**Okumu v Attorney General & 8 others (Environment & Land Case 55 of 2015) [2022] KEELC 12635 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12635 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE 55 OF 2015**

**AA OMOLLO, J**

**SEPTEMBER 28, 2022**

**BETWEEN**

**SYLVESTER OKUMU ........................................................................ PLAINTIFF**

**AND**

**ATTORNEY GENERAL ................................................................... 1ST DEFENDANT**

**EDWARD OSALO ............................................................................ 2ND DEFENDANT**

**CAROLINE AKINYI KHAGONDI ............................................... 3RD DEFENDANT**

**JUMA OGALE ................................................................................ 4TH DEFENDANT**

**DONATI OGALE ............................................................................ 5TH DEFENDANT**

**JONAY OJIAMBO .......................................................................... 6TH DEFENDANT**

**LAND REGISTRAR, BUSIA .......................................................... 7TH DEFENDANT**

**BOARD OF TRUSTEES, ST MARKS BUKIRI SECONDARY SCHOOL ................................................................................................ 8TH DEFENDANT**

**STANLEY OMALA NASOGA ....................................................... 9TH DEFENDANT**

**RULING**

1. The 8th defendant brought the present application under sections 1A, 1B and 3A of the *Civil Procedure Act* and order17 rule 2 of the *Civil Procedure Rules* on the August 25, 2021 hence the 8th defendant shall hereinafter be referred to as the applicant and the plaintiff be referred to as the respondent. The applicant prays for orders that:

   a) This suit be and is hereby dismissed with costs for want of prosecution;

b) That in the alternative, the suit against the 8th defendant be struck out as the 8th defendant is a non-legal entity;

c) Costs for the application be provided for.

2. The application was supported by the affidavit of Gabriel Fwaya dated August 25, 2022 and the following grounds;

a) That, the suit was commenced in 1992 and it is still pending;

b) That since 2019, now a period of over one year, there has been no step or action taken in this suit to have it heard or determined;

c) That the plaintiff has no interest in this suit;

d) That the 8th defendant, as sued is not a legal entity, thus lacks capacity;

e) That the pendency of this suit is prejudicial to the 8th defendant; and

f) That the relief sought meets the ends of justice.

3. The respondent filed his response to the application vide a replying affidavit filed on the February 18, 2022. He denied the allegations that he is no longer interested in the suit or that there has been no prosecution since the year 2009. He deposed that the suit was fixed for hearing on the March 24, 2020 but the hearing could not proceed because of the outbreak of the COVID-19 pandemic which affected the operations of the judiciary. He deposed further that he made several attempts to fix the matter for hearing and even got a mention date for the November 23, 2021. That the mention did not proceed due to the death of the 2nd defendant and the grant for letters of administration had not been made with respect to the estate of the deceased. On the issue of the 8th defendant not being a legal entity, the respondent opted to rely on the pleadings filed by the 8th defendant especially its statement of defence dated August 17, 2017 where it admit that it was properly sued in this suit. He prayed that this application be dismissed with costs as it had no merit.

4. The application was canvassed by way of written submissions with only the applicant filing his submissions on the June 10, 2022. He submitted that the respondent's replying affidavit explains the inaction on the account of the death of the 2nd defendant and the outbreak of COVID-19 yet he failed to disclose when the 2nd defendant passed and how the passing affected the setting down of the matter for hearing. The applicant submitted further that there was no COVID-19 between October 2019 and March 2020 and that even during the period of 2020 and 2021 cases were fixed for hearing and proceeded virtually despite the pandemic. That the respondent is using the pandemic as a mere excuse and has no sound reason for the delay.

5. On the issue of the 8th defendant not being a legal entity, the applicant submitted that the 8th defendant is a duly registered education institution and the legal entity is the Board of Management previously known as board of governors as mentioned in the respondent's submissions and pleadings cited. that the board of trustees is a non-legal entity and the plaintiff has never sought an amendment. The applicant urged the court to find that the application is merited and that the same should be allowed as prayed.

6. There are two issues for determination of this suit is whether the 8th defendant's name should be struck out from the pleadings for lack of capacity and secondly, the suit should be dismissed for want of

prosecution. Order 17 rule 2(1) of the *Civil Procedure Rules* governs the dismissal of suits for want of prosecution and provides as follows:-

> " 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."

7. The discretion of whether or not to dismiss a suit for want of prosecution lies with the court. This was discussed in the case of *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat and others & another* [2016] eKLR, the court stated as follows:

> " 11. Nonetheless, article 159 of the *Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:
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> > "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court." (underline mine for emphasis)

8. The present suit is already past the discovery stage and ought to have been heard on the March 24, 2020. The matter did not proceed on the said date because of the government's directive for closure of courts and other institutions to avert the spread of the covid-19 pandemic. I have looked at the record of the court file and note that at one point, the respondent already received a judgement in his favour which was set aside on April 6, 2014 at the instance of the 2nd, 4th and 5th defendants so that the blame of this matter being in court for too long is not solely the indolence of the plaintiff/respondent. Although the present suit was instituted in 1992, dismissing it at this stage will cause not only cause hardship but also an injustice to the respondent who would have been chased from the judgement seat. In the case of *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated 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."

9. On the issue of legality of the applicant, it is submitted that the respondent's omission to write "management" in place of "Trustees" makes the 8th defendant a non-legal entity. This court takes the

position that this is an omission that can be cured by an amendment and not necessarily striking out the party from the suit as envisaged under article 159 (2) of the *Constitution*. The power to strike out a party should however be approached with caution and the same should be allowed in the circumstances where there is no justified cause of action against a party. In the case of *DT Dobie and Company (K) Ltd v Joseph Mbaria Muchina & another* (1982) KLR 1 Madan JA stated thus-;

> "The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

10. In light of the foregoing, I find that the interests of justice lie in allowing the plaintiff/respondent to prosecute his claim. He is directed to expeditiously move to comply with the requirements of the law as regards the claim against the 2nd defendant and set down the matter for hearing. The matter to be mentioned on a date to be given during the delivery of this ruling for purposes of fixing a date for hearing. Accordingly, I decline to allow the application dated August 25, 2021, and proceed to dismiss it with no order as to costs.

**DATED, SIGNED & DELIVERED AT BUSIA THIS 28TH DAY OF SEPT., 2022.**

**A. OMOLLO**

**JUDGE**