



**Waweru v International & 3 others (Environment & Land Case  
357 of 2017) [2022] KEELC 2332 (KLR) (14 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2332 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 357 OF 2017**

**A NYUKURI, J  
JULY 14, 2022**

**BETWEEN**

**PAUL NJOROGE WAWERU ..... PLAINTIFF**

**AND**

**JOASH OCHIENG T/A AEGIS INTERNATIONAL ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. Vide an application dated 6<sup>th</sup> June 2021, the 3<sup>rd</sup> Defendant/Applicant sought for the following orders;
  - a. That the Plaintiff's suit herein be dismissed for want of prosecution.
  - b. That the costs of this application be borne by the Plaintiff.
2. The application is premised on the supporting affidavit of Ian Mudavadi, the 3<sup>rd</sup> Defendant's legal officer. He stated that this matter was last listed for hearing on 24<sup>th</sup> January 2019, when the same did not proceed, and that the delay in prosecuting this matter has been inordinate and inexcusable, demonstrating that the Plaintiff has lost interest in the matter.
3. The application is opposed. Mr. Jonathan Omangi, counsel for the Plaintiff, filed a replying affidavit on 8<sup>th</sup> November 2021, whereof he stated that there have been negotiations between the Plaintiff and the 3<sup>rd</sup> Defendant involving the Anti-corruption Agency over alleged high price of compensation; that the Plaintiff's counsel has had three meetings with the 3<sup>rd</sup> Defendant's counsel one Mr. Lawrence Maruti, who has been on record in this matter; that it is only fair that the Plaintiff is granted an opportunity



to have his day in court; that the last time the matter was in court on 29<sup>th</sup> May 2019, but the court was not sitting and there were no nearer dates and that the Plaintiff has never missed attending court as his land was hived off to pave way for a road and that he is keen to proceed with the case.

4. In addition, Paul Njoroge Waweru, the Plaintiff herein, filed a further affidavit on 12<sup>th</sup> November 2021, in which he averred that the 3<sup>rd</sup> Defendant was aware that parties were negotiating; that the Plaintiff had been attending meetings with the management of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which culminated in an award to him by the 2<sup>nd</sup> Defendant on January 2021, which award is yet to be implemented; that in default of the award, the suit herein will proceed to hearing.
5. The application was canvassed by written submissions. On record are the 3<sup>rd</sup> Defendant/Applicant's submissions filed on 14<sup>th</sup> January 2022 and the Plaintiff/Respondent's submissions filed on 27<sup>th</sup> January 2022.

### **Submissions**

6. Counsel for the Respondent submitted that there was a delay in taking a step to prosecute this suit by the Plaintiff. Counsel pointed out that by his own admission, the plaintiff averred that the matter was last in court on 24<sup>th</sup> January 2019 and that the Plaintiff had failed to demonstrate by evidence the steps they took to ensure timely prosecution of the suit. Counsel relied on the case of *Moses Otsiula v Children of God Relief Institute* [2015] eKLR for the proposition that the Plaintiff's duty in a suit is to take all reasonable steps at his disposal to achieve an expeditious disposal of his claim, while the duty of the Defendant is to either list the suit for hearing or apply for its dismissal. Counsel's position was that the Plaintiff has never listed the matter for case management or for hearing for a period of over two years.
7. Counsel referred the court to the cases of *Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another* [2014] eKLR and *Agip Kenya Limited v Highlands Tyres Limited* [2001] eKLR for the proposition that inordinate delay occurs where there is a delay beyond acceptable limits. It was counsel's view that this inordinate delay on the part of the Plaintiff has not been explained. It was therefore contended for the Applicant that the circumstances of this case show that the Plaintiff had lost interest in this suit and that the same ought to be dismissed.
8. On the other hand, counsel for the Plaintiff/Respondent submitted that the Plaintiff has been keen to prosecute this matter and the last attendance demonstrate that the matter was being negotiated. Counsel observed that it was out of this negotiation that the 2<sup>nd</sup> Defendant made an award of Kshs. 4,682,116/= which is awaiting payment. Counsel pleaded with the court to grant the Plaintiff a chance to realize the negotiated settlement, in default to proceed with the matter to conclusion.

