



**Mosonik ((Suing as the administrator of the Estate of Andrew Kiprotich
Chepkwony Deceased)) v Changwony & another (Environment and Land Case
Civil Suit 25 of 2015) [2022] KEELC 13357 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 25 OF 2015
JM MUTUNGI, J
SEPTEMBER 27, 2022**

BETWEEN

**JUDITH CHERONO MOSONIK PLAINTIFF
(SUING AS THE ADMINISTRATOR OF THE ESTATE OF ANDREW
KIPROTICH CHEPKWONY DECEASED)**

AND

**DICKSON KIPKEMBOI KIPLAGAT CHANGWONY 1ST DEFENDANT
JOYCE JEPKEMBOI TOROITICH 2ND DEFENDANT**

RULING

1. Before me for determination is the 1st and 2nd defendants notice of motion application dated December 21, 2021 and filed on the same date seeking the following prayers:
 1. That the honourable court be pleased to order that the plaintiff's suit herein stands dismissed for want of prosecution pursuant to the provisions of order 17 rule 2(5) of the *Civil Procedure Rules* since the plaintiff has failed to move the court for a period of over two years one month from the date of last action taken in the matter.
 2. That the court be pleased to discharge its order issued on February 10, 2015 directing the registration of an inhibition on the defendants suit parcel title number Nakuru/Lengenet/792 and thereon the inhibition and/or any restrictions placed on the land register on behalf of the plaintiff in respect of the aforesaid suit parcel be removed forthwith.



3. That the costs of this application and costs of the dismissed suit be awarded to the defendants/applicants.
2. The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by Dickson Kipkemboi Kiplagat Changwony and Joyce Jepkemboi Toroitich. They averred that they are the joint registered owners of land parcel No Nakuru/Lengenet/792.
3. The applicants averred that the plaintiff filed her suit together with an application under certificate of urgency on February 3, 2015 and in response they filed their defence on March 16, 2015 together with their replying affidavit.
4. They further averred that on February 3, 2015 the court gave an order that was issued on February 10, 2015 directing that an inhibition be registered barring any disposition in the register of the suit property. The applicants stated that the matter was last in court on November 21, 2019 when the court delivered a ruling that directed the plaintiff to pay the 1st defendant costs of Kshs 71,425/= arising from a previous related matter which was Nakuru CMCC No 126 of 2014 which costs were to be paid before the plaintiff could proceed with the matter herein.
5. The defendants/applicants averred that the plaintiff neglected to comply with the said ruling of November 21, 2019 and the suit has not been prosecuted since that date. That a period of two years and one month had lapsed since the matter was last in court.
6. The defendants/applicants further averred that the court issued an order on February 10, 2015 which led to the registration of an inhibition on the land register of land parcel No Nakuru/Lengenet/792 and further that the plaintiff placed a restriction on the register of the suit parcel.
7. That as a result of the inhibition and restriction, the applicants aver that their rights of ownership of the suit property have been greatly curtailed and therefore the court should order for their removal.
8. The plaintiff filed a replying affidavit sworn on February 28, 2022 and filed on March 1, 2022. She deposed that she had previously fixed the matter for hearing on several occasions but for one reason or another, neither the defendants or the court were ready to proceed.
9. The plaintiff deposed that on November 21, 2019 the court on application by the defendants stayed the present suit until the plaintiff paid costs of the lower court which were in the sum of Kshs 71,425/= . She deposed that she is a widow with no source of income and that the effects of the Covid-19 pandemic affected her financial status.
10. She sought that the court allows her to prosecute the case as she looks for money to pay the said costs and sought to be given at least twelve months to repay the same in instalments.
11. The plaintiff filed a supplementary affidavit dated June 21, 2022 on June 27, 2022. She reiterated that the delay in prosecuting the matter was occasioned by the court order issued on December 19, 2019 that stayed the prosecution of the present suit until payment of costs of Kshs 71,425/=.
12. She deposed that she has since complied and paid the sum of Kshs 71,425/= to the firm of Kanyi Ngure & Co Advocates. She deposed further that the explanation she has advanced is sufficient explanation for the delay in prosecuting the matter and sought that the court exercises its discretion in her favour.
13. In conclusion, she stated that it is in the interest of justice that she be allowed to prosecute the matter so that it is determined on merit.



14. The application was canvassed by way of written submissions. The defendants/applicants filed their submissions dated May 5, 2022 on the same day while the plaintiff/respondent filed her submissions dated June 21, 2022 on June 22, 2022.
15. The defendants/applicants submitted that prior to the institution of this suit, the plaintiff/respondent had filed a similar case before the lower court against the 1st defendant which was Nakuru CMCC No 126 of 2014 that was withdrawn and costs of Kshs 71,425/= awarded.
16. The defendants/applicants submitted further that on November 21, 2019 the court gave orders that stayed the present suit until the costs owed to the 1st defendant was paid. It was the defendants contention that the plaintiff had lost interest in prosecuting the case since a period of over two years and one month had lapsed from the last time the matter was in court. Further, they argued, the plaintiff had neglected to comply with the ruling of November 21, 2019 and therefore the suit remained unprosecuted.
17. The defendants/applicants relied on order 17 rule 2 (6) of the *Civil Procedure Rules* and submitted that the plaintiffs suit stands dismissed and that the only avenue available is for the plaintiff to apply for reinstatement of the already dismissed suit.
18. The defendants/applicants relied on the cases of *Stephen M Kanui & 52 Others vs China Wuyi Co Ltd* [2022] eKLR and *Patrick Mukiri Kabundu vs Nation Media Group Limited* [2022] eKLR in support of their arguments. The defendants/applicants also relied on the case of *Deborah Anyango Mulaha vs Simon Mburu Gachuhi* [2007] eKLR where the court held as follows:

