



**Kihara v Thumbi (Environment & Land Case 18 of 2018)
[2022] KEELC 3333 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3333 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 18 OF 2018**

BN OLAO, J

JULY 27, 2022

**IN THE MATTER OF AN APPLICATION FOR ORDERS UNDER SECTION 37
AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

AND

**IN THE MATTER OF THE PARCEL OF LAND KNOWN AS
NDIVISI/KHAKUMULI /1294 AND NDIVISI/KHALUMULI/2729**

AND

IN THE MATTER OF APPLICATION FOR ORDERS BASED ON ADVERSE POSSESSION

BETWEEN

JOSEPH MWANIKI KIHARA PLAINTIFF

AND

PETER MWANGI THUMBI DEFENDANT

RULING

1. Joseph Mwaniki Kihara (the Applicant herein) moved to this Court vide his Originating Summons filed on 24th April 2018 seeking the main order that he has acquired by way of adverse possession the land parcel No Ndivisi/ Khalumuli/1294 and should be registered as the proprietor thereof in place of the registered owner Peter Mwangi Thumbi (the Respondent herein).
2. The Respondent filed a replying affidavit on 10th May 2018 challenging the Applicant's claims.
3. Thereafter, the Applicant went to sleep and on 16th February 2021, (not 18th February 2021 as stated in the Applicant's Notice of Motion dated 1st March 2022 and which is the subject of this ruling), the Court acting on it's own motion dismissed the Applicant's suit.



4. The Applicant has now approached the Court vide his Notice of Motion dated 1st March 2022 and premised on the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act as well as Order 5 Rule 2 and 17 of the Civil Rules seeking the following orders: -
 1. That the orders made on 18th February 2021, (the correct date is 16th February 2021), be set aside and the suit be reinstated to hearing on merit.
 2. That costs of this suit (it should be costs of the application) be in the course.
5. The application is based on the grounds set out therein and is also supported by the affidavit of Namukhula M. Wanjala Counsel for the Applicant.
6. The gravamen of the application is that Counsel for the Applicant was not notified about the intention to dismiss this suit as required in law. That Counsel only learnt about the dismissal of the suit when he visited the registry to file an application to transfer this suit to the Subordinate Court at Webuye Court for consolidation with Webuye ELC case No 52 of 2018. Counsel also adds that due to lack of proper instructions which was thereafter followed by the global COVID – 19 pandemic, movement was paralyzed and so too was the access to institutions including Courts. That no prejudice will be caused to the Respondent and it is in the interest of justice that the orders sought be granted.
7. Annexed to the supporting affidavit are the plaint and other pleadings in Bungoma ELC case No 138 of 2015 which, I presume, must have been transferred to Webuye Court where it is now Webuye ELC case No 52 of 2018.
8. The application is opposed and Mr Bwonchiri Counsel for the Respondent filed grounds of opposition dated 6th April 2022 in which he described it as frivolous, vexatious and an abuse of the due process of the Court having been filed too late as the orders for dismissal were issued on 18th February 2021 (they were issued on 16th February 2021 as I have already stated above). Further, that the Applicant has not explained why he never took any action since filing the suit on 24th April 2018.
9. When the application was placed before me on 3rd March 2022, I directed that it be canvassed by way of written submissions. However, only Mr Bwonchiri Counsel for the Respondent has filed submissions. On 11th April 2022 when the parties appeared for mention before the Deputy Registrar, Mr Namatsi informed the Court that the Applicant would not be filing any submissions but would rely on the authorities filed.
10. I have considered the application, the supporting affidavit and grounds of opposition as well as the submissions by Mr Bwonchiri.
11. In dismissing this suit on 16th February 2021, this Court made the following order: -

“The Originating Summons was filed on 24th April 2018. A reply thereto was filed on 10th May 2018. No action has been taken in the matter since then.

This suit is marked as dismissed under Order 17 Rule 2(5) of the Civil Procedure Rules.”

Ideally, that order ought to have been extracted and served upon the parties at least for their information. I have checked the record and I have not seen that the order was infact extracted and served upon the parties. That notwithstanding, it is not correct for Counsel for the Applicant to aver, as he has done in paragraph 10 of his supporting affidavit, that: -

10 “..... No notice for dismissal was served upon by the Courts as required by law”



Order 17 Rule 2(5) of the Civil Procedure Rules under which the order of 16th February 2021 was issued reads: -

“A suit stands dismissed after two years where no step has been undertaken.”

Clearly therefore, where no action has been undertaken in a suit for 2 years, such suit “stands dismissed” by operation of the law and the Court is not even obliged to issue any notice for such dismissal. The dismissal is automatic. The mischief intended under that provision which was introduced through L.N No 22 of 2020 must have been to ensure that suits which have been in the registries for 2 years and above with the parties taking no action are removed to pave way for other cases and not to take up valuable space in our already congested registries indefinitely. Indeed, even under Order 17 Rule 2(1) of the Civil Procedure Rules, the issuance of a notice for the dismissal of a suit is not mandatory. It reads: -

“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.” Emphasis mine.

