



**Oroto & another v Okello & 4 others (Environment & Land Case  
56 of 2019) [2022] KEELC 2475 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2475 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ENVIRONMENT & LAND CASE 56 OF 2019**

**AA OMOLLO, J**

**JULY 21, 2022**

**IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**AND**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION**

**BETWEEN**

**DENNIS OKETCH OROTO ..... 1<sup>ST</sup> APPLICANT**

**BERNARD OKETCH ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHN BARASA OKELLO ..... 1<sup>ST</sup> RESPONDENT**

**NYERERE OKELLO ..... 2<sup>ND</sup> RESPONDENT**

**ARTHUR OKELLO ..... 3<sup>RD</sup> RESPONDENT**

**SANYO OKELLO ..... 4<sup>TH</sup> RESPONDENT**

**CHRISTOPHER OKELLO ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicants brought the present application dated the 15<sup>th</sup> of November, 2021 and premised on the provisions of article 159 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 12 Rule 7, Order 22 Rule 22 and Order 25 Rules 6 of the *Civil Procedure Rules*. They sought for orders that:

a) Spent;



- b) That there be interim orders for stay of execution of this Honourable Court's orders including stay of execution and/or stay of the Certificate of Costs pending hearing and determination of the application interpartes;
  - c) That there be interim orders for stay of execution of this Honourable Court's orders pending hearing and determination of the application; and
  - d) That this Honourable Court be pleased to set aside the orders dismissing the Plaintiffs' suit reinstate the same and the suit be heard and determined on merit;
  - e) The costs of the application be provided for.
2. The Application was supported by the affidavit of BERNARD Oketch dated 15<sup>th</sup> November, 2022 and the following grounds;
  - a) That, the Applicant was not aware of the application to dismiss;
  - b) That, the matter was not ripe for dismissal;
  - c) That, this is family land where the Applicant together with his two mothers and all family members live and they will suffer irreparable loss if the orders sought are not granted;
  - d) That, the pending dismissal was communicated to their sister who is their instructing agent but she could not communicate to the Applicant as she was totally sick and incapacitated.
3. The Respondents opposed the application on the following Grounds filed on the 1<sup>st</sup> of December, 2021:
  - a) That the application is without any merit and is an afterthought;
  - b) That the applicants have made this application after service of notice to show cause against them;
  - c) That the suit was dismissed on the 24.6.2021 and over 5 months ago;
  - d) That the Respondents' bill of costs was served upon counsel for the Applicants on the 21.8.2021 a clear indication of the fact that this suit had come to its conclusion;
  - e) That the application was frivolous, vexatious, an abuse of the Court process and ought to be dismissed with costs.
4. In his Supplementary Affidavit filed on the 23<sup>rd</sup> of February, 2022, the 5<sup>th</sup> Respondent deposed that the Applicants brought to the court's attention that the 1<sup>st</sup> to 4<sup>th</sup> Respondents had died and despite the mention on the 10.12.2019 for the Applicants to provide proof of death, they failed to do so. That no efforts were made for the substitution of the Respondents or withdraw the suit against them and neither was a citation taken out. He deposed further that the reason why the Applicants would want to keep the matter in abeyance is because they are in occupation of the land that does not belong to them. He averred that the application is an afterthought and the same should be dismissed with costs.
5. Parties agreed to canvass the application by way of written submissions. The Applicants filed their submissions on the 10<sup>th</sup> of February, 2022. They submitted that the gist of the application is that their father bought the land in dispute and settled his family and two wives and children thereon and once the father died he was buried on the same land. They submitted that the application for dismissal was premature because the matter has been in court severally and that the last time it was slated for 8.6.2020 the matter could not proceed because of the COVID restrictions that were prevailing at that time. That



from the 8.6.2020 from 26.3.2021 when the application was filed a year had not lapsed as provided under Order 17 Rule 2 (1) & 3. That the Applicant was not aware of the application for dismissal as his counsel did not have his contacts but only had those of the 1<sup>st</sup> Plaintiff and the Applicant's sister. That if the orders sought are not granted the Applicants and his entire family would suffer irreparable loss as they stand to lose the only land they depend on. He relied on the cases of *Invita vs. Kyumba* (1984) KLR 441 and *Anthony Murigi Kiarie vs. Bidco Oil Refineries Limited*; and *Utalii Transport Company Limited & 3 Others vs. NIC Bank & Another* (2014) eKLR.

6. In the case of *Anthony Murigi Kiarie vs. Bidco Oil Refineries Limited* the Court held:

“I have however considered that should this application not be granted the claimant would forever be banished from the corridors of justice. I have further considered that the Claimant's counsel has admitted that it was the firm that was at fault in not recording the date of the Notice to Show Cause in the diary. Against this, I have considered that the Respondent will have an opportunity to defend the claim on the merits and can be compensated by way of costs for the delay.”

