



**Fredrick Kathanzu Kavuthi t/a Kanyuni Constructors & another v Al-Haiee Investments Limited (Environmental and Land Originating Summons 1264 of 2013) [2022] KEELC 13431 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13431 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1264 OF 2013**  
**OA ANGOTE, J**  
**OCTOBER 6, 2022**  
**IN THE MATTER OF SECTION 37 & 38 OF THE**  
**LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF ACQUISITION OF L.R.**  
**NO.209/12071/1 BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**FREDRICK KATHANZU KAVUTHI T/A KANYUNI CONSTRUCTORS .... 1<sup>ST</sup>**  
**PLAINTIFF**

**JAMES KYALO T/A SECOND TRY CONSTRUCTION**  
**COMPANY ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AL- HAIEE INVESTMENTS LIMITED ..... DEFENDANT**

**RULING**

1. In the notice of motion dated May 24, 2022, the plaintiffs/ applicants have sought for the following orders:
  - a. That leave be and is hereby granted to the firm of Sagana Biriq & Co Advocates to come on record for the plaintiffs/applicants in place of the firm of bill Simbah & Associates Advocates.
  - b. That this honourable court be pleased to quash, vary and/or set aside the order dismissing the plaintiffs/ applicants' suit issued on May 12, 2022 and any other consequential orders.
  - c. That this honourable court be pleased to reinstate the plaintiffs/ applicants' suit.



- d. That this honourable court be pleased to direct that this suit be set down for a mention for directions for priority hearing.
  - e. That costs of the application be in the cause.
2. This application is premised on the grounds on the face of it and supported by the affidavit sworn by the 1<sup>st</sup> plaintiff, Fredrick Kathanzu Kavuthi, on May 24, 2022. According to the 1<sup>st</sup> plaintiff, on April 19, 2022, the firm of Sagana Biriq & Co Advocates received instructions to take over this matter from Bill Simbah & Associate Advocates on behalf of the plaintiffs.
  3. It was deponed that the plaintiffs discovered that this suit was dismissed for want of prosecution on May 12, 2022; that the plaintiffs' then advocates never informed the plaintiffs to avail the witness on the hearing date and that the mistakes of counsel should not be visited upon a client.
  4. The 1<sup>st</sup> plaintiff deponed that the applicants have since learnt that the defendant instituted another matter, ELC Pet No E017 of 2022 in respect of the suit property, seeking injunctive orders against the officer commanding police division Embakasi, Inspector General of Police and Attorney General.
  5. It was deponed that the applicants are at risk of eviction if the court does not reinstate this suit and that the plaintiffs have been keen and desirous of prosecuting this suit and stand to suffer irreparable harm should the suit not be reinstated and the dismissal order set aside.
  6. In the defendant/respondent's replying affidavit dated June 10, 2022, it was deponed that when this suit came up for hearing on May 12, 2022, Miss Nyaga advocate told the court that Mr Waema advocate had instructed her to apply for adjournment on grounds that he had not filed the statements of his witnesses in compliance with the hearing directions of November 8, 2021.
  7. It is the defendant's case that the defendant and the interested party were ready to proceed with the hearing and that in its decision, the court ruled that the case was filed in 2013 and no sufficient reason had been given by the plaintiffs for their absence in court and failure to comply with the directions issued on November 8, 2021.
  8. The defendant's representative averred that the plaintiffs have not come with clean hands and hence do not deserve the exercise of this court's discretion and that the manner and frequency with which the applicant has been changing advocates so close to hearing dates has contributed to delaying the hearing of the suit to the detriment of the defendant.
  9. According to the defendant, the deputy registrar's report of July 5, 2019 showed that the plaintiffs and their financiers were trying to engage violent and unorthodox means to try and grab the suit property and it was for that reason that he was forced to seek redress in court against members of the National Police Service in ELC Petition No E017 of 2022, which suit has nothing to do with the plaintiffs herein.
  10. The suit was canvassed by way of oral submissions which I have considered.

### **Analysis and determination**

11. The only issue for determination in this application is whether this court should reinstate the suit and set aside the order dismissing it issued on May 12, 2022.
12. In brief, this suit was instituted by way of originating summons, in which the plaintiffs claimed that they have acquired the suit land, LR No 209/12071/1, by way of adverse possession, as they have been in possession of the land since 1996.



13. The defendant's case, on the other hand, is that it is the legitimate owner of the suit property; that it has been in active possession of the suit property since it was transferred and registered in its favour in 1994; that the depositions by the plaintiffs are false and that the plaintiffs attempted to invade the suit property on February 6, 2014.
14. The law on dismissal of a suit for want of prosecution is set out in order 17 rule 2 of the *Civil Procedure Rules*:
- “ 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 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.”
15. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In *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.”
16. The factors to be taken into account for the purpose of reinstatement of a suit were addressed in *Ivita v Kyumbu* [1984] KLR 441 where the court stated as follows:
- “The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



17. Should an error or blunder by an advocate be visited upon the client? The courts have adopted an equitable approach in addressing this issue. In the case of *Philip Chemwolo & another v Augustine Kubede* (1982-1988) KAR 103, the court posited as follows:
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”
18. The plaintiffs have relied on the case of *John Nabashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR where the court addressed itself on the principles for reinstatement of a suit as follows:
- “The fundamental principles of justice are enshrined in the entire Constitution and specifically in article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the dancles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the plaintiff will suffer if the suit is not reinstated.”
19. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable; whether justice can still be done despite the delay; and whether the plaintiff or the defendant will be prejudiced by reinstatement of the suit.
20. It is not disputed that this suit was dismissed on May 12, 2022 for want of prosecution. This was after the plaintiffs failed to comply with the court’s orders of November 8, 2021 to file documents and witness statements as well as their absence in court when the matter came up for hearing on May 12, 2022.
21. The Applicants have averred that the suit was dismissed due to the mistake of their advocate which ought not to be visited on them. It is however a well-established principle that the suit belongs to the client and the client has an obligation to follow up with his advocates to ensure that the Advocate is carrying out the instructions given. (see *Duale Mary Ann Gurre v Amina Mohamed Mahamood & another* [2014] eKLR).
22. It will appear that between November 2021 when this court issued directions and May 2022, when the plaintiffs allegedly discovered that this suit had been dismissed, the plaintiffs never bothered to find out either from the court or their advocate the status of the suit. indeed, the delay in prosecuting this suit since 2013 when it was filed has not been explained to the satisfaction of this court.



23. For those reasons, the plaintiffs' application dated May 24, 2022 is dismissed with no order as to costs. For avoidance of doubt, the suit stands dismissed.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Okuto for Omuga for Defendant

Mr Ogado for Plaintiff/Applicant

Court Assistant - June

