



Chiro & 3 others v Kamimi Company (1976) Limited & 4 others (Environment & Land Case 232 of 2014) [2022] KEELC 4806 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 232 OF 2014
JO OLOLA, J
SEPTEMBER 22, 2022**

BETWEEN

**MTSONGA KABILA CHIRO 1ST PLAINTIFF
KHAMIS MOHAMED 2ND PLAINTIFF
EMMANUEL FADHILI JEFWA 3RD PLAINTIFF
ESTHER TSORAMBA TSULU (ALL SUING ON BEHALF OF THEMSELVES
AND THE OTHER MEMBER OF BARANI POLE POLE SELF HELP
GROUP) 4TH PLAINTIFF**

AND

**KAMIMI COMPANY (1976) LIMITED 1ST DEFENDANT
MTWAPA HOLDINGS LIMITED 2ND DEFENDANT
KABIBI HOLDINGS LIMITED 3RD DEFENDANT
AYEM INVESTMENTS LIMITED 4TH DEFENDANT
BAJABER LIMITED 5TH DEFENDANT**

RULING

1. By the notice of motion dated and filed herein on March 20, 2021, Bajaber Limited (the 5th defendant) prays for an order that this suit be dismissed for want of prosecution. The application which is supported by an affidavit sworn by Swaleh Bajaher, a director of the 5th defendant company is based on the grounds that:
 - (a) This court gave orders on May 27, 2020 requiring the plaintiffs to take steps to prosecute the matter and fix the same for directions and hearing within 60 days but the plaintiffs have totally failed, refused and/or neglected to comply with the orders;



- (b) The plaintiffs have refused, neglected and/or otherwise failed to take other steps to prosecute this matter for a period of over 3 years since the last court attendance;
 - (c) The delay is inordinate and inexcusable;
 - (d) The 5th defendant/applicant continues to suffer irreparable damage as the plaintiffs are enjoying the consensual orders to have the status quo maintained. The said orders are being misused/violated by the plaintiffs as they are wantonly wasting the suit property;
 - (e) The delay in prosecution of the suit is clear evidence that the plaintiffs have no interest in the suit whose pendency is prejudicial to the 5th defendant who is the registered proprietor of the suit property; and
 - (f) It is in the interest of justice that this court grants the orders sought in the application.
2. The application is opposed. In a replying affidavit sworn and filed herein on April 29, 2021 by their Advocate on record Robinson O Malombo, the plaintiffs aver that the delay in prosecuting the suit was not intentional and inordinate given the history of this matter where a number of applications have been filed and determined.
 3. The plaintiffs aver that the main dispute between the parties still exists to-date and urge the court to have the matter determined on merit rather than to terminate the same. The plaintiffs further aver that they have orally been pursuing settlement of the dispute with the 5th defendant's Advocates with a view to reaching an amicable settlement. They aver that the defendants should not seek dismissal of the suit while knowing the existence of such discussions and the possibility of settlement.
 4. I have carefully perused and considered both the 5th defendant's application as well as the response by the plaintiffs. I have similarly considered the rival submissions and authorities placed before me by the learned Advocates representing the parties herein. The 1st respondent indicated through their counsel on record that they were not opposed to the application.
 5. Order 17 rule 2(1) of the [Civil Procedure Rules](#) which governs dismissal of suits for want of prosecution 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.”
 6. Further, Order 17 rule 2(3) of the [Civil Procedure Rules](#) upon which this application is premised provides that:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1.”
 7. As Chesoni J (as he then was) stated in *Iriba vs Kyumbu* (1984) KLR 441:

“The test applied by the courts in an 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 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 available time. It is a matter in the discretion of the court.”



8. As it were, it was not in dispute that the plaintiffs instituted this matter *vide* an originating summons filed herein on December 11, 2014. Neither was there a dispute that the parties herein have since September 19, 2017 never taken any steps to prosecute the suit herein. On that particular day, this court did dismiss an application dated February 6, 2017 brought by the 5th defendant herein wherein it sought orders of injunction restraining the plaintiff from trespassing upon the suit property.
9. The said application was dismissed after the court noted that there were orders issued in the matter on December 29, 2014 binding the parties to maintain *status quo*. Thus by the ruling rendered on the said 19th day of September 2017, the parties were directed to continue maintaining the *status quo* until the matter was heard and determined.
10. It was however apparent to me that the orders extending the *status quo* had had the effect of sending the plaintiffs to sleep. I say so because some two years after those orders were issued, the plaintiffs had not taken any steps to prosecute their suit. By a similar application dated March 18, 2019, the 5th defendant/applicant sought to have the suit dismissed for want of prosecution.
11. In response to that application for dismissal of their suit, the plaintiffs while conceding that no steps had then been taken to prosecute the suit for more than a year, asserted that no prejudice had been visited upon the 5th defendant and urged the court to allow them time to fix the matter for hearing on its merit.
12. In a ruling delivered herein on May 27, 2020, this court acceded to the plaintiffs' request and declined to dismiss the suit for want of prosecution on condition that the plaintiffs would fix the matter for directions and schedule the same for hearing within 60 days.
13. Some 10 months down the line, the plaintiffs had not complied with the court's orders and the 5th defendant brought this application seeking the dismissal of the suit for a second time. The plaintiffs have in the replying affidavit filed on their behalf by their Advocate not given any cogent reason why the orders of the court were not complied with. Instead, they exhort the court to strive to sustain rather than terminate suits.
14. As Gikonyo J stated in *Fran Investment Limited vs G4S Security Services Limited* (2015) eKLR:

“It is well understood and a legal reality that dismissal of a suit without hearing it on merit is such a draconian act. But that reality should be checked against yet another equally constitutional demand that cases should be disposed of expeditiously, which is founded upon the old adage and now an express constitutional principle under article 159 of the *Constitution*, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the plaintiff.”
15. In the matter herein, the 5th defendant had first sought to have the plaintiffs suit dismissed for want of prosecution in the year 2019. By that time the suit had not been prosecuted for two (2) years. In response to that application, the plaintiffs sought to be granted time to fix the matter for hearing. This court granted them the time they requested and gave them two (2) months to do so. Some ten (10) months down the line, they were yet to comply with the orders and I find no justification whatsoever why this court should again extend its discretion in their favour.
16. From the material placed before me, it is apparent that the suit property being claimed by the plaintiffs is registered in the name of the 5th defendant. The orders of *status quo* granted herein have ensured that the plaintiffs continue to remain on part of the land and it is evident that the plaintiffs are not in a hurry



to prosecute the suit. The existence of the suit unprosecuted since the year 2014 is certainly prejudicial to the registered owner as the owner may not deal with the property in the manner it desires.

17. It follows that I am persuaded that the delay in prosecuting the suit is inordinate and that the 5th defendant has suffered unnecessary prejudice. Accordingly I allow the motion dated March 30, 2021 and hereby dismiss the plaintiffs suit for want of prosecution with costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:

Ms Sidinyu holding brief for Malombo for the Plaintiff/Respondent

No appearance for the defendant/applicant

Court assistant - Kendi

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J. O. Olola

JUDGE

