Gichura v National Land Commission & 2 others (Civil Suit 96 of 2017) [2022] KEELC 13629 (KLR) (11 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13629 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 96 OF 2017

LL NAIKUNI, J

OCTOBER 11, 2022

BETWEEN

JAMES NJIHIA GICHURA ..... PLAINTIFF

AND

NATIONAL LAND COMMISSION ..... 1ST DEFENDANT

KENYA RAILWAYS CORPORATION ..... 2ND DEFENDANT

CHINA ROAD & BRIDGE CORPORATION LIMITED ..... 3RD DEFENDANT

RULING

I. Introduction

1. The 3rd defendant/applicant – China & bridge Corporation (K) Limited, moved this honorable court seeking its determination onto a notice of motion application dated November 19, 2021. It is brought under the provisions of order 17 rule 2 and order 2 rule 15 (1)(a) of the *Civil Procedure Rules, 2010*.

II. The 3rd Defendant/Applicant's Case.

2. The application by the 3rd defendant/applicant seeks for the following orders: -

    a. This suit be dismissed for want of prosecution.

    b. In the alternative, the claim against the 3rd defendant be struck out and dismissed because the plaint dated March 22, 2017 does not disclose any reasonable cause of action against the 3rd defendant.

    c. Costs

4. The 3rd defendant/applicant's application is premised on the testimonial facts, grounds and averments made out under the six (6) paragraphed supporting affidavit of Jude Obiero sworn and dated on

November 19, 2021. She deponed being the legal officer of the 3rd defendant/applicant had been duly authorized by the said 3rd defendant/applicant to swear the affidavit for and on its behalf. She held understanding the contents of the filed plaint dated March 22, 2017 and being guided by Mr Antony Masila advocate, the counsel in conduct of the matter for the 3rd defendant/applicant herein.

5. She deponed that this suit ought to be dismissed for want of prosecution for the very reason that the plaintiff had never taken any steps on record to prosecute the case todate since July 17, 2017 when the court delivered the ruling with respect to the interlocutory application for the interim injunctive orders dated March 22, 2017. She contended that the delay of four (4) years and eight (8) months from March 22, 2017 to date was unreasonable and undue inordinate. She averred that the delay had prejudiced the 3rd defendant/applicant herein taking that they had been unable to trace and avail its former workers who scattered after the 3rd defendant/applicant completed construction of the Standard Gauge Railway (SGR) phase 1 from Mombasa to Nairobi.

6. Additionally, she deponed that the said filed plaint never discloses a reasonable cause of action against the 3rd defendant/applicant taking that under paragraph 5 of the plaint pleads that the plaintiff was the legal and absolute registered owner of all that parcel of land known as Mbololo/Tausa/4546. The plaintiff under paragraph 6 pleads that a portion of the land was repossessed by the 1st defendant for the construction of the Standard Gauge Railway. Prayer (a) sought a declaration that portion that remained after the acquisition of the said portion belonged to the plaintiff and the 3rd defendant/applicant had no lawful claim. But the argued that the 3rd defendant/applicant herein had never made nor were they making any claim over the said portion of land as alleged from the pleadings. It was a matter of public knowledge and general notoriety that the 3rd defendant/applicant herein was only contracted by the 2nd defendant to construct the Standard Gauge Railways phase 1 from Mombasa-Nairobi. The dutifully and successfully undertook it. Indeed, the project was completed and launched by His Excellency President Uhuru Kenyatta in 2017 and the 3rd defendant discharged from the construction contract.

7. She deponed that the 3rd defendant/applicant was neither involved in the compulsory acquisition of land nor the compensation of compulsorily acquired land which was the mandate vested on the 1st defendant by the provisions of the *Constitution* of Kenya , 2010 and the *Land Act*, No 3 of 2012.

8. In the circumstances, she averred that having the presence and participation of the 3rd defendant/applicant in these proceedings was not necessary and its inclusion would only derail the expeditious disposal of the suit contrary to the overriding objectives of the court.

III. Submissions.

9. On May 19, 2022 while in the presence of all the parties, the honorable court directed that the notice of motion dated November 19, 2021 be disposed of by way of written submissions. Pursuant to that all parties fully complied. The ruling was to be on notice.