7. The Respondents filed their submissions on the 23<sup>rd</sup> of February, 2022 and reiterated that the application lacks merits as the history of the suit supports the orders for its dismissal. That despite this Court ordering for substitution of the 1<sup>st</sup> and 4<sup>th</sup> Respondents, the Applicant's failed to do the same leading to the lodging of an application to dismiss the suit by the Respondents. That the Applicants lacked the seriousness in prosecuting the matter hence the dismissal. That the sole reason why the Applicants would keep this matter in abeyance is because they are illegally in occupation of land that does not belong to them. They submitted further that the application is an afterthought and was filed only after the Respondent's bill of costs was taxed awaiting execution. They urged this Court to dismiss the Application.

8. The main question for determination here is whether this suit should be reinstated. The Respondent moved this Court vide an application dated 25<sup>th</sup> March, 2021, seeking to have the suit dismissed for want of prosecution. That application was allowed on the 24<sup>th</sup> June, 2021 since there were no grounds offered in opposition.

9. Order 12 Rule 7 of the Civil Procedure Rules provides thus:

“Where under this order judgement has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgement or order upon such terms as may be just.”

10. In the case of *Utalii Transport Company Limited* (supra), Justice F. Gikonyo stated thus:

“Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by court in an application for dismissal of 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 to 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?"
11. The Applicants have admitted that they did not participate in the application for dismissal and their advocate had no instructions to act on the same because the instructing client who is their sister has been indisposed for a long time. They have provided treatment notes to prove that assertion. They instituted the present application on the 15<sup>th</sup> of November, 2021, approximately four months after the suit was dismissed.
12. So, was there inordinate delay on the Applicants' part in prosecuting their originating summons? The suit was instituted on the 24<sup>th</sup> of September, 2019 and during the mention on the 4<sup>th</sup> of February, 2020, the Applicants were given leave to amend their application. On the further mention on the 10<sup>th</sup> of March, 2020, the Applicants had not complied with the issued orders and a further date issued where the Applicants' advocate prayed for time to take out citations in respect of the deceased Respondents and the matter was referred back to the registry. The Application for dismissal was filed on the 9<sup>th</sup> of April, 2021, 9 months after the matter was last in Court. In the case of *Utalii Transport Limited* (supra), the Court defined inordinate delay as:
- “Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to 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. On applying court's mind on the delay, caution is advised for courts not to take the word 'inordinate' in its dictionary meaning, but 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. See the case of *Allen V AlfredMcALPHINE& Sons*[1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of *AGIP (Kenya) Limited V Highlands Tyres Limited*[2001] KLR 630 and *Sagoo V Bhari*[1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also NBI HC ELC CASE NO 2058 OF 2007 where delay of about 1 ½ years was considered not to be inordinate....”
13. In the instant case, although the applicant delayed by 4 months in moving the Court, the same is excused from being counted as inordinate on the basis of the inconveniences caused by the Covid-19 pandemic. Thus the delay can be excused.
14. On whether the dismissal will prejudice the Applicants, the Applicants have annexed photos of the alleged homesteads that they live in within the suit parcels. From the photos, most of the houses are permanent houses. In their Originating Summons, the Applicants seek to be declared the absolute registered owners of 15 acres of the land parcel known as Samia/Budongo/371 in which they have been in actual possession peacefully for a period exceeding 40 years from 1978 to date. If let to stand



the dismissal might occasion an injustice upon the Applicants. The Respondents on the other hand stand to suffer no prejudice if the suit is reinstated and determined fully and can be compensated by way of damages for the delay.

15. While reinstating a suit, Hon F. Gikonyo J. had this to say in the case of *Joseph Kinyua v G.O Ombachi* [2019] eKLR

“.... However, as I stated, dismissal is a draconian order which drives away the litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict condition. No prejudice will be suffered by the respondent in reinstating the appeal. Accordingly, I set aside the dismissal order and reinstate the appeal...”

16. In light of the foregoing, I allow the application and make the following orders:

- a) That this court does set aside the orders dismissing the Plaintiffs’ suit and reinstates the same to be heard on merit on the following terms:
  - i) That the Plaintiffs shall deposit in Court Kshs.60,000 as security for costs of the 2<sup>nd</sup> (5<sup>th</sup>) and 3<sup>rd</sup> defendants within a period of 90 days from the date of delivery of this ruling.
  - ii) The Plaintiffs either withdraws the suit against deceased defendants or bring an application to substitute them within a period of 120 days from date hereof.
  - iii) In default of both conditions, the order of dismissal will automatically be reinstated.
- b) The costs of this application awarded to the 2<sup>nd</sup> (5<sup>th</sup>) and 3<sup>rd</sup> defendants/respondents.

**DATED, SIGNED & DELIVERED AT BUSIA THIS 21<sup>ST</sup> DAY OF JULY, 2022.**

**A. OMOLLO**

**JUDGE**

