



**Mungela & 6 others v Hinzano & another (Environment & Land  
Case 246 of 2014) [2022] KEELC 3139 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3139 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 246 OF 2014**

**MAO ODENY, J**

**JUNE 8, 2022**

**BETWEEN**

**JAPHET KAHINDI MUNGELA ..... 1<sup>ST</sup> PLAINTIFF**  
**CHARO KAHINDI MUNGELA ..... 2<sup>ND</sup> PLAINTIFF**  
**ALI KAHINDI MUNGELA ..... 3<sup>RD</sup> PLAINTIFF**  
**ALBERT MUNGELA ..... 4<sup>TH</sup> PLAINTIFF**  
**KAMBI MASHA ..... 5<sup>TH</sup> PLAINTIFF**  
**KADZITU KOMBE ..... 6<sup>TH</sup> PLAINTIFF**  
**KATSELE ALI ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**KITSAO NGONYO HINZANO ..... 1<sup>ST</sup> DEFENDANT**  
**HARRISON KOMBE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

- 1 This ruling is in respect of a Notice of Motion dated 12<sup>th</sup> February 2021 by the Plaintiff/Applicants seeking orders that the order dismissing this suit be set aside and the suit be reinstated for hearing and determination on merits. The motion was premised on the grounds on the face of the application and supported by the affidavit of Charo Kahindi Mungela who deponed that due to another suit before the Malindi Chief Magistrates Court CMCC No. 160 of 2010, this suit was stayed pending the determination of the former suit.
- 2 That despite the stay order, this suit was dismissed for want of prosecution yet they were never served with a notice to show cause why the same should not be dismissed. Counsel submitted that since the present suit was a claim for adverse possession, it was imperative that it be stayed pending the



determination of the issue of ownership at the subordinate court. Counsel urged the court to allow the application as prayed.

- 3 The 1<sup>st</sup> Defendant opposed the application vide Replying Affidavit on 15<sup>th</sup> March 2021 where he deponed that this suit was indeed stayed on 20<sup>th</sup> December 2017 pending the hearing and determination of the suit before the Chief Magistrates Court which was heard and determined on 30<sup>th</sup> April 2020 and a decree issued on 25<sup>th</sup> August 2020.
- 4 He further deponed that on the same date, a decree was sent to the Plaintiffs' advocates, Messrs. Richard Otara & Company Advocates and to this court. That the Plaintiffs who were the Defendants in the lower court case never filed any defence therein.

### Analysis And Determination

- 5 The issue for determination is whether the Applicants have satisfied the court to reinstate the dismissed suit. 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 and others & another* [2016] eKLR, the court stated as follows:

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 vs 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.”

- 6 The law governing dismissal of a suit for want of prosecution is 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.
- 7 A perusal of the proceedings shows that this suit was indeed stayed on 20<sup>th</sup> December 2017 relying on the doctrine of sub judice, pending the hearing and determination of the suit before the lower court. On 19<sup>th</sup> June 2018, this matter was listed for directions however, the same was stood over generally. This suit was listed again on 26<sup>th</sup> October 2020 after the lower court's suit had been heard and determined. The court then presided by Olola J dismissed the suit for want of prosecution.



8 The Plaintiffs' argument was that a Notice to Show Cause was not issued prior to the dismissal. This is not true as on 16<sup>th</sup> September 2020, this court sent such notices to the Plaintiffs' then advocates, Kanyi J and Company Advocates. Neither the Plaintiffs nor their counsel were present in court to explain why the suit should not be dismissed.

9 It is important to note that the notice as given was sufficient as was held in the case of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR:

Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word "give notice". The court may give notice of dismissal through its official website or through the cause-list. And those mediums will constitute sufficient notice for purposes of Order 17 Rule 2 (1) of the Civil Procedure Rules."

10 The court has the discretion to allow or disallow the reinstatement of a suit for want of prosecution which depends on the circumstances of each case. This discretion must be applied judiciously as was held in the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 where the Court stated that: -

In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

11 A party seeking to have a suit reinstated must demonstrate good faith and bring the application for reinstatement without unreasonable delay as was held in the case of *Simion Waitim Kimani & Three others vs Equity Building Society* (2010) eKLR where Koome J (as she then was) in Paragraphs 4 and 5 held:-

4 "The courts have discretion generally to reinstate a suit which is dismissed for nonattendance but in all matters involving the exercise of the courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to court without unreasonable delay. This suit was filed on 12<sup>th</sup> March 2002 and since 29<sup>th</sup> November, 2004 no steps were taken to prosecute it. It is the court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years."

5. Even if this court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the court dismissed the suit for want of prosecution.



According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation .....

- 12 The Applicant must also satisfy the court with reasons why he/she did not attend court when the matter was called and why they did not take any steps to prosecute the case. In the present case, the Plaintiffs have not demonstrated why the discretion should be exercised in their favour. The only reason given is that they were not served with notice to show cause but the court has already established that notice was sufficiently issued.
- 13 The order of stay of the proceedings ceased to operate when a judgment was delivered in CMCC No. 160 of 2010 on 30<sup>th</sup> April 2020 dismissing the Defendants suit. The stay was pending the hearing and determination of that suit. By the time the suit was dismissed, there was no stay as alleged by Plaintiff’s counsel.
- 14 I therefore find that this Application lacks merit and is dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 8<sup>TH</sup> DAY OF JUNE, 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.