“...I am satisfied that the plaintiff is not interested in her suit. That a period of 3 years without any action on file is not required for the court’s permission to dismiss a suit. A suit is automatically dismissed upon the judges orders without notice to any of the parties (order XVI Civil Procedure Rules). If the suit is still within the limitation of action time a party may file a fresh suit...As it stands no action having been taken, this suit stands dismissed. The application of December 13, 2006 be and is hereby allowed with costs to the defendant of this application and the main suit,” (emphasis added)

19. The plaintiff/respondent submitted that the power to dismiss a suit for want of prosecution under order 17 in a matter that is within the discretion of the court. She relied on the case of *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium vs MD Popat and others & another* [2016] eKLR where the court stated as follows:

“ 11. Nonetheless, article 159 of the Constitution and order 17 rule 2(3) give 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 vs Kyumbu* [1984] KLR 441 [1984] KLR 441 espoused that:

“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."

20. The plaintiff/respondent further submitted that she has always been willing to prosecute the case and reiterated that the reasons for the delay was attributed to the order issued by the court on November 21, 2019 which barred the plaintiff from prosecuting the case until payment of costs of Kshs 71,425/=.
21. She submitted further that the delay in the payment of the costs was as a result of the difficult times caused by the Covid – 19 pandemic and that the said amount has already been paid.
22. The plaintiff/respondent relied on the case of *George Gatere Kibata vs George Kuria Mwaura & another* [2017] eKLR and submitted that in determining an application for dismissal of a suit for want of prosecution, the court is called upon to consider other factors other than those imposed by the law and that the court should also consider the conduct of the parties. The plaintiff/respondent further submitted that she is desirous to prosecute the matter to its logical conclusion.
23. The plaintiff/respondent further submitted that the court's power to dismiss the suit is discretionary and that the court should keep in mind that dismissal of a suit on any ground without according a party a substantive hearing violates the principles of natural justice and may occasion irreparable harm to a party.

Analysis and Determination

24. After considering the application, the affidavits and the submissions, the singular issue that arises for determination is whether the delay in prosecuting the suit on the part of the plaintiff has been unexplained, unreasonable and in excusable to warrant the dismissal of the suit for want of prosecution.

Order 17 rule 2 of the *Civil Procedure Rules* 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."

25. In the present matter, it is a fact that the court on November 21, 2019 made an order staying the prosecution of the suit until the costs of a previous suit in the sum of Kshs 71,425/= awarded to the 1st defendant were paid. The court did not fix a time limit within which the costs were to be paid. The plaintiff therefore could not prosecute the suit until she had paid the costs. The plaintiff in her replying affidavit explained that she was unemployed and had no source of income and relied on



subsistence farming to feed for herself and her family. She further explained her situation was worsened by the outbreak of the Covid-19 pandemic during 2020. She stated she had been eager to prosecute her suit save for the order staying the suit and the requirement that she pays the costs of Kshs 71,425/= before she could prosecute the suit. Through the supplementary affidavit sworn on June 21, 2022 she affirmed she had complied with the order and had paid the sum of Kshs 71,425/= to Kanyi Ngure & Co Advocates for the defendants on June 8, 2022. The plaintiff sought the court's indulgence to prosecute the suit for a determination to be made on merit in the interest of justice.

26. I have considered the defendants application and the plaintiff's response thereto and I am persuaded the plaintiff has offered a reasonable explanation as to the cause of the delay in prosecuting the suit. I note there was in force an order of stay in force barring any action towards the prosecution of the suit until the plaintiff had paid the costs of Kshs 71,425/= awarded in a previous case. I do take note that Covid-19 impacted and disrupted people's lives including revenue sources and that during 2020/2021 when the pandemic ravaged the country it is probable that the plaintiff was affected.
27. The fact that the plaintiff has since paid the costs, notwithstanding that the same was paid during the pendency of the instant application is a demonstration that the plaintiff is interested in the suit and wants to have her day in court. In the interest of fairness and doing justice to all the parties, it is my view that the matter should be allowed to proceed to trial to be heard and determined on merit.
28. Consequently, I dismiss the defendants notice of motion dated December 21, 2021 and order that the costs of the application shall abide the outcome of the suit.

RULING DATED SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF SEPTEMBER 2022.

J M MUTUNGI

JUDGE

