



Lamu Estate Agency Limited v Attorney General & 2 others; Nyaga (On her Behalf and on Behalf of all the residents of Jamii ya Mgini Village) & another (Interested Parties) (Environment & Land Petition 14 of 2015) [2022] KEELC 3736 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3736 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 14 OF 2015

MAO ODENY, J

JULY 25, 2022

IN THE MATTER OF: THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS AS ENSHRINED UNDER ARTICLES 19, 20, 21, 22, 23, 24, 40, & 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT, CAP 281 (NOW REPEALED)

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012

AND

IN THE MATTER OF: THE LAND ACT, 2012

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF: COMPULSORY ACQUISITION OF L. R. NO. 12852/342 LAMU ESTATE RANCH

BETWEEN

LAMU ESTATE AGENCY LIMITED PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT



NATIONAL LAND COMMISSION 2ND RESPONDENT

COUNTY GOVERNEMENT OF LAMU 3RD RESPONDENT

AND

MARY IMMACULATE W. NYAGA (ON HER BEHALF AND ON BEHALF OF
ALL THE RESIDENTS OF JAMII YA MGINI VILLAGE) ... INTERESTED PARTY

MOHAMED ALI OMAR INTERESTED PARTY

RULING

1. This ruling is in respect of the application dated 22nd October, 2021 by the Petitioner /Applicant seeking the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to set aside, discharge and/or vacate the order dismissing this Petition for want of prosecution on 2nd November, 2020 and all consequential orders issued therein.
 3. That costs of the application be in the cause.
2. Counsel agreed to canvas the application *vide* written submissions which were duly filed

Petitioner/Applicant's Submissions

3. The application is supported by the grounds on the face of the application together with the affidavit of Asli Osman sworn on 22nd October, 2021 where she deponed that the Court issued an order pursuant to Order 17, Rule 2 of the Civil Procedure Rules dismissing the suit for want of prosecution on 2nd November, 2020.
4. Ms Asli further stated that the Petitioner was never served with a Notice to show Cause hence was not aware that the matter was listed for dismissal and only discovered when they attempted to file a partial consent in settlement of the matter on 15th October, 2021.
5. It was her averment that during the pendency of this matter, parties commenced negotiations in a bid to settle the dispute out of court and that the negotiations were multifaceted and involved various government agencies. That subsequently, the 2nd Respondent published a notice in Gazette Notice No. 3979 dated 9th November, 2018 which aligned with the terms of the consent sought to be filed.
6. Ms Asli deponed that prior to this gazette, parties herein executed a consent dated 2nd October 2018 marking the matter as settled in terms of the consent attached to the supporting affidavit. That the Petitioner, 2nd Respondent and the Interested Parties executed the consent but the 1st Respondent informed the Petitioner that it required more time to get approval from the Solicitor General on account of the portion excised for the Kenya Defence Forces.
7. Counsel further deponed that the 3rd Respondent did not participate in the extensive processes and instead took a hardline stand wherein it did not even make a representation before the National Land Commission.



8. Ms Asli submitted that the gist of the Petitioner's application is that the suit ought to be reinstated to allow the Petitioner an opportunity to file the consent and adopt the same as an order of the court as between the consenting parties herein being the Petitioner, the 2nd Respondent and the Interested Parties.
9. Counsel relied on the cases of *Jim Rodgers Gitonga Njeru v Al-Husnain Motors Limited & 2 others* [2018] eKLR, *Fran Investments Limited. v G4S Security Services Limited* the court cited *Associated Warehouse Co. Ltd & Others v Trust Bank Ltd* Hccc no. 1266 of 1999 (Unreported), *Ibrahim Athman Said v Ibrahim Abdille Abdullah & another* [2014] eKLR, *Ivita v Kyumbu* [1984] KLR 441 and urged the court to exercise its discretion in favour of the Petitioner and set aside the orders of dismissal of the Petition for want of prosecution as no prejudice will be occasioned to the Respondents as alleged.
10. Ms Asli also cited the cases of *CMC Holdings Limited v Nzioki* (2004) 1 KLR 173 and that of *Philip Chemowolo & Another v Augustine Kubende* (1982-88) 1 KAR 103 on the court's wide discretion to set aside the order of dismissal of the Petition.

