



Muia & 2 others v Nzyoka & another (Environment & Land Case 108 of 2018) [2022] KEELC 3717 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 108 OF 2018**

**TW MURIGI, J
JULY 27, 2022**

BETWEEN

JULIUS MONZI MUIA & 2 OTHERS PLAINTIFF

AND

THOMAS MUTHIANI NZYOKA DEFENDANT

AND

KAJIADO COUNTY GOVERNMENT THIRD PARTY

RULING

1. By a notice of motion dated April 7, 2022 brought pursuant to the provisions of article 159 of the Constitution, section 3A of the Civil Procedure Act and order 12 rule 7 of the Civil Procedure Rules, 2010 the Applicants seeks the following orders: -
 1. That the order made on March 17, 2022 dismissing the Plaintiffs' suit for want of prosecution be set aside and the suit be reinstated for hearing.
 2. That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit sworn by Vincent M. Muia Advocate on the even date.
3. A summary of the grounds and the averments is that the suit was dismissed on March 17, 2022 without the knowledge of the Plaintiffs or their Advocates.
4. Counsel averred that the Notice to Show Cause which was issued and heard by this Court, leading to the dismissal of this suit was never served upon the Plaintiffs or their Advocates. Counsel urged the Court to reinstate the suit for hearing and determination.
5. Despite being duly served, the Defendant and the 3rd Party did not file any response to the application.



Analysis And Determination

6. Having considered the application and the supporting affidavit, I find that the only issue for determination is whether this suit should be reinstated.
7. The Applicants have brought this application pursuant to the provisions order 12 rule 7 of the [Civil Procedure Rules](#) which provides as follows;

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application may set aside or vary the judgment or order upon such terms as may be just.”
8. It is clear that the said order regulates how a matter is to be heard if only one party appears and the consequences of non-attendance by either party at such hearing.
9. The proper legal provision in this instance is order 17 rule 2(6) which allows the making of an application to reinstate a suit that has been dismissed for want of prosecution. It states that: -

(6) A party may apply to court after dismissal of a suit under this Order.
10. Nonetheless, the Applicants have invoked the discretion of this court under section 3A of the [Civil Procedure Act](#) which binds this Court to promote the ends of justice in civil litigation.
11. The overriding objective under the [Civil Procedure Act](#) should be to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.
12. The record shows that the Plaintiffs filed this suit on September 12, 2003 and sought for the reliefs therein against the Defendants. It is evident that this matter has not been certified as ready for hearing.
13. The record shows that this matter had been fixed for pre-trial directions on April 1, 2020 at the height of the Covid 19 pandemic. The applicant averred that neither the Plaintiffs nor their Counsel was served with the notice and hence they could not defend the same.
14. Order 17 rule 2 (1) of the [Civil Procedure Rules](#) provides that: -

“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.”
15. It is clear from the above provisions that it does not require service of notice. The above provision uses the words “give notice in writing”. The notice can be effected through the cause list and the judiciary and Law Society website. The notification herein was made in the cause list.
16. It is clear from the record that the suit was dismissed as there was inordinate delay in prosecuting the same. The Applicants stated that the prolonged delay in prosecuting this suit was attributed by the effects of the Covid-19 pandemic which caused the scaling down of Court operations. In the case of [Ivita v Kyumbu](#) [1975] eKLR, ZR Chesoni, J held as follows: -

“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 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... 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.”

17. In *Essanji & another v Solanki* (1968) EA 218 it was observed as follows:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

18. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable, whether justice can still be done despite the delay and whether the Plaintiff or defendant will be prejudiced by the reinstatement of the suit. In the present case, I find that the applicants’ explanation on the delayed prosecution of the matter is plausible. No prejudice will be suffered by the defendant and third party if the suit is reinstated. It is in the interest of justice that this matter proceeds on the merits to its logical conclusion.

19. In the end, I find that the application dated is merited and I proceed to allow the same in the following terms: -

1. The order made on March 17, 2022 dismissing the plaintiffs suit for want of prosecution be and is hereby set aside.
2. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY, 2022.

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HON. T. MURIGI

JUDGE

In The Presence Of: --

Court assistant – Mr Kwemboi

Muia for the Applicant.

