



Opini v Musila & another (Environment and Land Case Civil Suit 69 of 2017) [2022] KEELC 15443 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CASE CIVIL SUIT 69 OF 2017
CG MBOGO, J
DECEMBER 21, 2022**

BETWEEN

JULIUS ONYONI OPINI APPLICANT

AND

ALFRED N. MUSILA 1ST RESPONDENT

JAMES OCHEGO ONDUSO 2ND RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated August 4, 2022 and expressed to be brought under Order 12 Rule 7, Order 17 Rule 2, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following orders: -
 1. That this honourable court be pleased to set aside orders made herein dismissing the plaintiff's suit for want of prosecution and reinstate the suit for hearing on merits.
 2. That the costs of this application be in the cause.
3. The application is premised on the grounds that the failure to prosecute the suit was not deliberate as he was not aware that the matter had been transferred from Nakuru for the reason that their firm did not receive notification that the suit had been transferred to Narok and allocated the current case number.
4. The application is supported by the affidavit of Kelvin Muriithi-Advocate sworn on even date. The applicant deposed that the suit was filed in the year 2013 as ELC No 484 of 2013 at Nakuru ELC registry in which an application for injunction was filed together with the plaint. Further, that the said application was listed for hearing but was adjourned on a number of occasions and as such it was not determined on its merits.
5. The applicant further deposed that during one of the many attempts to locate the file, the applicant's advocate was informed that the file had been transferred to Narok in the year 2017. Further that upon



learning that the same was transferred to Narok, the applicant's advocates clerk proceeded to Narok and confirmed that the file was assigned the current case number and it had been listed down for mention and subsequently dismissed as no cause was shown. He further deposed that although there was correspondence indicating that the applicant's advocates was served with the notification of the transfer and notice to show cause, the firm did not receive such correspondence and that failure to attend court and prosecute the matter was due to unavoidable circumstances and the inability to locate the court file to enable the applicant set down the suit for hearing.

6. The applicant further deposed that the subject matter of the suit is land and if not determined on merits, the plaintiff will be prejudiced and that reinstatement of the suit will further the ends of justice.
7. The 2nd respondent filed grounds of opposition dated August 26, 2022 challenging the application on the grounds that: -
 1. The plaintiff has wrongly moved the court under Order 12 Rule 7 of the [Civil Procedure Rules](#) which is inapplicable rendering the said application incompetent.
 2. The plaintiff/applicant has not demonstrated and or shown good cause sufficiently as to why he was not able to prosecute this case which has been pending in court for more than 9 years to enable this court to exercise its inherent jurisdiction to reinstate the suit for hearing.
 3. The application is couched in a vague language and there is no disclosure as to the specific date when the orders of dismissal were issued which orders the plaintiff/applicant is seeking to vacate and or set aside.
 4. This is clearly a matter that the plaintiff lost interest which his lawyer is trying to resuscitate hence an abuse of the court process and therefore a waste of precious judicial time.
 5. That to allow the instant application, this court could have undermined the very doctrine that litigation must come to an end which is the very rationale for courts dismissing matter that are dormant for want of prosecution.
 6. There are no correspondences either to court or to counsel for the defendant(s) annexed to the supporting affidavit demonstrating the efforts made by the plaintiff or his counsel in tracing the court file therefore and the allegation of the court file missing remains bare unsubstantiated allegations.
8. The application was disposed off by way of written submissions. The applicant filed written submissions dated October 31, 2022. The applicant submitted that the power to reinstate a suit which has been dismissed for want of prosecution is vested on the discretion of the court and that the discretion is exercised judicially based on the merits of the case. The applicant relied on the case of [Trade Circles Limited v Family Bank Limited & Another](#) [2021] eKLR.
9. The 2nd respondent filed written submissions dated November 23, 2022. The 2nd respondent submitted that the application is incompetent for failure to state when the orders of dismissal were issued and that in the absence of disclosure of the date, this court cannot exercise its inherent powers in favour of the applicant. The 2nd respondent further deposed that Order 17 Rule 2 of the [Civil Procedure Rules](#) does not provide for reinstatement of a suit dismissed for want of prosecution and that in various judicial pronouncements, the courts have opined that one can move the court under Section 3A of the [Civil Procedure Act](#).
10. The 2nd respondent further submitted that it is more than 9 years since the suit was filed and the applicant has not taken any steps to prosecute the suit. He further submitted that the applicant has



not provided evidence to confirm correspondence on the status of the matter. In conclusion, the 2nd respondent submitted that there is no demonstration of genuine efforts to prosecute the matter on the part of the applicant.

11. I have analysed and considered the application, the grounds of opposition and the written submissions filed by both parties and the issue for determination is whether this court ought to set aside the orders dismissing the suit for want of prosecution.
12. Order 12 Rule 7 of the *Civil Procedure Rules* provides that, “Where under this Order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or order upon such terms as may be just.”
13. The legal basis for dismissal of suits for want of prosecution is founded on the principle that litigation must be expedited, and concluded by parties who come to court seeking justice. This court has a duty to assist in clearing backlogs in court and restoring public confidence and trust in 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 as justice delayed is justice denied. Nonetheless, should there be any delay arising from a justifiable cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the court may in its discretion dismiss the action.
14. In this case, the applicant filed a plaint dated July 26, 2013 accompanied by a notice of motion application of even date seeking injunctive orders in Nakuru ELC Case No 484 of 2013. The notice of motion application was set down for hearing on May 6, 2014 but the same did not proceed. The application was slated for hearing on July 10, 2014. On the said date, the applicant was not present and the application was dismissed for want of prosecution. From the record, nothing transpired in this matter and it appeared to have stagnated from July 10, 2014 to March 8, 2017. Also, as per the records, this file was transferred to Narok vide a letter dated January 27, 2017 and both parties were copied in the said letter of transfer. This was done pursuant to an order of transfer of suit issued on January 24, 2017.
15. This court upon receipt of the file from Nakuru ELC registry issued a mention notice to both parties and none of them attended. This court issued a notice to show cause to be heard on 8th May, 2017 and again both parties failed to appear. This court on being satisfied that proper service had been effected, dismissed the suit under Order 17 Rule 1 of the *Civil Procedure Rules*.
16. The Provisions of Order 17 Rule 2 of the *Civil Procedure Rules* provides,

“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.
- (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.”



17. In order for the above provisions of the law 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.
18. This court being satisfied that both parties failed to make efforts to dispose off the suit, dismissed the same for want of prosecution.
19. The applicant's reason for failing to prosecute the matter was that he had made numerous attempts to trace the file at the Nakuru ELC registry and it was only later that he learnt that the file had been transferred to Narok ELC registry. The applicant has not provided evidence to show proof of the efforts he made in a bid to trace this file. There is no letter addressed to the Deputy Registrar. If at all the file was missing, he could have even sought for a reconstruction of the same. Most notable is the fact that this matter was without any action from 10th July, 2014 to 8th March, 2017.
20. In the case of *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the court held that;
- “There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”
21. Indeed it is 9 years since the suit was filed and the applicant has not made any efforts to prosecute the same. The delay is in my humble view inordinate and inexcusable. The applicant ought to be vigilant and ensure an expeditious disposal of the matter. The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade the court to exercise its discretion. The reason advanced by the applicant that he made numerous attempts in tracing the file without any proof cannot be reason enough.
22. Arising from the above, I find that the notice of motion application dated August 4, 2022 lacks merit and the same is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 21ST day of DECEMBER, 2022.

HON. MBOGO C.G.

JUDGE

21/12/2022.

