



REPUBLIC OF KENYA



**Shivling Supermarket Ltd v Nyabuti & another (Environment & Land
Case 201 of 2016) [2022] KEELC 2981 (KLR) (1 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 2981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 201 OF 2016**

**JM ONYANGO, J
AUGUST 1, 2022**

BETWEEN

SHIVLING SUPERMARKET LTD PLAINTIFF

AND

JIMMY ONDOCHO NYABUTI 1ST DEFENDANT

JOHN ANTHONY NYABATI 2ND DEFENDANT

RULING

Introduction

1. By a Plaint dated 13th July, 2016 the Plaintiff filed suit against the Defendants seeking the following orders:
 - a. A declaration that the Plaintiff is the lawful proprietor of a parcel of land known as Kisii Municipality/block III/298 (hereinafter referred to as the suit property.
 - b. A permanent injunction restraining the Defendants whether by themselves, servants or agents from entering, or trespassing on the suit property or in any manner dealing with the suit property rights as the proprietor of the suit property;
 - c. General damages for trespass and/or mense profits.
 - d. Any other or further order that may be necessary in the circumstances.
 - e. Costs of suit.
2. The Defendants filed an amended statement of Defence and Counterclaim on 21st November, 2016 wherein they denied the Plaintiff's claim. In the Counterclaim they sought the following orders against the Plaintiff;



- a. A declaration that the parcel of land known as LR Kisii Municipality /block III/298 belongs to the estate of the late Zachariah Angwenyi where the 2nd Defendant is the legal administrator.
 - b. A permanent injunction restraining the Plaintiff whether by themselves, servants, agents, workers, employees or any other person from further demolishing, fencing, leasing, building onto, developing and/or in any manner whatsoever dealing with the suit property or any portion of the suit property.
 - c. Any other relief that this Honourable court may deem fit and appropriate in the circumstances.
 - d. Costs of the suit.
3. On 19th October, 2021 the Defendants filed a Notice of Motion seeking that the suit be dismissed for want of prosecution. The application was based on the grounds that the Plaintiff was guilty of prolonged, inordinate and excusable delay in prosecuting the matter and that the Defendants stood to suffer prejudice if this application was not granted.
 4. On 15th November, 2021 the Plaintiff filed a Replying Affidavit sworn by one Rajesh Patel, the Director of the Plaintiff. Mr. Rajesh averred that he had learned that in March, 2018 during the pendency of this suit, the Plaintiff's title to the suit was revoked and reverted to the original parcel (parcel 262). The Defendants were then registered as the proprietors of parcel 262. Mr. Rajesh averred that the restoration of parcel 262 and concurrent revocation of parcel 298 forced the Plaintiff to sue Defendants among others vide ELC case No. 14 of 2018.
 5. Mr. Rajesh deposed that the failure of the Plaintiff to prosecute its suit was occasioned by an oversight on its part after the firm of Ogutu Mboya & Ochwal Advocates which was representing it in the matter previously ceased to act for the Plaintiff. He averred further that the Plaintiff's inadvertent failure to appoint counsel to represent it left the suit unattended.
 6. Mr. Rajesh further deposed that the Plaintiff has filed a Notice of Motion dated on 15th November, 2021, seeking to have the matter stayed pending the hearing and determination of ELC case No. 14 of 2018 claiming that the determination of that particular case would have a bearing on this suit.
 7. In response to the application by the Plaintiff dated 15th November, 2021, the Defendant filed a Replying Affidavit sworn by the 2nd Defendant on 2nd February, 2022. In the said affidavit he confirmed that the Plaintiff had indeed instituted a claim against the Defendants vide Kisii ELC Case No. 14 of 2018. The 2nd Defendant also averred that the two suits had different prayers and thus it was not true that the suit, Kisii ELC Case No. 14 of 2018 would conclusively determine this suit.
 8. He averred that if the Plaintiff believed the two matters were related he ought to have made an application for their consolidation. He contended that the Plaintiff was only forced to file this application after being served by the Defendant's application to dismiss this suit for want of prosecution.
 9. The court directed that the two applications filed by both the parties dated 19th October, 2021 and 15th November, 2021 respectively be disposed of jointly through written submissions. Both parties subsequently filed their submissions which I have considered.

Issues For Determination

10. The main issues for determination are:
 - i. Whether this suit should be dismissed for want of prosecution.



- ii. Whether the suit should be set aside pending the hearing and determination of case number, KISII ELC Case No. 14 of 2018.

Analysis And Determination

Whether this suit should be dismissed for want of prosecution.

11. The legal framework on dismissal of a suit for want of prosecution is found in Order 17 Rule 2 of the [Civil Procedure Rules](#), 2010 which provides 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 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.”

12. From the following provision of the [Civil Procedure Rules](#), it is clear that a court may suo motto dismiss a suit for want of prosecution and at the same time it may dismiss a suit upon the application by either party to the suit.

