Mbugua v Njenga & another (Environment & Land Case 108 of 2013) [2025] KEELC 4326 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4326 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 108 OF 2013

JG KEMEI, J

MAY 29, 2025

BETWEEN

GEORGE K N MBUGUA ..... APPLICANT

AND

FRANCIS KIBATHI NJENGA ..... 1ST RESPONDENT

EMBAKASI RANCHING CO LIMITED ..... 2ND RESPONDENT

RULING

1. What is before me is the motion dated the 3/2/25 seeking orders of reinstatement of the suit dismissed on the 25/1/2022.

2. The application is premised on the grounds annexed thereto and the supporting affidavit of the applicant sworn on the 3/2/25 where he deponed that the last time the matter was heard was in 2018 when the hearing was adjourned to allow the Managing Director of the 2nd Defendant to attend court and testify. That his advocate has since made several attempts to locate the file but without much success and later he discovered that the suit was dismissed and now urges the court to reinstate the suit for defence hearing.

3. David Karanja Thuo, the advocate in conduct of the suit avowed that he wrote to the advocates for the 2nd Respondent with a view to taking a hearing date vide a letter dated the 9/3/2022 but no date was fixed because the file was missing and that his attempts to locate the file has been unsuccessful. However on perusing the file he noted that there is a note that he was called by the registry on 24/1/22 and asked to attend court on 25/1/22. That he did not receive the said call and that in any event the methods employed by the Registry does not fall within the procedure for service. That he has now seen that the suit was dismissed on 25/1/2022 and urged the court to reinstate the suit.

4. The application is opposed by the 1st Respondent vide his Replying affidavit sworn on the 21/3/25. He deponed that this matter was last in court on the 2/12/2019 and was dismissed on 25/1/22. That it has

been close to 3 years since the suit was dismissed during which neither the applicant nor his advocate made any effort to move the court. The prolonged inaction and loss of interest in the suit constitute undue delay rendering the new attempt to revive the claim prejudicial and inequitable. There is no reasonable and justifiable explanation for the inaction and urged the court to dismiss the application. The applicant having slept on his rights this far the court was urged not to aid an indolent litigant.

5. The 2nd respondent did not oppose the application.

6. On the 0n 26/3/25 the parties elected to file and exchange written submissions. The 1st Respondent filed submissions dated the 28/4/2025 which I have read and considered. I have carefully looked at the CTS system and find that the applicant filed authorities only and no submissions. I have considered them too. The 2nd Respondent did not comply.

7. The key issue for determination is whether the application is merited.

8. The historical perspective of the suit is necessary. This suit was filed on 23/1/2013. After several mentions on preliminaries the hearing begun on 23/10/2017 wherein the applicant testified. His counsel moved the court for orders to summon the Managing Director of the 2nd Respondent to appear in Court and testify on 31/11/2018. The court acceded to the request and ordered that summons be issued to the witness. Come the 31/11/2018 the hearing failed to take off for one reason and another. Thereafter parties failed to attend court despite notices having been issued by the court leading to the dismissal of the suit on the 25/1/22.

9. Reinstatement of a suit is an act of exercise of discretion by a court. The court in *Shah v Mbogo & another [1967] EA 116* espoused how such discretion ought to be exercised. It held thus:

> " ..... the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

10. The applicant is aggrieved by the dismissal of the suit and hence this application. The application has been brought 5 years after the last hearing and over three years after the dismissal of the suit. The court agrees with the 1st Respondent that this constitutes inordinate delay on the part of the applicant.

11. In the case of *Utalii Transport Co Limited & 3 others Vs NIC Bank & Anor* (2014) EKLR, the court held that it is the primary duty of the Plaintiffs to take steps to progress their cases since they are the ones who have dragged the defendant to court.

12. Equally the overarching aims of our civil procedure rules obligates the parties and their advocates to facilitate the achievement of the overriding objectives of the court as far as the expedient determination of suits are concerned.

13. The record shows that before the dismissal orders were made on the 25/1/22 the court had served the parties on three instances which service did not elicit any response. I donot therefore agree with the applicant's counsel that his firm was not served when there is a stamp affixed on the court copy of the notice issued on 27/2/2019 and a note that he was telephoned by the registry on the eve of the hearing of 25/1/22.

14. The explanation on record by the applicant is that the file got lost and his counsel was unable to locate the file. That said there is no iota of any evidence in form of correspondences by the said advocate to the registry requesting for the file. The court finds this reason not plausible and the court is persuaded

that the applicant is an indolent litigant who has failed to offer any reasonable or justifiable reason to allow the court exercise direction in his favour.

15. In this regard, due attention and recognition is given to the provisions of Article 159 (2) (b) of *the Constitution*, 2010, which provides as hereunder;

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed;

16. In the Court of Appeal in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, where the court observed as hereunder;

> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

17. In the end it is must now be apparent that the application is devoid of merit.

18. In the premises the Notice of Motion dated the 3/2/25 be and is hereby dismissed with costs to the 1st Respondent.

19. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of.

Ms Karanja HB for Mr Thuo for Applicant

Ms Muthungu HB for Mr Kimathi for the 1st Respondent

N/A for the 2nd Respondent

A – Ms Yvette