A. The 3rd Defendant's Written Submissions

10. On May 26, 2022, the law firm of Messrs Sina Law advocates for the 3rd defendant filed their written submissions dated May 25, 2022. Mr Mwai advocate, the counsel submitted that the 3rd defendant's application dated November 19, 2021 seeking to dismiss the entire suit for want of prosecution.

The learned counsel submitted that they relied upon the following documents on records:-

a. The 3rd defendant's notice of motion application dated November 19, 2021 and filed on November 22, 2021, together with the accompanying supporting affidavit sworn by Jude Obiero on November 19, 2021.

b. The list of documents by the defendant and list and bundle of authorities dated May 25, 2022.

10. Evidently, he argued that the plaintiff had lost interest in his case as he had failed to take any tangible steps towards fixing it for hearing and disposal for over four (4) years since the last time it was ever before this court on July 17, 2017 without any satisfactory reason. The learned counsel held that despite having been properly served, the plaintiff had never bothered to file any replies to the application. Thus, the application remained unopposed.

11. The learned counsel submitted that the operative provision on this matter was under order 17 rule 2(1) of the *Civil Procedure Rules* which provided that:

> " 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".

12. The learned counsel submitted that according to the 3nd defendant the application raised the following issues for this honourable court to determine:

i. Whether the plaintiff had taken any step(s) to prosecute this suit for one (1) year?

ii. Whether the plaintiff had offered any plausible explanation for failing to take steps in the suit for more than four (4) years?

iii. Whether the defendant would suffer prejudice if the suit was dismissed?

13. On the issue of whether the plaintiff has taken any step(s) to prosecute this suit for one (1) year, the learned counsel submitted that the plaintiff has failed to take any steps to prosecute this suit for more than one (1) year because the record shows that this matter was last in court on July 17, 2021 when the court delivered its ruling on the application dated March 22, 2012 for interim injunctive orders as indicated under paragraph 3 of the 3rd defendant's supporting affidavit. The plaintiff had neither made any application nor taken any steps to prosecute the suit for four (4) years and eight (8) months since the July 17, 2021. The plaintiff had not filed any affidavit to controvert this averment and it therefore remained admitted. To buttress this point the leaned counsel relied on the case of:- "*Andrian Kithinji Mungania v Japhet R Nkonge Auctioneers & another* [2013] eKLR, whereby the High Court held:

> " That averment has not been controverted because the 1st respondent despite being served with the application has not filed any affidavit to controvert the statement made in the applicants affidavit. Those averments remain unchallenged it is trite law that any statement of fact which is not controverted by the opponent is deemed to be admitted. I find that the 1st respondent has not controverted the statement...."

14. The learned counsel emphasized that the period of four (4) years and eight (8) months constituted an inordinate delay which exceeded the requisite threshold of one (1) one year expected and required for dismissing a suit as stated under the provision of order 17 rule 2(1) of the *Civil procedure Rules, 2010*.

15. On the issue of whether the plaintiff had offered any plausible explanation for failing to take steps in the suit for more than four (4) years, the learned counsel submitted that the plaintiff had not offered any satisfactory *bona fide* reason or at all for failing to take steps for over four (4) years to have this matter

resolved expeditiously. In the first place, the plaintiff had not filed any replying affidavit to explain why he had failed to prosecute the case for four (4) years. On that basis alone, it was clear that the plaintiff had no reason, let alone a plausible one, on record to excuse the plaintiff's laxity.

16. The learned counsel submitted that in any event, they noted that the plaintiff was represented by an advocate in this case. Nonetheless, the plaintiff had a duty to show interest, take steps and follow up on its case, irrespective of whether or not it was represented by an advocate. The counsel cited the Court of Appeal case in "*Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR held that:

> "It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel. (emphasis theirs)

17. The learned counsel submitted that the plaintiff litigant himself had not adduced any evidence to explain the steps it had taken in this suit for the past four (4) years. It would therefore not also be enough to blame his advocates for the delay in prosecuting this suit. He further relied on the case of "*Rajesh Rughani v Fifty Investments Limited & another* [2016] eKLR where the Court of Appeal pronounced itself thus:

> "It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay. It is our considered view that the judge did not err in finding that the delay was not only inordinate but unexplainable."