Respondent's Submissions

11. The 1st Respondent opposed the application *vide* grounds of opposition and stated that the matter was dismissed one year ago on 2nd November, 2021 therefore the Applicants are guilty of laches and that they have not advanced compelling reasons deserving of the orders sought.
12. It was counsel's submission that the court record shows that the Petitioner was aware and duly represented on 2nd November, 2021 during the dismissal of the matter and that the allegations regarding the notice to show cause was never raised by the Petitioner at the opportune moment during dismissal hence it is an afterthought and overtaken by events.
13. Counsel submitted that no consent had been recorded by the parties as the alleged gazette notice had been introduced unprocedurally thus an illegality in the circumstances. Counsel therefore urged the court to dismiss the application with costs.
14. The 3rd Respondent opposed the application *vide* a replying affidavit sworn by Paul M. Munyendo on 17th November, 2021 whereby he deponed that the Petition having been filed on the 6th October, 2015 the matter had not been listed for hearing as the Petitioner was busy enjoying conservatory injunctive orders issued on the 6th October, 2015.
15. The deponent also stated that the allegation that there was a consent in place was not true and according to him there were no negotiations, deliberations or discussions between the Petitioner and the 3rd Respondent.
16. Further that the Petitioner was not interested in prosecuting the matter as no reasons have been advanced to explain the failure to fix the matter for hearing and that on the day of the hearing of the notice to show cause the petitioner was represented by one Mr. Obaga who was holding brief for Ms Osman for the Petitioner.
17. Counsel submitted that the court in dismissing the matter stated that the matter was last in court two years ago when parties adjourned to enable negotiations and that the 3rd Respondent will suffer great prejudice which cannot be compensated by an award of costs as some of the witnesses who were employees have since left employment with the 3rd Respondent.
18. Counsel for the 1st Respondent submitted that there was inordinate delay in filing this application and relied on the provisions of Order 17 Rule 2 of the *Civil Procedure Rules* 2010 and the case of *Argan*



Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR. That the delay was inordinate and inexcusable as the Petitioner had not prosecuted the Petition for over two years which period exceeds the one contemplated under Order 17 Rule 2 (1) of the Civil Procedure Rules 2010. Counsel relied on the Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M. D Papat and Another (2016) eKLR to buttress the issue of inordinate delay.

19. On the second issue of whether there was sufficient notice prior to the dismissal, counsel submitted that Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice and relied on the case of Mwangi S. Kimenyi -vs- Attorney General & Another (2014) eKLR and stated that the Petitioner was given sufficient notice through the cause list prior to dismissal of the suit.
20. Counsel for the 3rd Respondent submitted that the Petitioner was represented and the court not being satisfied with the reason before it for adjournment, the court went ahead and dismissed the Petition for want of prosecution and relied on the case of Kestem Company Ltd vs Ndala Shop Limited & 2 others (2018) eKLR where the court cited with approval the ruling of Hon. Justice Gikonyo in Fran Investment Limited vs G4S Security Services Limited (2015) eKLR Counsel therefore urged the court to dismiss the application with costs.

Analysis and Determination.

21. The issues for determination in an application to reinstate a suit which has been dismissed for want of prosecution are well settled. In the case of Ivita v Kyumbu (1984) KLR 441 the court laid down the principles to be considered in such a case. First, the court has to consider whether the delay is prolonged and inexcusable and secondly, whether justice can be done despite the delay. The court 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 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 it 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".

22. Similarly, in the case of the case of Utalii Transporters C Ltd & Others vs NIC Bank & Another where the court held *inter alia* that: -

"the first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a court from such impulsive inclination, and requires it to make further inquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the plaintiff from the judgement seat. It is, therefore, a matter of discretion by the court.....Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by the court in an application for dismissal of a suit for want of prosecution. These principles are: -