12. Parties must therefore appreciate that they need to be on top of their cases. They should take note that the laid – back approach whereby suits are filed in our Courts but the parties recline in the comfort of their seats and go to sleep will no longer be the practice. As was stated in The Chairman Board of Trustees Ndalu Mosque & another .v. Martin Mabele & Others 2018 eKLR: -

“Parties must be warned that Courts have now taken charge of the proceedings and will no longer take a laid back approach to litigation but will ensure that the overriding objective of the Civil Procedure Act and Rules are strictly adhered to so that matters are heard and determined expeditiously.”

This suit was filed on 24th April 2018 and therefore by the time it was dismissed on 16th February 2021, no steps had been taken for almost 3 years towards prosecuting it. Under the law, it stood “dismissed.”

13. However, sub – rule 2(6) of Order 17 states that: -

“A party may apply to Court after dismissal of a suit under this order.”

That means that the Court still retains the discretion to reinstate a dismissed suit if the indolent party can satisfy it that there are good reasons why the suit remained un – prosecuted for that long period. It must be remembered that justice demands that all parties be heard and unless there is a deliberate attempt by one party to subvert the cause of justice, the Court must always bear in mind the right to a fair hearing as guaranteed under Article 50(1) of the Constitution as well as the right to access to justice under Article 48. Each case must however be determined on the facts of its peculiar circumstances. The dismissal of a suit for want of prosecution can serve the interest of justice just as much as the reinstatement of a dismissed suit can amount to an injustice. The above was captured well by Chesoni J (as he then was) in the case of Ivita .v. Kyumbu 1984 KLR 441 when he said: -

“So the test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice both for 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 and that justice can still be done to the parties notwithstanding 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."

The onus is therefore on the plaintiff to demonstrate that notwithstanding the delay, there is sufficient reason why a suit should not be dismissed or, if it has already been dismissed, why it should be reinstated to hearing. Unless a fair trial is no longer possible, a Court should aim at sustaining rather than dismissing a suit. I am reminded of the words of Ainley J in *Jamnadas Sodha v. Gorchandas Hemraj* 1952 7 U.L.R 11 that: -

"..... it should always be remembered that to deny the subject a hearing should be the last resort of a Court"

14. Guided by the above, what is the explanation for the Applicant's delay in prosecuting this suit? In his supporting affidavit, Counsel attributes it firstly to lack of instructions. That is a rather lame excuse. While it is true that the case belongs to the party, it also behoves Counsel, as an officer of the Court, to play his role in the expeditious disposal of cases. And if no instructions are forthcoming from the client, Counsel has the liberty to apply to cease acting. Lack of instructions should not only mean, as is the common practice in our Courts, the client's failure to pay fees. The other explanation is that the global COVID – 19 pandemic paralyzed movements and access to the Courts. No doubt the hardship and restrictive measures put in place following the COVI – 19 pandemic is a matter that this Court must take cognizance of. There is no exhaustive list of what the Court should consider in exercising its discretion in such an application. I also take into account the fact that the Respondent was also at liberty to move this Court to dismiss the suit but did not do so, perhaps due to the very same COVID – 19 pandemic. Indeed, there was no replying affidavit to rebut the Applicant's averments. Further, it has not been shown by the Respondent that the delay has in any manner prejudiced him in prosecuting his defence. There is no suggestion that the Respondent will not be able to mount a defence to the Applicant's claim due to lack of evidence or that his witnesses are no longer available. In any event, this Court has been informed that there is another pending case at Webuye Court being ELC CASE No 52 of 2018 which is intended to be consolidated with this case upon transfer to that Court. It is therefore in the interest of both parties that this suit be sustained so that the issues raised in both cases can be heard and fully determined. That will be a more prudent exercise of Judicial resources as well as for the parties. Finally, costs will adequately compensate the Respondent. In the circumstances, I am persuaded that this application is for allowing.
15. Ultimately therefore, the Notice of Motion dated 1st March 2022 is allowed in the following terms: -
1. The orders made on 16th February 2021 dismissing this suit are hereby set aside and the suit is reinstated to hearing.
 2. The Applicant shall meet the costs of this application.
 3. With regard to the proposed application to transfer this suit to Webuye Court for consolidation with Webuye ELC case No 52 of 2018, I would suggest without deciding, that this being an Originating Summons seeking orders in adverse possession, it may be preferable that the Webuye ELC case No 52 of 2018 be the one to be transferred to this Court for consolidation with this case.



Boaz N. Olao.

J U D G E

27th July 2022.

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 27TH DAY OF JULY
2022 BY WAY OF ELECTRONIC MAIL.**

Boaz N. Olao.

J U D G E

27th July 2022.