18. The learned counsel submitted that it followed that the plaintiff had not tendered any satisfactory explanation to this court for failing to take steps in this suit. The plaintiff's unjustified delay in prosecuting the suit for four (4) years and eight (8) months therefore remains inexcusable.

19. On the issue of whether the 3rd defendant/applicant would suffer prejudice if the suit the was not dismissed the counsel submitted that the pendency of the suit was causing serious prejudice to the 3rd defendant/applicant as the defendant could not continue with its business with certainty because of the anticipated and uncertain outcome of the suit. The 3rd defendant was unable to trace and avail its former employees as witnesses as they dispersed after the completion of the SGR project. (In paragraph 3(c) of the defendant's supporting affidavit).

20. The learned counsel submitted that the delay also defeated the overriding objective of the court under the provision of section 1A of the *Civil Procedure Act*, cap 21 to ensure efficient and timely resolution and disposal of disputes. The plaintiff filed this case in 2017, over five (5) years ago. it would seriously prejudice the defendant should the court decline to dismiss this stagnant suit. He cited the case of "*Jacob Nyaga v Njeru Kinanda* [2017] eKLR, the ELC dismissed a suit, holding that:

> "The suit herein was filed in 2011 which is about six years ago. The court is not satisfied that a fair trial can be had after such passage of time without occasioning prejudice to the defendant...the same is hereby dismissed in its entirety with costs to the defendant."

21. In conclusion, the learned counsel contended that they had demonstrated that all the ingredients of dismissing a suit exist, which ingredients the High Court in "*Canuk Holdings Limited v Pramod Patel t/a Pramod Patel Advocate* [2020] eKLR laid down as follows:

> "Notably, a court should only dismiss a matter where all the three (3) ingredients to wit, inordinate and inexcusable delay and prejudice to an opposing party exist. If one (1) ingredient is absent, a court should lean towards saving a suit for determination on merit. In the case herein, all the ingredients were present."

22. He reiterated that the plaintiff simply filed this case, sat pretty and remained in his comfort zone even after the 3rd defendant filed the present application to dismiss the suit. In fact, when the application came up for hearing on May 19, 2022, the plaintiff failed to attend court despite being served with the hearing notice. They therefore urged the court to dismiss the suit in its entirety with costs to the 3rd defendant.

B. The 2nd Defendant's Written Submissions

23. On May 26, 2022, the law firm of Messrs Ndegwa Katisya Sitonik & Associates advocates for the 2nd defendant filed their written submissions dated May 26, 2022. Mr Sitonik, the learned counsel submitted that the 2nd defendant supported the application dated November 19, 2021 seeking to dismiss the suit for want of prosecution and wholly adopts the 3rd defendant's submissions dated May 25, 2022 on the said application.

24. The learned counsel submitted that the entire suit should be dismissed, and the 2nd defendant be awarded costs for the reason that the 2nd defendant had incurred expenses and time to participate in this suit by filing the memorandum of appearance dated April 20, 2017 and filed on April 21, 2017, filed the defence dated April 28, 2017 and filed on May 9, 2017. They also filed the replying affidavit sworn by Erastus Chege on May 29, 2017 and filed on May 29, 2017 respectively.

25. The learned counsel submitted that in any event, it was trite law that costs should follow the event and provided for the provision of section 27(1) of the *Civil Procedure Act*, 2010 which provided that: "Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

26. The learned counsel submitted that the Supreme Court fortified this position in the case of "*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR thus:

> "so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

27. The learned counsel submitted that the Supreme Court in that case proceeded to conclude that:

> "It emerges that the award of costs would normally be guided by the principle that 'costs follow the event': the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails."

28. The learned counsel concluded by submitting that consequently, they urged the court to allow the 3rd defendant/applicant's notice of motion application dated November 19, 2021 by dismissing the entire suit and awarding the 2nd defendant costs for defending this suit.

