



**Pasha Enterprises Limited v Kenya Farmers Association Ltd & another; County Government of Machakos (Interested Party/Respondent) (Environment & Land Case 130 of 2015) [2022] KEELC 13741 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13741 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 130 OF 2015  
A NYUKURI, J  
OCTOBER 19, 2022**

**BETWEEN**

**PASHA ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**KENYA FARMERS ASSOCIATION LTD ..... 1<sup>ST</sup> DEFENDANT**

**JANE ITEMBE ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS .... INTERESTED PARTY/  
RESPONDENT**

**RULING**

**Introduction**

1. Vide a notice of motion dated October 5, 2021, the plaintiff/applicant sought for the following orders;
  - a. Spent
  - b. That this honourable court be pleased to issue orders dismissing the application dated February 6, 2019 for want of prosecution by the defendants and thereby set aside the ex parte orders made herein on February 7, 2019 staying the execution of decree.
  - c. That costs be provided for
2. The application is premised on the supporting affidavit sworn by Samuel Kimondo Theuri, the plaintiff's managing director. The applicant's case is that although this suit was determined in their favour, the defendant filed the application dated February 6, 2019 seeking stay of execution whereof ex parte interim orders were made on February 7, 2019. Further, that on February 13, 2020, the court



directed parties to file submissions in respect of the said application but the applicant failed to comply. The applicant contends that unless the orders of February 7, 2019 are set aside and the application dismissed for want of prosecution, they will not be able to enjoy the fruits of the judgment.

3. The application was opposed. The defendants filed a notice of preliminary objection and a replying affidavit sworn by Symon K Cherogony, the managing director of the 1<sup>st</sup> defendant; both dated October 28, 2021 and filed on October 29, 2021. The defendant's preliminary objection is based on grounds that the application is bad in law, fatally defective, incompetent and an abuse of the court process. He also states that this court has no jurisdiction to entertain the application and that the law does not envisage any such application.
4. In the respondent's replying affidavit, it was averred that the defendants have always been keen to prosecute the application dated February 6, 2019. They further stated that there were other applications dated July 27, 2019, January 28, 2019, March 5, 2019 and October 28, 2019, which had been ordered to be determined first, which delayed the prosecution of the application dated February 6, 2019. In conclusion, the respondents stated that the application herein was strange, unknown in law and an abuse of the court process.
5. The court directed that both the application and the preliminary objection be heard and determined together and further directed that the same be canvassed by written submissions. On record are the plaintiff/applicant's submissions dated March 7, 2022.

### **Submissions**

6. Counsel for the applicant submitted that the application was properly before court and that this court has jurisdiction to determine the same by dint of order 17 rule 2 of the *Civil Procedure Rules*, which empowers the court to dismiss a suit for want of prosecution where no step is taken for a period of one year. Counsel relied on the case of *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v MD Popat & Others [2016] eKLR* for the proposition that the court has discretion to dismiss a suit for want of prosecution if there is unexplained delay in the prosecution of the same.
7. It was further submitted for the applicant that judgment herein was entered on January 31, 2019 and on February 13, 2020 this court directed the respondents to file a response and thereafter for parties to file submissions. Counsel argued that the pendency of an application for recusal of the judge was overtaken as the judge had long been transferred from the station, hence the same could not be an excuse in the delay of the prosecution of the application dated February 6, 2019.
8. It was also contended that there was no explanation given by the respondents why there was delay in prosecution of the application dated February 6, 2019. Reliance was placed on the case of *Mukavi Ways Co Ltd vs Family Bank Limited [2020] eKLR* for the proposition that although dismissing a suit without hearing it on merit is draconian, yet the constitutional demand that cases should be disposed of expeditiously must also be taken into account.
9. In conclusion, counsel argued that the preliminary objection was not based on a point of law and therefore the same ought to be dismissed and the instant application allowed.

### **Analysis and determination**

10. The court has considered the application, the supporting affidavit, the replying affidavit, the preliminary objection and the submissions. It is the view of this court that the issues that emerge for determination are as follows;
  - a. Whether the preliminary objection is merited, and;



- b. Whether the applicant has met the threshold for grant of the orders sought.
11. It is a settled legal principle that a preliminary objection must be based on a pure point of law, where the facts relied upon are not in dispute. (See *Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) EA 696*). Besides, a preliminary objection ought to be precise as to the specific point of law raised.
  12. Having considered the preliminary objection herein, I note that the same stated that the application was bad in law and incompetent; that this court lacks jurisdiction and that the application is not envisaged under the law. The same did not refer to any specific law that the instant application had violated. In my view, the preliminary objection raised by the respondent is vague and couched in general terms, having no reference to any specific law and therefore the same is not a proper preliminary objection. The same is hereby dismissed for lack of specificity.
  13. Turning to the application, I note that the applicant sought for dismissal of the application dated February 6, 2019 on grounds that three years had lapsed without the defendants having prosecuted the said application.
  14. Having considered the record, I note that before the application sought to be dismissed for want of prosecution was filed, there were already two other pending applications; namely, the applications dated October 28, 2018 and March 5, 2019. On March 7, 2019, this court ordered that the two applications be heard first.
  15. The record also shows that the application dated March 5, 2019 was determined on July 26, 2019. Further, the application dated October 28, 2018 was scheduled to be heard on May 19, 2020, but on the said date the court noted that the matter was not listed due to covid-19 pandemic. Therefore, the court extended interim orders until the application dated October 28, 2018 is heard.
  16. Therefore, the record clearly show that this matter was active and that there were other applications which were given priority by the court. It is therefore not correct that the defendants failed to prosecute their application as argued by the plaintiff. Where a party files a proceeding and fails to prosecute the same, this court has inherent power to order its dismissal if there is no explanation why the same has not been prosecuted, as the court will not be helpless where a party files a proceeding and fails to prosecute the same for no reason. However, in the instant matter, the respondent has satisfactorily explained that there were other applications which were prioritized by the court, which explanation is excusable.
  17. In the premises, the application dated October 5, 2021 lacks merit and the same is hereby dismissed with costs.
  18. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Ms Magana for the Respondents

No appearance for the Applicant

Ashley – Court Assistant