- a. Whether there has been inordinate delay on the part of the plaintiffs in prosecuting the case;
 - b. Whether the delay is intentional, contumelious and, therefore, inexcusable;
 - c. Whether the delay is an abuse of the court process;
 - d. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant;
 - e. what prejudice will the dismissal occasion the plaintiff?;
 - f. whether the plaintiff has offered a reasonable explanation for the delay;
 - g. Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court?
23. The parties have laid down the background to the case and given a chronology of what transpired prior to the dismissal of the Petition for want of prosecution. It is on record that this matter has been adjourned severally at the instance of the parties.
 24. On the 14th June 2021 when this matter came up for hearing, Ms. Munyuny counsel for the 1st Respondent told the court that negotiations were going on for purposes of recording a consent. Mr. Shujaa for the Petitioner thereafter confirmed that that was the position.
 25. On the 15th October, 2018 when the matter was listed for taking directions, Ms. Swaleh for the 3rd Respondent appeared with Ms. Alsi for the Petitioner and Ms. Swaleh told the court that some parties had not executed the consent and the matter was given another date to allow the parties complete negotiations.
 26. Further on 10th December, 2018, in the presence of the Petitioner's Advocate, Ms. Lutta who was holding brief for Ms. Munyuny for the 1st and 2nd Respondents and Ms. Swaleh for the 3rd Respondent all parties were in agreement that they needed more time to finalize the matter.
 27. A perusal of the record clearly shows that parties were engaged in an out of court settlement and it is improper for the 1st and 2nd Respondent to misstate facts that no negotiations were ongoing.
 28. It is further on record that Mr. Obaga held brief for Osman for the Petitioner and tried to apply for a further mention date which the court rejected on the ground that this matter was an old matter which the Petitioner had not taken any steps to prosecute for a period of 2 years. It is therefore not factually correct for the Applicant to say that they were not aware of the dismissal of the Petition for want of prosecution. Mr. Obaga after holding brief should have relayed the outcome of what transpired in the case. The court is not told whether such an action took place.
 29. The record also shows that parties in this Petition were at an advanced stage of negotiation before the matter was dismissed for want of prosecution. It is admitted that some of the parties had executed the consent apart from the 3rd Respondent who required more time to get approvals to sign the consent. This would be the only reason why the court would exercise its discretion in favour of the Applicant to enable them finalize with the consents if any.
 30. Order 17 Rule 2 (1) of the [Civil Procedure Rules](#) grants the court power to dismiss a suit in which no step has been taken for one year. The Order also requires the court to give notice to the party concerned to show-cause why the suit should not be dismissed for want of prosecution, and if no cause is shown to the satisfaction of the court, the court may dismiss the suit.



31. I am in agreement with Gikonyo J in the case of *Fran Investments Limited v G4S Security Services Limited* [2015] eKLR (*supra*) where he held that: -

"this order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think, it is so especially when one fathoms the requirements of article 159 of the *Constitution* and the overriding objective which demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial 'sword of the Damocles'. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under article 159 of the *Constitution*, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff. This is the test I shall apply here."

32. The court complied with Order 17 Rule 2 (1) of the *Civil Procedure Rules* by issuing a notice as required by procedure. It is clear that the Order 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. Litigants should know that courts are not a parking lot for cases, when a litigant files a case, he/she must be ready to prosecute it, not getting conservatory or injunctive orders then go to slumber.

33. The Applicant filed this application on 26th October 2021 and the suit was dismissed on 2nd November 2020 which is more than a year after the suit was dismissed. The delay in filing the application has been explained that they were not aware that the suit had been dismissed for want of prosecution and the parties were still negotiating. The issue is whether Mr. Obaga who held brief for Osman had instructions to do so, and if so, did he relay the outcome of the case to the instructing client.

34. On the issue whether there was inordinate delay, delay has to be considered case by case as it is relative. In the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR the court held that:-

"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word "inordinate" in its dictionary meaning, but to apply it in the sense of excessive as compared to normality. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.

35. A court may find that 3 of 6 days delay is inordinate delay depending on the circumstances of the case and what is supposed to happen or not happen within a certain period of time. The same court might also find that 1 or 2 years does not amount to inordinate delay.

36. As earlier alluded to the only reason why the court would exercise its discretion in favour of the Petitioner is that the parties were negotiating an out of court settlement which consent had been partially signed. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause to warrant the setting aside of the decision or proceedings.



37. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that: -

"Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application....

38. I have considered the application, the submissions by counsel, together with relevant authorities and find that it would be in the interest of justice to allow the application to enable the Petitioner be heard on merit. The Respondents will not suffer any prejudice if the application is allowed. Parties can pursue the negotiations if they are still on the table and fix this matter for hearing within 30 days failure to which the order lapses.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JULY, 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.