III. Analysis and Determination

29. I have considered all the pleadings in this matter arisen from the bounds of the notice of motion application dated November 19, 2021 by 3rd defendant herein wanting to have the suit dated March 22, 2017 by the plaintiff dismissed for want of prosecution, the grounds adduced thereof and the articulate written submissions by the parties herein the cited authorities to boot and the relevant provisions of the law.

30. In order to arrive at an informed, just and fair decision, I have framed the following three (3) issues for determination these are: -

    a. Whether the notice of motion application dated November 19, 2021 by the 3rd defendant against the suit by the plaintiff meets the required fundamental standards enshrined under the provision of order 17 rules 3(1) and (2) of the *Civil Procedure Rules 2010*.

    b. Whether the parties are entitled to the relief sought.

    c. Who should meet the costs of the notice of motion application dated November 19, 2021.

Issue No. (a) Whether the notice of motion application dated November 19, 2021 by the 3rd defendant against the suit by the plaintiff meets the required fundamental standards enshrined under the provision of order 17 rules 3(1) and (2) of the *Civil Procedure Rules 2010*.

Brief Facts.

31. Before embarking on the analysis of the issue under this sub – heading, the honorable court feels significant to extrapolate of the facts of the case briefly so that all concerned parties are on the same level on this matter. The suit was instituted through a plaint dated March 22, 2017 together with a notice of motion application seeking injunction orders by the plaintiff against the 1st, 2nd and 3rd defendants. In particular, the plaintiff targeted the 2nd defendant and all that parcel of land known as parcel No Mbololo/Tausa/4256 other than the 0.5787 hectares portion already acquired and for which the plaintiff had been compensated pending hearing the determination of the application. This was close to five (5) years ago. The honorable court granted interim orders. being aggrieved by the said ruling the petitioner preferred an appeal at the Court of Appeal. Todate, the said appeal was still pending hearing and final determination by the said superior court. The plaintiff sought several reliefs from the filed suit.

32. The 3rd defendant contended that the plaintiff had not taken any steps on record to prosecute the case since July 17, 2017 when the court delivered the ruling with respect to the application for injunction dated March 22, 2017. There had been a delay of four (4) years and eight (8) months as per the time the application was filed by the 2nd defendant. In addition, the plaint dated March 22, 2012, the plaintiff did not disclose any reasonable cause of action against the 3rd defendant. For these reasons, the 3rd defendant wanted the entire suit dismissed for want of prosecution. This position was supported by the 2nd defendant. That is adequate for the brief facts so far.

33. Now turning to the issue under this sub-heading. The legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assists in clearing backlogs in court and the ever-increasing

over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – 'justice delayed is justice denied' and "equity does not aid the indolent". Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should be inordinate. Unreasonable and inexcusable as that would be doing grave injustice to one side or the other or both and in such circumstance, the honorable may in its discretion dismiss the action straight away.

34. The provisions of order 17 rule 2 (3) of the *Civil Procedure Rules, 2010* provides this: -

1 (1). Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment

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.

3). any party to the suit may apply for its dismissal as provided in sub-rule 1".

3. Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by order 12, or make such other order as it thinks fit.

35. In order for these legal principles to be applicable the following need to be demonstrated: -

a. That no application has been made or step taken by either party for one (1) year from the time of filing the suit and

b. That the respondents have failed to comply with the directions of the court clearly.

Clearly, the powers granted to court hereby by law are discretionally and have to be exercised judicially, fairly and capriciously.

36. In so doing, the test applied by court in the application for dismissal of suits for want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. In other words, if the delay is satisfied with the plaintiff's excuse for the delay and the parties are still keen and interested in pursuing their matter going forward in the fullness of time, justice can still be done to the parties before court, and hence the action would not be to dismiss it but direct that it be heard at the earliest time possible and available.

