



**Nyakundi & another v Michira & 2 others (Environment & Land Case 158 of 2016) [2022] KEELC 4747 (KLR) (25 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 4747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 158 OF 2016  
JM ONYANGO, J  
AUGUST 25, 2022**

**BETWEEN**

**CECILIA KWAMBOKA NYAKUNDI ..... 1<sup>ST</sup> APPLICANT**

**JOSEPH MICHIRA NYAKUNDI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JAMES NYAKUNDI MICHIRA ..... 1<sup>ST</sup> RESPONDENT**

**WALTER ONDONGA NYABERI ..... 2<sup>ND</sup> RESPONDENT**

**JANE BOKORO YOBESHI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The plaintiffs/applicants herein filed an application dated April 5, 2022, seeking the following orders:
  - a) Spent
  - b) That this court be pleased to set aside its order issued on November 20, 2018 dismissing the suit filed by the plaintiff on June 2, 2016 against the defendants/respondents for want of prosecution and reinstate the suit.
  - c) That the court be pleased to grant the plaintiff leave to amend the Notice of Motion dated June 2, 2016 to enable them identify the subject matter of the suit as well as the prayer for proper adjudication and determination of the suit.
  - d) That upon grant of the above two prayers the court be pleased to transfer the matter to Ogembo Law Courts which has jurisdiction to deal with the matter.
  - e) That costs be provided for.



2. The application is premised on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of the 1<sup>st</sup> applicant sworn on the April 5, 2022. In her affidavit, the 1<sup>st</sup> applicant averred that they had instructed the firm of Kiboi and Co Advocates to file suit in June, 2016. The said firm of advocates filed the suit, set the same for hearing on October 6, 2016 and served a hearing notice upon the defendants.
3. He further stated that on the hearing date, neither their advocate nor the defendants showed up in court. He averred that on numerous occasions they requested their advocates to prosecute the suit but they failed to do so until the matter was eventually dismissed for want of prosecution. It is his contention that the suit raises weighty issues of law and fact which ought to be ventilated in court and that it is in the interest of justice that the application be granted
4. In response to the application, the defendants/respondents filed a Replying Affidavit sworn on June 13, 2021 by Walter Ondonga Nyaberi, the 2<sup>nd</sup> defendant/respondent, on behalf of himself and the other defendants. He averred that the plaintiffs'/applicants' application was an abuse of the court process and that the same should be dismissed with costs. He stated that the suit had been dismissed for want of prosecution by Mutungi J on November 20, 2018 and the application was therefore being made late in the day.
5. He further revealed that the applicants had instituted a similar suit at Ogembo Principal Magistrate court and the same was dismissed on February 16, 2022 on an account of a dismissal order by Justice Mutungi in this suit which they ought to have set aside first before filing the said suit. He contended that the parties in the Ogembo case were similar and the dispute between them is over the same subject matter.
6. The court directed that the matter be disposed of by way of written submissions and both parties filed their submissions which I have considered.

#### Issues for Determination

7. The main issue for determination is whether the applicants have met the requirement for setting aside the order of this court dated November 20, 2018 dismissing their suit for want of prosecution.

#### Analysis and Determination

8. The discretion of court to set aside an order for dismissal ought to be exercised judiciously. When a suit that is dismissed for a want of prosecution, it means that the parties therein failed to aid the court in meeting the overriding objective of the *Civil Procedure Rules*, which is to facilitate the just expeditious and affordable adjudication of cases. The party seeking to reverse this order must therefore explain to the satisfaction of the court why he failed to prosecute his case in order for the court to exercise its discretion in his favour. The test for consideration in granting an order to set aside an order dismissing a case for want of prosecution was emphasized in the case *Boniface Kamau Njoroge v John Waweru Wanjohi* [2021] eKLR where the court held as follows;

“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 the defendant will be prejudiced by reinstatement of the suit.” (Emphasis supplied).

9. Having perused the court records, I note that the suit was filed on June 2, 2016. Together with the suit, the applicants filed an application dated June 2, 2016 seeking temporary injunctive orders. When the application came up for hearing on October 5, 2016 both parties were absent and the court dismissed



the application for want of prosecution. On November 20, 2016 the matter came up for hearing of the notice to show cause why the same should not be dismissed for want of prosecution. Once again both parties were absent and thus the suit was dismissed.

10. Four (4) years down the line the applicants have come before this court seeking that the suit be reinstated. The applicants who have never taken any step to prosecute their suit since instituting the same in 2016 now claim that the failure to prosecute the matter was caused by their former advocate who upon filing the suit on their behalf, failed to fix the same for hearing. The averment in the Supporting affidavit that the applicants had on numerous occasions requested their advocates to prosecute the suit in vain, is not at all convincing.
11. Furthermore, the respondents through the Replying Affidavit sworn by the 2<sup>nd</sup> respondent revealed that applicants sought to revive their suit after a similar matter they had filed in the Ogembo Principal Magistrate's Court was dismissed on the grounds that the applicants had not set aside the order of dismissal issued by this court.
12. From the above analysis, it is clear that applicants have never bothered to prosecute their suit since they instituted it 6 years ago. It is also not lost to me that the applicants had never taken any steps to revive the suit since it was dismissed for want of prosecution 4 years ago and instead chose to file a similar suit at Ogembo Court. The delay is not only inordinate, it is inexcusable. The applicants' attempt to blame their former advocate for failing to prosecute the case cannot be countenanced by this court. The applicants ought to have realized that the case belonged to them and they had a responsibility to follow up on the same with a view to ensuring that it was prosecuted.
13. The explanation advanced by the applicants presents to me parties to a suit who are guilty of negligence. This is because the applicants have not demonstrated in any way, the steps they took in following up on their own case. It is not enough for them to simply blame their former advocates without showing any tangible steps taken up by them to follow up on their case. It is also disturbing to note that the applicants moved the court through a different advocate, a practice that offends order 9 rule 9 of the Civil Procedure Rules, after their suit at Ogembo Chief Magistrate's court was dismissed.
14. I therefore find that the applicants' inaction confirms that they have not been keen on having this suit heard expeditiously. They cannot shift the blame to their former advocates. The suit herein was filed on June 2, 2016 and the 6-year delay is prolonged, inordinate and inexcusable.
15. The upshot is that the application is without merit and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 25<sup>TH</sup> DAY OF AUGUST, 2022.

J M ONYANGO

JUDGE