### **Analysis and determination**

9. I have considered the application, the response as well as the submissions and authorities relied upon. In my view, the only issue that arise for determination is whether the Defendant has met the threshold for dismissal of the Plaintiff's suit for want of prosecution.
10. The power of the court to dismiss a suit for want of prosecution is anchored on Order 17 Rule 2 which provides as follows;
  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 its satisfaction, may dismiss the suit.



2. If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
  3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
  4. The court may dismiss the suit for non-compliance with any direction given under this order.
  5. A suit stands dismissed after two years where no step has been undertaken.
  6. A party may apply to court after dismissal of a suit under this order.
11. It is clear from Order 17 Rule 2 of the Civil Procedure Rules, that where no step is taken for over one year, and the Plaintiff fails to explain the delay the court may dismiss the suit on its own motion or on application of any party.
  12. In a long line of authorities, courts have held the position that while the court has discretion to dismiss a suit for want of prosecution where the parties have not taken any step for a period of over one year, the court ought to ensure that in reaching its decision, the ends of justice are met for all the parties in the suit. In the case of Mwangi S. Kaimenyi v Attorney General & Another Civil Misc. No. 720 of 2009, the court held as follows;

When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties-the plaintiff, the defendant- and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.

13. Similarly, in the case of Naftali Opondo Onyango v National Bank of Kenya Ltd [2005] eKLR, the court was of the view that the court should be hesitant in dismissing a suit for want of prosecution, where it is satisfied that the suit can proceed without further delay. The court held as follows;
 

However, in deciding whether or not to dismiss a suit under Rule 6 it is my view that a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.
14. Also, in Ivita v Kyumbu (1984) KLR 441, the court gave the test for dismissal application as follows;
 

The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.
15. In the instant suit, the 3<sup>rd</sup> Defendant/Applicant has argued that it is over two years since the plaintiff took a step in this matter. In a rejoinder, the Plaintiff argued that the delay was due to the fact that parties were negotiating, which negotiation yielded an award from the 2<sup>nd</sup> Defendant in favour of the



Plaintiff, dated 8<sup>th</sup> January 2021. I have considered the record and I note that this matter came up last up in court on 3<sup>rd</sup> October 2019. The proceedings of 29<sup>th</sup> June 2019, show that parties were engaged in negotiations and the court gave them a mention date for 9<sup>th</sup> July 2019, for purposes of recording a consent. It appears that that consent was not forthcoming as soon as it was expected by the Parties.

16. My understanding of Order 17 Rule 2 is that as long as a step is taken towards resolution of a matter, then that is sufficient. The step need not necessarily be the fixing of a hearing date, mention date or a date for case management. It only needs to be a step towards the resolution or conclusion of the matter. I therefore agree with the Plaintiff that he has not been indolent as alleged by the Applicant. In my view, a negotiation is a step towards the conclusion of a matter. Besides, Article 159 (2) (b) of *the Constitution*, provides that one of the principles that should guide a court is the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Indeed, it is this negotiation that resulted in the award of Kshs. 4,682,116/= to the Plaintiff by the 2<sup>nd</sup> Defendant. In addition, the 3<sup>rd</sup> Defendant/Applicant has not stated the nature of prejudice that they stand to suffer should the Plaintiff be given opportunity to prosecute his case. In my view therefore, I find and hold that the 3<sup>rd</sup> Defendant/Applicant has not met the threshold for dismissal of this suit for want of prosecution.
17. In the premises, I find and hold that the Notice of Motion dated 6<sup>th</sup> June 2021 has no merit and the same is hereby dismissed with costs.
18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 14<sup>TH</sup> DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of:**

Mr. Omangi for the Plaintiff/Respondent

No appearance for the Applicant

Ms Josephine Misigo – Court Assistant