37. This court on the legal ratio of order 17 (2) (3) of the *Civil Procedure Rules, 2010* relies on the decision of "*Investment Limited v G4S Security Services Limited* (2015) eKLR where court held:

> " This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of article 159 of the Constitution of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "sword of the damocles". But in reality, should be checked against yet another equally important constitutional demand that case should be disposed of expeditiously, which is founded upon the old adage and now an express constitutional principle of justice under article 159 (2) of the Constitution of Kenya that justice delayed is

justice denied. Here I am reminded that justice is to all the parties not only to the plaintiff. This is the test I shall apply.

Issue No (b). Whether the parties are entitled to the relief sought.

38. From the surrounding facts, the inferences and the legal principles founded on order 17 rule 2 (3) of the *Civil Procedure Rules 2010*, is graphically clear to the effect that the suit was filed on March 23, 2017 by the plaintiff. The plaintiff is the owner of the parcel of land known as Mbololo/Tausa/4256 which measured 1.30 ha. The 1st defendant acquired 0.5787 ha thereof for the 2nd defendant for purposes of the construction of the SGR. The applicant was since compensated for the said portion. The 2nd defendant has inexplicably and for no known reason, unlawfully and unconscionably demanded that the applicant pull down the structures on the uncompensated remainder and vacate the same. To that end, it has commenced the destruction of properties along the SGR.

39. This honorable court is anxious to know the substantive reason the plaintiff has prolonged the fixing of the suit for over four (4) years eight (8) months certainly the delay is inexcusable, inordinate and unreasonable at the chagrin of the defendants. The plaintiff's action has definitely caused the defendants agony, anguish and frustrations for no apparent good reasons. The court has not been shown any order in form of stay of proceedings from the Court of Appeal which would bar this matter from proceeding to the logical conclusion. Orders of stay of proceedings or execution are not mere formalities as they are intended to serve a specific purpose of proceedings of case.

40. This honorable court takes judicial notice to the fact that old and delayed matters still pending before this court are now being addressed so mechanically. These cases seem to have stagnated and stalled at the behest of the parties. In the recent past, cognizance will be taken that these categories of cases are having notices to show cause under order 17 rule 2 (1) of the *Civil Procedure Rules* as a wakeup call being issued and listed in the daily cause list and the judges service week activity all intended to clear them from unnecessarily clogging the judiciary system. The decision is working marvelously and borne positive robust results whatsoever.

41. For this very reason the application must succeed and the plaintiff's suit be considered for dismissal for want of prosecution.

Issue No C Who should meet the costs of the notice of motion application dated November 19, 2021.

42. It is trite law that issues of costs are discretionary. Costs mean an award granted to a party after the conclusion of any legal action, process and proceedings of any litigation. The provision of section 27 (1) of the *Civil Procedure Act*, cap 21 holds that costs follow the events. This court fully concurs with the learned counsel for the 2nd defendant while citing the Supreme Court decision of "*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR and its ratio thereof on the matter of costs.

43. In this case, as court finds that the 1st, 2nd & 3rd defendants through the efforts made by the 3rd defendant/applicant through filing of its application dated November 19, 2021 have succeeded. In my view, they are fully entitled to costs to be borne by the plaintiff/respondent herein accordingly.

IV. Conclusion and Disposal.

44. Ultimately, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application I find that the notice of motion application dated November 19, 2021 by the 3rd defendant/applicant has merit and should be and is hereby allowed with costs. I therefore order as follows:-

a. Thatthe notice of motion application dated November 19, 2021 be and is hereby allowed with costs in its entirety.

b. Thatan order be made that the entire suit instituted by the plaintiff be and is hereby dismissed for want of prosecution under the provision of order 17 rules 1, 2 & 3 of the *Civil Procedure Rules, 2010*.

c. Thatthe costs of this notice of motion application and suit to be borne by the plaintiff to the 1st, 2nd & 3rd defendants.

It is so ordered acordingly.

RULING, DELIVERED, SIGNED AT MOMBASA AND DATED THIS 11TH OF OCTOBER 2022.

HON. JUSTICE (MR) L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

a. M/s. Yumna & Mr. Omar, the Court Assistants.

b. No appearance for the Plaintiff/Respondent.

c. No Appearance for the 1stDefendant

d. No Appearance for the 2nd Defendant.

e. Mr. Mwai Advocate for the 3rd Defendant/Applicant.