13. Further, the guiding principle to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of authorities, among them the case of *Ivita -vs- Kyumbu*(1984) KLR 441 where the court summarized the criteria for dismissal as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

14. In *Mwangi S. Kimenyi -vs- Attorney General and Another*, Civil Suit Misc. No. 720 of 2009, the court restated the test as follows: -

1. 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.
2. 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; 3) 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.” (emphasis mine)

15. The Defendants herein have moved this court to dismiss the suit filed by the Plaintiff on the grounds that the Plaintiff is guilty of prolonged, inordinate and excusable delay in prosecuting the matter and that the Defendants stand to suffer prejudice if this application for dismissal is not granted.
16. In his response the Plaintiff acknowledged its failure to prosecute and explained that the failure was occasioned by an oversight on its part after the former firm of Ogutu Mboya & Ochwal Advocates ceased to act for it and the Plaintiff inadvertently failed to appoint another counsel to represent it.
17. The Plaintiff having acknowledged that there was a delay and/or failure on its part to prosecute his suit the question therefore is whether the reason given for the failure and/or delay in prosecuting the matter by the Plaintiff is reasonable and excusable.
18. The court record reveals that the inactivity on the part of the Plaintiff in the matter began on 6th August, 2018 when the firm of Oguttu Ochwangi & Ochwal Advocates who were previously representing it filed an application seeking to cease acting for the Plaintiff. In the said application the said firm of Advocates argued that during the pendency of the suit, the National Land Commission had nullified the title to the suit property illegally. The said firm stated that despite advising their former client that there was an urgent need to institute Judicial Review proceedings against the National Land Commission, the Plaintiff went silent and did not bother to give them any instructions. They contended that they were therefore not in a position to defend the Plaintiff’s interests in the suit and thus requested to be discharged from representing the Plaintiff.
19. The said application came up for hearing on 26th September, 2018. After confirming that the Plaintiff had been served with the application as evidenced by an affidavit of service dated 22nd September, 2018 and that the same was not opposed, the court allowed the application.
20. On 16th November, 2020, this court issued a Notice to show course why the suit should not be dismissed for want of prosecution under order 17 rule 2(1) of the Civil Procedure Rules 2010. The Notice was served upon firm of Oguttu, Ochwangi & Ochwal Advocates and the counsel representing the Defendants. On 5th March, 2021 when the matter came up for mention only a representative of the firm of Oguttu, Ochwangi & Ochwal Advocates appeared in Court. The said representative informed the court that their firm had been discharged from acting for the Plaintiff in the matter on 26th September, 2018 and requested that the Plaintiff be served in person.
21. The court therefore directed that the Plaintiff be served in person and the matter be mentioned on 27th April, 2021. Once again the Notices were erroneously served upon the former advocates who appeared in court and insisted that the Plaintiff be served in person. The Court once more directed that a Mention Notice be served by the court on the Plaintiff in person and the matter be mentioned on 27th May, 2021 for further directions. From the court record there is copy of a Notice bearing the stamp of the Plaintiff showing that indeed a Mention Notice was served on the Plaintiff on 27th April, 2021.
22. On 27th May, 2021, only the learned counsel for the Defendants attended court and thus the court directed that the matter be mentioned on 22nd July, 2021. On the said date, once again it was counsel for



the Defendants who appeared in court. Counsel for Defendants requested the court to grant him an opportunity to file the application for dismissal of the suit. The said application was subsequently filed.

23. From the above review of the proceedings in this matter, it is clear that this was a matter that was ripe for dismissal by this Court suo moto without even considering the merits of the application for dismissal by the Defendants and the response to the said application by the Plaintiff.
24. The Plaintiff having been served with a Mention Notice dated 27th April, 2021 for them to appear in court on 27th May, 2021 failed to do so. There is nothing that prevented this court from dismissing the suit under Order 17 Rule 2 (1) of the *Civil Procedure Rules*, 2010. The reason given for the failure to prosecute the Plaintiff's case cannot aid the Plaintiff an in indolent party who had already been given sufficient time to show cause why the suit should not be dismissed and failed to show such cause.
25. That being the position, this court cannot grant an application for stay by the Plaintiff on a matter that was set for dismissal as early as 27th May, 2021 for want of prosecution. The Plaintiff which personally received the said notice cannot be heard trying to shift blame to its former Advocates for its indolent. Furthermore, the Plaintiff has in its application for stay revealed that it has another matter, ELC Case No. 14 of 2014 which will substantially resolve the issues in dispute. It beats logic why this court should stay a matter whose resolution can be found in another case.

Conclusion

26. For the foregoing reasons and in the interest of justice, I allow the application for dismissal of this matter by the Defendants dated 19th October, 2021 and dismiss the Plaintiff's application for stay dated 15th November, 2021. The Plaintiff shall bear the costs of both applications.

Dated, signed and delivered at Kisii this 1st day of August, 2022.

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J.M ONYANGO

JUDGE

