



Gatei v Gatei (Environmental and Land Originating Summons 12 'A' of 2019) [2022] KEELC 15674 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEELC 15674 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 12 'A' OF 2019
EC CHERONO, J
JULY 22, 2022**

BETWEEN

FRANCIS KARANI GATEI PLAINTIFF

AND

PERIS WAINOI GATEI DEFENDANT

RULING

1. The applicant who is also the defendant in this case moved this honourable court *vide* a notice of motion application dated January 28, 2022 seeking the following orders;
 1. That this matter be dismissed for want of prosecution.
 2. Costs of the application be provided.
2. The application is supported by an affidavit sworn by the defendant/applicant and grounds apparent on the face of the said application sworn dated on even date. By way of a response, the plaintiff filed a replying affidavit sworn on February 8, 2022.
3. When the application came up for hearing on February 14, 2022, the parties through their legal representatives agreed to canvass the same by written submissions.

Applicant's Summary of Facts and Submissions

4. The applicant in his supporting affidavit stated that this matter was last in court on March 8, 2020 and that the plaintiff has not taken any steps to prosecute the same for over one year and that the plaintiff is enjoying orders of status quo given on June 28, 2020 to his detriment.
5. The applicant further contends that the plaintiff is destroying and continues to destroy property belonging to the defendant on the suit property.



6. In his submissions, the applicant through his advocates on record did not cite any case in support of the application.

Respondent's Summary of Facts and Submissions

7. The respondent in his replying affidavit stated that the respondent herein filed another application in Kerugoya HCC succession cause 350 of 2012, seeking orders, inter-alia that the orders of this court be removed. He stated that because of the other case which is related to the instant suit and also due to financial constraints, he had no choice but to use his little resources to defend the case before the High Court instead of the current suit. He stated that it was only after the trial judge in the High Court case stayed the proceedings in that other case and directed the parties to proceed in the case before this court that he is now free to prosecute this case. He stated that he is desirous to prosecute this matter.
9. His lawyer submitted that besides the legal framework set out in order 17 rule 2, the guiding criteria for considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities. He cited the case of *Ivita v Kyumbu* (1984) KLR 441 and *Mwangi Kimenyi v Attorney General & another*, civil suit Misc No 720 of 2009.

Analysis and Decision

10. I have considered the application, the affidavits, both in support and in opposition thereto and the rival submissions. I have also considered the applicable law. The issue for determination in this ruling is whether or not the suit herein is liable for dismissal for want of prosecution under the provisions of order 17 rule of the *Civil Procedure Rules*. The law under the said order states as follows;

2

- (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 the satisfaction, may dismiss the suit.”

11. The superior courts have clarified the conditions required before a suit is dismissed for want of prosecution. First, the applicant must prove that there have been no steps taken by the plaintiff to prosecute the case for more than 12 months and secondly, whether there has been inordinate and inexcusable delay on the part of the plaintiff in prosecuting this suit. The third and final question is whether it would cause grave injustice to the defendant if the case were to proceed to trial notwithstanding the delay by the plaintiff.
12. Looking at the background of this case, it is clear from the pleadings that the plaintiff commenced these proceedings by way of originating summons dated February 19, 2019. The record also shows that the suit was filed contemporaneously with a notice of motion in which the plaintiff/applicant sought, among others, an interlocutory injunction order. After the *inter-parte* hearing of that application, this court rendered itself and ordered the status-quo prevailing at the time to be maintained pending the hearing and determination of this suit. On October 1, 2019, the matter came up for directions and the Court certified the case as ripe for hearing. At the time, the defendant through her advocate on record threw the court's attention to a notice of preliminary objection dated October 8, 2019 which was agreed by consent of the parties to be canvassed by written submissions. This honourable court considered the submission by the parties and on May 8, 2020, it also rendered itself by not upholding the said preliminary objection. From the date of the said ruling on May 8, 2020, the plaintiff did not take any steps for more than 12 months to prosecute this case until February 2, 2022 when the



current application was filed. The plaintiff has explained that the reasons for failing to prosecute this suit was because the defendant filed an application in another related case before the High Court being succession cause No 350 of 2012 (Kerugoya).

13. The plaintiff further stated that the High Court in the said succession cause No 350 of 2012 was active until early this year when the trial judge ordered stay of proceeding in that matter and directed the parties to proceed in this case to avoid getting two different decisions over the same matter. He stated that it was after the trial judge in the High Court gave those orders and directions that the defendant rushed to file the current application. Those averments given on oath have not been controverted.
14. I am satisfied by the explanations given by the plaintiff for not prosecuting this suit for more than 12 months. It is not in dispute that the defendant had filed an application before the High Court succession cause No 350 of 2012 (Kerugoya). I find that the plaintiff had every reason to pause this suit and to defend that other claim which relate to the same subject matter. That explains why the trial Judge in the other case being HC succession cause No 350 of 2012 (Kerugoya) ordered stay of proceedings and directed the parties to proceed in this case to avoid two conflicting decisions over the same subject matter.
15. The upshot of my analysis is that the application dated January 28, 2022 is without merit and the same is hereby dismissed. The costs of the application shall be costs in the cause. Orders accordingly.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 22ND JULY, 2022.

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Igati Mwai for the Applicant
2. Mr. Hey holding brief for Mrs Makazi for Respondent
3. Kabuta – Court Assistant.

