



**Kiguru v Muhia (Sued in the capacity of the legal administrator
of the Estate of Muhia Thuku) & 2 others (Land Case 91 of 2013)
[2025] KEELC 1082 (KLR) (Environment and Land) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
LAND CASE 91 OF 2013
MC OUNDO, J
MARCH 6, 2025**

BETWEEN

STEPHEN NJOROGE KIGURU PLAINTIFF

AND

**GEOFFREY KAHIGA MUHIA (SUED IN THE CAPACITY OF THE LEGAL
ADMINISTRATOR OF THE ESTATE OF MUHIA THUKU) .. 1ST RESPONDENT**

JOSEPH MUCHIRI 2ND RESPONDENT

KORU NGORANI 3RD RESPONDENT

RULING

1. What is before me for determination is the Notice of Motion dated 29th September, 2023 brought under the provisions of Section 1A, 1B (a), 3A and 63 (e) of the *Civil Procedure Act* and Order 51 Rule (1) and Rule 10 (2) of the Civil Procedure Rules and all other enabling provisions of the law seeking that the court set aside the order made on the 18th October, 2022 dismissing the Plaintiff's suit for non-compliance and thereafter reinstate the said suit for hearing.
2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by Stephen Njoroge Kiguru, the Plaintiff herein who deponed that when the instant suit had come up for hearing on the 11th October, 2022, all the parties had complied with pre-trial directions. That however, it had later come to his attention that there had been some documents that had not been in the court record and flowing from the nature of the matter, it would have been crucial for the court to have an actual understanding of the situation wherein he had instructed his Advocate to input the same into his pleadings flowing from which the court had directed that an Application be filed to reopen proceedings.



3. That due to financial constraints on his part, he had been unable to pay his Advocate in good time to file the said Application for which his suit had been dismissed with costs. That he would be exposed to extreme prejudice, loss and damage were he not allowed to produce the crucial documents and test the averments and allegations of the Defence witnesses. He thus sought that the dismissal orders of 18th October 2022 be set aside and his suit be reinstated for hearing.
4. In response, the 2nd Defendant through his Replying Affidavit dated 15th January, 2025 deponed that the Plaintiff had been in contempt after he had been directed on 11th October, 2022, to pay a sum of Kshs. 10,000/= before the subsequent hearing date, which monies he had not paid as at the time the matter came up for mention on the 18th October, 2022 wherein suit was struck out.
5. That the Plaintiff's disobedience of the court order had violated the principle of equity; he who comes to equity must come with clean hands and therefore it had denied him the right of audience in the same court that had issued the order. That in any case, there had been no suit by the Plaintiff because the court had struck out the same on 18th October, 2022 thus the excuse of being unable to raise money for the advocate to lodge an application was timid and unsubstantiated.
6. That the Plaintiff had been lethargic in prosecuting the case as evidenced by the delay of 12 months to bring the present application which was an abuse of the court process. That the delay of 12 months delay before lodging the Application to reinstate the suit, had been a clear indication that the Plaintiff had no interest in pursuing the instant matter thus it would be a waste of the Court's valuable time to allow the present application.
7. That justice delayed was justice denied and therefore the instant matter ought to be dispensed off expeditiously through the dismissal of the present application with costs.
8. The 3rd Defendant's response vide his Replying Affidavit dated 24th October 2024, was that the Application was malicious on the face of it for misjoinder wherein the application did not disclose any cause of action against him and secondly because the Plaintiff had failed to prosecute the same since its inception in the year 2009 wherein the same had been dismissed for non-compliance with the pre-trial directions.
9. That the present Application had been brought after inordinate delay after the dismissal. That the Applicant was on a fishing expedition thus the instant application and the suit herein should be dismissed with costs to the 3rd Defendant. That in any case, the Applicant had no audience having failed to comply with the orders that had been issued on 2nd May, 2023. That further, the present Application was statutory time barred as a result of the pleadings herein having been filed over 15 years ago in Nakuru suit No. 161 of 2019. He deponed that the cause of action as had been pleaded in the Plaint had since been overtaken by events thus the same could not form the basis of the current litigation. That it had thus been fair and just to dismiss the suit and that the same should not be reinstated to unclog the court of unnecessary cases. That the Applicant had not made out a prima facie case to warrant the orders that had been sought.
10. The 1st Defendant did not participate in the instant Application.
11. The Application was canvassed by way of written submissions, wherein only the 2nd and 3rd Defendants/Respondents complied and filed their respective submissions which I shall summarize as herein under.



2nd Defendant's Submissions.

