and *Nzoia Sugar Company Limited v West Kenya Sugar Limited [2020] eKLR*.

12. According to the 2nd respondent's counsel, the matter was last in court on January 24, 2018 during which time the petitioner's application for injunction was dismissed and that in response to the present application, the petitioner filed two replying affidavits with differing explanations evincing the casual manner in which the petitioner continues to conduct the suit.
13. The petitioner submitted that the delay in prosecuting the suit was occasioned by the petitioner's previous counsel; that mistakes of counsel should not be visited upon the client and that whereas phase 1 of the standard gauge railway has been finalized, the petitioner has yet to be compensated.
14. Counsel submitted that the decision of whether or not to dismiss a suit is discretionary, which discretion must be exercised judiciously and that the court should lean towards sustaining rather than dismissing a suit. Counsel sought to rely on the cases of *Nzoia Sugar Co Ltd v West Kenya Sugar Limited [2017] eKLR*, *Mwangi S Kimenyi v Attorney General & Another [2014] eKLR*, *John Harun Mwau v Standard Limited & 2 Others [2017] eKLR* and *Ngwambu Ivita v Akton Mutua Kyumbu [1984] KLR 441*.

Analysis & determination

15. Having considered the application, the affidavit in support and against thereof and the submissions, the only issue for determination is whether or not the petition should be dismissed for want of prosecution.
16. The legal framework on dismissal of suits for want of prosecution is found in order 17 rule 2 of the Civil Procedure Rules which provides as follows: -
 - ' (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.'
17. It is clear from the foregoing that a court may dismiss a suit for want of prosecution suo motto or on the application of a party to the suit.
18. The court's exercise of its power to dismiss a suit for want of prosecution under the provisions of order 17 aforesaid is discretionary in nature. It is now settled that the exercise of the court's discretion must be judicious and based on sound legal principles. This was re-affirmed by the Court of Appeal in the case of *Patriotic Guards Limited v James Kipchirchir Sambu [2018] eKLR* wherein it was stated;
 - ' It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to



the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.'

19. What then is the criteria to be applied in a deliberation of whether or not a suit should be dismissed for want of prosecution? The Court of Appeal in *Moses Muriira Maingi & 2 Others v Maingi Kamuru & Another [2013] eKLR* adopted the decision of Chesoni, J (as he then was) in the case of *Ivita vs Kyumbu [1984] KLR 441*, where it was held that;

' The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the defendant must satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff.'

20. More recently, the Court of Appeal in *Ecobank Ghana Limited v Triton Petroleum Co Ltd & 5 Others [2018] eKLR* stated thus;

'It is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.'

21. This suit was commenced on August 5, 2015, by way of a petition filed contemporaneously with a chamber summons seeking for conservatory orders restraining the respondents from paying compensation with respect to the standard gauge railway construction on the suit property.
22. The respondents thereafter filed their respective responses and several applications were filed in the interim seeking, among others, joinder of the interested parties and for conservatory orders by the petitioner.
23. The record shows that on January 24, 2018, the court dismissed the petitioner's application of August 5, 2015 as well as the application of January 19, 2016. The court record indicates that there was no action on the file from January 24, 2018 to February 23, 2021 when the 2nd respondents' counsel sought to have the matter set down for mention.
24. The record shows that the time between the delivery of the ruling and the filing of the present application constitutes a period of more than 12 months. Nonetheless, it is now trite that even where delay is shown, the court can still excuse a party if the interest of justice so dictates. This was aptly expressed by the Court of Appeal in *Ivita vs Kyumbu* (supra);

' Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. 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.'

25. The 2nd respondent having demonstrated that over 12 months have lapsed since the last step was taken herein by the petitioner, the question that arises is whether that delay is prolonged; whether there is a reasonable justification for the delay and whether any prejudice will be suffered by the parties if the suit is not dismissed for want of prosecution.
26. On the first limb, there can be no doubt that the delay is prolonged. It goes beyond the one year that is provided for under order 17 rule 2(1) of the Civil Procedure Rules. Is the delay excusable?
27. It is noted from the court record that two replying affidavits have been filed in response to the application. The first by the petitioner's previous counsel dated March 3, 2021 and the second by the petitioners' county solicitor dated August 24, 2021.
28. In the affidavit of March 3, 2021, it was deponed that the delay in prosecuting the suit was occasioned by the present application and that the failure by the petitioner to take any step in the matter was occasioned by unavoidable circumstances being that the file was taken to Thika for the delivery of a ruling by Gacheru J.
29. A perusal of the record shows that the last time Justice Gacheru dealt with the matter was on November 30, 2016 when she issued directions on service of the pleadings and submissions by the parties. On February 27, 2017, the matter came up before Justice Obaga where similar directions were issued.
30. The period in question is between the delivery of the ruling of January 24, 2018 and the filing of the present application. No explanation has been rendered by the petitioner as to why no action was taken between that period. Indeed, by January, 2019, a year had lapsed without any action being taken by the petitioner. Considering that the present application was filed in March, 2020, it cannot be said to have contributed to any delay.
31. The petitioner has not demonstrated the attempts it made to set the matter down for hearing. Indeed, it is unclear when exactly the petitioner and its previous counsel fell out as alleged. It has been said time without number that a case belongs to the client and not to his counsel.
32. That being the case, this court finds it difficult to believe that the petitioner, a county government, let itself to be held hostage by its counsel. In the circumstances, it is the finding of this court that the delay in prosecuting the petition is not excusable.
33. From the pleadings, the petitioner's case is that it is entitled to compensation on the basis that it is the legal owner of the suit property and as such, no other party residing on the property ought to be been compensated.
34. As admitted by both parties, the compensation the subject of this petition proceeded and has since been finalized. This therefore means that the situation that obtained at the time of filing the suit has changed.
35. While it is appreciated that the court must at all times err on the side of maintaining rather than dismissing a suit, it must be remembered that the right to a fair trial under article 50 of the Constitution envisages a fair and speedy trial. The delay in prosecuting this suit goes afoul that requirement.
36. For those reasons, the application dated March 16, 2020 is allowed with no order as to costs. For avoidance of doubt, the petition herein stands dismissed.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF JUNE, 2022.

OA ANGOTE

JUDGE

In the presence of;

Mr Oduru holding brief for Nyakoye for the Petitioner

Mr Agwara for the 2nd Respondent

Mr Olaha for the Interested Party

Court Assistant: June/Tracy

