



Kirathe & 4 others (All suing for themselves and for and on behalf of Mbai Family, Giachamwenge Village) v County Government of Nyeri & 2 others (Environment & Land Case 125 of 2017) [2022] KEELC 15203 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15203 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 125 OF 2017
JO OLOLA, J
DECEMBER 8, 2022

BETWEEN

GEORGE WACHIRA KIRATHE 1ST PLAINTIFF
MICHAEL MBAI NGUTHIRO 2ND PLAINTIFF
JOHN KIAGO MWAURA 3RD PLAINTIFF
SOLOMON KAMURI THUMBI 4TH PLAINTIFF
DANIEL KIAGO MBAI 5TH PLAINTIFF
ALL SUING FOR THEMSELVES AND FOR AND ON BEHALF OF MBAI
FAMILY, GIACHAMWENGE VILLAGE

AND

COUNTY GOVERNMENT OF NYERI 1ST DEFENDANT
BOARD OF MANAGEMENT GIAKANJA PRIMARY SCHOOL 2ND
DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. By the Notice of Motion dated December 9, 2021, the County Government of Nyeri (the 1st Defendant/Applicant) urges this Court to strike out and/or dismiss with costs the Plaintiff's suit for want of prosecution. The application is supported by an Affidavit sworn by one Francisia Ndirangu and is premised on the grounds:

- (i) That the matter was filed vide an originating Summons dated December 16, 2016 and filed in court on March 21, 2017;



- (ii) That the 1st Defendant/Applicant filed its Notice of Appointment and Replying Affidavit on September 10, 2017 and January 22, 2018 respectively;
 - (iii) That the last time the Plaintiffs moved Court was on November 7, 2019 when they fixed the matter for hearing;
 - (iv) That the Court was not sitting on the said date and the matter has not had a date since then;
 - (v) That for a period of more than two (2) years, the Plaintiffs have neglected/failed to pursue prosecuting the matter or even to place the file before the Court for directions;
 - (vi) That the delay in prosecuting the matter is unjustified and prejudicial to the 1st Defendant's right to a fair trial; and
 - (vii) That it is therefore in the interest of justice that he orders sought be granted.
2. The Five (5) Plaintiffs suing for themselves and for and on behalf of the Mbai family, Gaichamwenge Village are opposed to the application. In a Replying Affidavit sworn for and on their behalf by their Advocate Charles Muchemi Karweru and filed herein on February 10, 2021, the Plaintiffs aver that the application is meant to give rise to a substantial risk to a fair trial and is likely to cause prejudice and injustice to the Plaintiffs.
 3. The Plaintiffs aver that they have made several efforts to prosecute the case by sending hearing and mention notices upon the Defendants and even going ahead to try and fix hearing dates inter-partes. It is their case that on March 2, 2021, they sent an email to the Court requesting to be granted a mention date for this matter amongst other matters handled by the Counsel for the Plaintiffs.
 4. The Plaintiffs assert that the delay in prosecuting the case is excusable as everyone was aware that since 2019 there has been a crisis in the Judiciary with lack of Environment and Land Court Judges and the only Judge who was attached in Nyeri could only come once in a while and give mention dates for the cases.
 5. The Plaintiffs further assert that in the year 2020, the Corona Pandemic hit the whole Country hard including the Judiciary and the prosecution of cases came to a halt for a period of time. The Plaintiffs thus aver that the 1st Defendant's application lacks merit, is an abuse of the Court process and only meant to evade justice since the Defendant did not serve any notice to show cause why the suit should not be dismissed for want of prosecution.
 6. It is further the Plaintiffs' case that the Defendant has not shown any reasonable cause that they will suffer prejudice and grave injustice if the suit were to proceed to trial.
 7. I have carefully perused and considered both the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 8. The 1st Defendant has urged this Court to be pleased to strike out and/or dismiss the Plaintiff's suit for want of prosecution. It is the 1st Defendant's case that the Plaintiff lodged this suit in 2016 and that despite the delicate nature of the claim, the Plaintiff has failed and/or ignored to prosecute the same.



9. In respect of dismissal of suits, Order 17 Rule 2 of the [Civil Procedure Rules](#) provides thus:
- “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) ... “
10. The guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of decisions. In [Ivita v Kyumbu](#) [1984] KLR 441, the Court held that:
- “The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”
11. In [Mwangi S. Kimenyi v Attorney General and Another](#), Civil Suit Misc. No. 720 of 2009, the Court restated the test as follows:
- “1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the Court from doing justice to all the parties – the Plaintiff, the defendant and any other third or interested Party in the suit; lest justice should be placed too far away from the parties.
2. Invariably, what should matter to the Court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
- (1) Whether the delay has been intentional and contumelious;
- (2) Whether the delay or the conduct of the Plaintiff amounts to an abuse of the Court;
- (3) Whether the delay is inordinate and inexcusable;
- (4) Whether the delay is one that give rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- (5) What prejudice will the dismissal cause to the Plaintiff. By this test, the Court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”
12. In the matter herein, the 1st Defendant accused the Plaintiff of indolence and points out that the last Court attendance or proceedings undertaken at the behest of the Plaintiff were on November 7, 2019



when the matter came up for a mention to fix the matter for hearing and that nothing much took place as the Court was not sitting on that day.

13. From a perusal of the record, it was true that this matter was last in Court on November 7, 2019 prior to the institution of this application by the 1st Defendant. I was not however persuaded that the Plaintiff's conduct amounted to an abuse of the Court process and/or that the delay was inexcusable. It was apparent that the Plaintiff had made some effort to have the suit fixed for hearing.
14. It was also not in dispute that during the relevant period, there was no Resident Judge at the Nyeri Law Courts and that the Judges sent to the station once in a while could only deal with urgent applications. During that same period as rightfully pointed by the Plaintiff the Corona global pandemic had hit the country hard forcing the Judiciary to scale down its operations and to halt the hearing of cases.
15. In the circumstances herein I was not persuaded that this suit was a proper candidate for dismissal for want of prosecution.
16. Accordingly I did not find any merit in the Motion dated December 9, 2021. I dismiss the same with the directions that the Plaintiff should proceed to fix the same for hearing within 90 days from today failure to which the same shall stand dismissed with costs.
17. The costs of this application shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 8TH DAY OF DECEMBER, 2022.**

In the presence of:

Mr. Otiende holding brief for Oyando for the Defendant/Applicant

No appearance for the Plaintiff

Court assistant – Kendi

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J. O. OLOLA

JUDGE