12. The 2nd Defendant vide his submissions dated 20th January, 2025, summarized the factual background of the matter and then framed his issues for determination as follows:
 - i. Whether the dismissal Order made on 18th October, 2022 should be set aside.
 - ii. Who is to bear the costs.
13. On the first issue for determination as to whether the dismissal orders that had been made on 18th October, 2022 dismissing the instant suit should be set aside, the 2nd Defendant he reiterated the contents of his Replying Affidavit to the effect that the dismissal of the instant suit had been due to the Plaintiff's non-compliance with the court's order. Further, the application to reinstate the suit had been lodged after a period of 11 months which was a clear indication that the Plaintiff had no interest in pursuing the instant matter.
14. He placed reliance in the decided case of *Mwangi S. Kimenyi v Attorney General 7 Another* [2014] eKLR to submit that the Plaintiff's excuse of financial constraints rendering him unable to raise money for his Advocate to lodge an application to re-instate the suit was timid and unsubstantiated. That there was no evidence that the Plaintiff had attempted to pay costs to the 1st and 2nd Defendant as per the court's orders which had then led to the dismissal of the suit. Further reliance was placed in a combination of decisions in the case of *Mobile Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR and *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR.
15. That there had been no credible, satisfactory and sufficient explanation provided by the Plaintiff for the 11 month's delay in filing an application to reinstate the suit. That as evidenced by the number of times that the court had either dismissed the suit and/or application for want of prosecution, the instant case having been in court for more than 10 years, the Plaintiff was guilty of indolence. That the delay in prosecuting the suit had been inordinate and inexcusable wherein the suit had been properly and lawfully dismissed by the court on 18th October, 2022. That the instant Application was unmerited and therefore since costs follow the event, the Applicant should meet the costs and the Application be dismissed with costs.

3rd Defendant's Submissions.

16. The 3rd Defendant submitted that there had been inordinate delay of over one (1) year in making the present Application. That indeed, the Plaintiff/Applicant had lost interest in the current suit immediately he had filed the same in the year 2009 wherein after he had gone to slumber for over ten (10) years until the year 2019 when he had attempted to revive the suit which should have been dismissed in the year 2016 for want of prosecution. That since Parties own their pleading, there had been no good reason why the instant suit should be allowed to live or be reinstated when it had already died.
17. That in any case, whatever prayers, order or the cause of action that the Plaintiff had been seeking in the year 2009 had been overtaken by events fifteen (15) years later, if at all, it did happen or exist since the same had been extinguished by afflation of time hence the instant Application and the suit had been a cause without any eventuality thus the same should be dismissed with costs.

Determination.

18. I have considered the Application herein seeking that the court set aside the order made on the 18th October, 2022 dismissing the Plaintiff's suit for non-compliance and afterwards reinstate the said suit



and fix the same for hearing. The reason as presented by the Applicant in his quest for the said orders was that, due to financial constraints on his part, he had been unable to pay his Advocate in good time so that he files an Application to re-open the proceedings and file additional crucial documents, which had seen his suit dismissed with costs. That he would be exposed to extreme prejudice, loss and damage if the said documents were not produced to test the averments and allegations of the Defence witnesses.

19. I have also considered the 2nd and 3rd Respondents' response and written submissions against allowing the said application to wit that the same had been filed one year after the dismissal of the suit for want of prosecution. That the 12 months delay before lodging the instant Application had been a clear indication that the Plaintiff had no interest in pursuing the instant matter thus it would be a waste of the Court's valuable time to allow the present application. Further that since filing of the suit in the year 2009, the Plaintiff/Applicant had lost interest in the same wherein he had gone to slumber for over ten (10) years until the year 2019 when he had attempted to revive the suit. That in any case, whatever prayers, order or the cause of action that the Plaintiff had been seeking in the year 2009, had been overtaken by events fifteen (15) years later
20. The Plaintiff herein instituted the instant suit vide a Plaint dated 8th June, 2009 seeking to restrain the Defendants from dealing with that part of the land which is a road of access or reserve next to and adjacent to his parcel of land known as L.R No. Plot No. 26411 (Kwa Muhia) in Naivasha.
21. From the 28th October 2010, the matter was in abeyance up to the 23rd May 2013 whereon parties appeared up to the 16th July 2014. From there, the matter went into slumber up to 9th October 2019 wherein on 18th October 2022, the same had been dismissed for non-compliance with the directives of the Court and for want of prosecution, and the 2nd Defendant's counterclaim was set down for hearing. However, vide an Application dated 29th September, 2023, the Applicant sought to have the order dismissing his suit be set aside and the said suit be re-instated for hearing. This Application was dismissed on 19th October, 2023 for non-attendance whereby via an Application dated 26th October, 2023, the Applicant sought for the said dismissal order to be set aside and the Application dated 29th September, 2023 be restored for inter-parties hearing. This Application was allowed via a court's Ruling of 17th October, 2024 which then resulted in the present matter for determination.
22. I find the issues arising for determination herein as being;
 - i. Whether the court's order issued on 18th October, 2022 should be set aside and the Applicant's suit be reinstated.
 - ii. What orders should the court grant?
23. Firstly, it is clear that whereas directions for disposal of the application had been issued on 5th November, 2024 that the application be canvassed by way of written submissions, on the 21st January, 2025, the Plaintiff/Applicant and the 1st Defendant/Respondent had been granted an extension of time to file their written submissions but as at the time I am writing this ruling, the Applicant and the 1st Defendant are yet to comply.
24. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an Applicant who fails to file their submissions on their application as ordered by the court is deemed as having failed to prosecute their application and therefore that application is liable for dismissal. The filing of submissions having been ordered as a mode for the hearing and determination of the application and there having been no compliance by the Applicant herein, the failure by the



Applicant to exercise the leave granted to him to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on his part in the prosecution of the matter. The Applicant had been afforded an opportunity to be heard by way of written submissions but failed to take it up.

25. The Court of Appeal in *Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai vs. Attorney General & 3 Others* [2016] eKLR, observed as follows:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity....”

26. The mode of hearing having been adopted by the court, and there having been no compliance by the Applicant to prosecute the same, I am persuaded to dismiss the Notice of Motion dated the 29th September, 2023.

27. In case I am wrong, I have looked at the order issued on 18th October 2022 dismissing the Applicant’s suit for non-compliance with the court’s orders and for want of prosecution. The Applicant now seeks that the court sets aside the said order, so that the suit can be reinstated for hearing on merit.

28. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide as follows;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

29. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of *Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd* [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd.*) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs. Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs Gasyali*. It also goes without saying that the reason for failure to attend should be considered.”

30. The Court of Appeal for Eastern Africa in the case of *Mbogo vs. Shah* [1968] EA 93, held that for the court to set aside a judgment/order, it must be satisfied about one of the two things namely:-

- a. either that the Defendant was not properly served with summons; or
- b. that the Defendant failed to appear in court at the hearing due to sufficient cause.



31. The Supreme Court of India in the case of Parimal vs Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed that: -

“Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”

32. In the instant case, did the failure by the Applicant to prosecute his suit constitute sufficient cause or was it meant to deliberately delay the cause of justice?
33. I have considered the reasons presented before me by the Applicant regarding financial constraint and inability to pay his counsel in good time to make a proper Application to re-open his case and produce important documents. I have also considered the affidavit filed in support of the application and considered whether the non-compliance with the court’s orders of 11th October, 2022 that had required the Applicant to file an Application for re-opening his case and pay the 1st and 2nd Defendant’s costs for the day by the end of that day and in default his suit would stand automatically dismissed for want of prosecution, had constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice. I have further considered whether the filing of the application for setting aside orders made on the 18th October 2023, more than 11 months after the said order was made, constituted inordinate delay.
34. Whereas the right to hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law, I also find that the overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases.
35. Nevertheless, in the matter before me, the conduct of the Applicant was indicative that he was not willing to prosecute his matter. Whereas the Applicant had all along indicated that he was ready to proceed, on 11th October, 2022, when the matter had come up for hearing, his counsel had indicated that the Applicant who had been indisposed for a while, had appeared that morning in his chambers with documents wherein he had instructed him to re-open his case. Interestingly, despite that knowledge, the Applicant’s Counsel had not put in any application to re-open the Plaintiff’s case to admit the said documents out of time even after the court had granted the Applicant an opportunity to file and serve the said Application and also pay the 1st and 2nd Defendant’s costs for the day by end of the day of 11th October, 2022 failure to which his case would automatically stand dismissed for want of prosecution. In fact, it was the Applicant’s Counsel who had indicated that the Applicant would pay the day’s costs while submitting on the need to re-open the Plaintiff’s case for purposes of admitting documents out of time.
36. However, when the matter had come up for mention on 18th October, 2022, the Applicant had not complied with the court’s directions of 11th October, 2022 thus his case stood automatically dismissed for want of prosecution. Further, it had taken him 11 months and 11 days after the dismissal of his suit, to file the present application seeking to reinstate the same. In the present suit, I find that the



Applicant had deliberately failed to prosecute his case by refusing to comply with court's direction including paying the 1st and 2nd Defendant's costs of 11th October, 2022.

37. Whereas the order to pay costs had been issued on the 11th October, 2022, 1 year and 4 months later, there is no indication that the Applicant has paid the said costs to the 1st and 2nd Defendants. To further demonstrate his lack of seriousness, the Applicant herein in furtherance of his delay tactic has failed to file written submissions in prosecution of his Application. He who comes to equity must come with clean hands and therefore by the Applicant failing to comply with the court's directions on payment of costs and secondly failing to comply with the direction issued on the mode for disposal of his application, I find that he is denied the right of audience.
38. Since the record reveals that it was not the first time that the Applicant was guilty of indolence, I find that the present Application is an afterthought, a waste of judicial time and an abuse of the court process and is also intended to vex the Respondents and put them to expense. The Respondents are being gravely prejudiced by the Applicant and therefore there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice for it is not powerless to grant relief, when the ends of justice and equity so demand. Therefore, the Applicant's application seeking to set aside the orders of the court that had dismissed his suit fails. Consequently, the prayer for reinstatement of the instant suit also fails There having been no sufficient cause demonstrated by the Applicant.
39. In the end, I find that the Application dated 29th September 2023 has no merit and the same is dismissed with costs to the 2nd and 3rd Defendants, at a lower scale.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 6TH DAY OF MARCH 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

