



REPUBLIC OF KENYA



Kirui v Langat (Land Case 3 of 2023) [2025] KEELC 1086 (KLR) (5 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1086 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
LAND CASE 3 OF 2023
MN MWANYALE, J
MARCH 5, 2025**

BETWEEN

JOSEPH KIRUI APPLICANT

AND

DANIEL KIPYEGON LANGAT DEFENDANT

RULING

1. On 03.10.2024, this court (Washe J) dismissed this suit for want of prosecution provoking the filing of the Application dated 08.11.2024 seeking setting aside of the orders of 03.10.2024 and reinstatement of this suit.
2. The Applicant further sought for a stay of execution proceedings and stay of proceedings in Kilgoris Magistrates court E&L No. 121 of 2018, between Daniel Kipyegon Langat vs Joseph Kirui.
3. The Applicant further sought for the transfer and consolidation of Kilgoris CME & L No. 121/2018 with this matter.
4. The grounds in support of the application are interalia, that the dismissal of the suit for want of prosecution was without due notice to the Plaintiff/Applicant, nor his Advocates.
5. The Application is equally supported by the supporting affidavit of Joseph Kirui the Applicant who reiterates most of the grounds in support of the Application which grounds have been drafted as a mixture of grounds of Appeal as well as submissions on the merits of the case.
6. The Application is opposed by the Replying Affidavit of the Respondent Mr. Daniel Kipyegon Langat who is acting in this matter in person, who deposes interalia,
 - i. That the suit had been dismissed on 21st June of 2023, and he attempted to file a bill of costs dated 12.07.2024 but was unable.



- ii. That he filed an application for dismissal and attempts to serve the Plaintiff/Applicant were futile as he was hostile to the process server, but service was effected on his Advocates through their email address – jkmutailaw@gamil.com
 - iii. That the Applicants were not present when the matter was fixed for hearing on 03.10.2024; occasioning the dismissal.
7. The Respondent in the matter Daniel Kipyegon Langat is acting in person while the Applicant is represented by the firm of JK Mutai Advocates.
 8. Directions were issued for canvassing of the Application by way of written submissions.
 9. In his submissions the Applicant framed two issues for determination and submitted on the same, to wit,
 - i. Whether the orders should be grant, and
 - ii. Who should bear the costs of the Application.
 10. On issue number 1, the Applicant submits that under order 17 Rule 2(1) of the Civil Procedure Rules, there is a requirement for issuance of a Notice to show cause before a suit is dismissed for want of prosecution.
 11. The Applicant submits no such notice to show cause was issued and hence the suit could not be dismissed for want of prosecution in support of this proposition, the Applicant placed reliance on the decision in case of James Kanyita Nderitu vs Marios Philotas Ghikas and Another as well as the decision in the case of Hamison Wanjohi Wambugu vs Felista Wairimu Chege & Another 2013 (eKLR)
 12. The Applicant cited the principles of reinstatement of a case was laid down in the decision in the case of Professor Mwangis Kimenyi vs the Hon. Attorney General and Kenya Institute of Public Policy Research and Analysis (KIPPR) Civil Suit No. 720 of 2009 where the court held interalia;

“The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case (see Ivita vs Kyumbu) 1984 KLR 441 “the test is whether the dela 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 not 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 he 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 the 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 set down for hearing at the earliest available time.”
 13. On the stringy of that decision as well as other decision that were cited in the case of Daniel Maingi Muchiri vs Jubilee Insurance Co. Ltd (Civil Appeal No. 175 of 2014) (2017 KECAH) the Applicant prayed for reinstatement of the suit.
 14. The Applicant also submitted for prayers 3 and 4; sought for stay of proceedings in Kilgoris CMLE No. 121 of 2018 as well as consolidation of the said suit together with this suit under Section 18 (2) (b) of the Civil Procedure Rules.



Respondents Submissions

15. As noted, the Respondent acted in person in this matter and the court could not make head or tail of his submissions save that, he prayed for the dismissal of the Application on the strength that the suit was Resjudicata given that there exists Kilgoris Magistrate E and L No. 121/2018.

Issues for Determination

16. Having considered the application and the affidavits, the law as well as the submissions of the parties the court frames the following as issues for determination;
- i. Whether or not the application is merited.
 - ii. What reliefs ought to issue.
 - iii. Who bears the costs of the application

Analysis and Determination

17. On issue number 1, the Applicant prays for reinstatement of the suit which was dismissed on 03.10.2024 provoking this application filed on 08.11.2024. As was stated in the decision in Professor Mwangi S. Kwenyi vs Kipra cited by the Applicant the principle to consider for reinstatement is firstly whether the delay is prolonged and secondly whether it is in excusable.
18. The suit herein was filed on 28.08.2023 and dismissed on 03.10.2024. Granted it had stayed in the court with no action for more than one year.
- the Application for reinstatement made on 09.11.2024 after 1 month and 5 days after the dismissal. The court notes that there was no prolonged delay in prosecuting the suit and neither was there prolonged delay in seeking its reinstatement.
19. On the whether the delay was inexcusable, the reasons alluded for the dismissal including the non-service of the notice to show cause, and there being no affidavit of service are excusable grounds.
20. On this score the court finds that the merit in the application for reinstatement.
21. On the other prayers the court finds that pursuant to an appeal lodged by the Applicant herein, before Narok ELC Appeal No. 10 of 2020, the entire Judgment of Hon. R.M Oanda in Kilgoris 121 of 2018 was set aside, hence there is no decree capable of execution in Kilgoris E & L 121 OF 2018, hence the prayers for stay of execution, ostensibly to stop an eviction and stay of proceedings in Kilgoris E & L 121 of 2018 is misplaced since that Judgment in that suit was set aside no possible execution proceedings can take place in Kilgoris E & L 121 OF 2018.
22. In the said Appeal, the court noted that the trial magistrates court had no jurisdiction to hear and determine the issue of the Appellants/Defendants counter-claim, which was still before the said trial court, it would follow that the issue of adverse possession was still live and ought to be determined by this court. That issue was to be determined alongside the Kilgoris ELC Case No. 9 of 2022 and an application to Amend the said suit was disallowed and that suit was withdrawn.

It follows that having withdrawn ELC No. 9/2022, the issue raised in the counter-claim in Kilgoris E & L No. 121 of 2018 also was withdrawn, the two suits having been consolidated in the Appeal. There is therefore no pending suit before Kilgoris CM's court to wit, Kilgoris E & L No. 121 of 2018 capable of being transferred and consolidated with this suit for hearing and determination and the alternative prayer equally is misplaced.



Disposition

23. The upshot is that the application date 08.04.2024 is allowed in terms of prayer 2 thereof, to wit, the orders of 3rd October 2024, dismissing this matter for want of prosecution are hereby set aside and the matter is reinstated for hearing and determination on its merits.
24. For avoidance of doubt, the Respondent having been granted costs in ELC No. 9/2022 which was withdrawn is at liberty to pursue the said costs.
25. Costs of this application shall be borne by the Applicant.

DATED AND DELIVERED AT KILGORIS THIS 5TH DAY OF MARCH, 2025.

HON. M.N. MWANYALE

JUDGE

In the presence of

C/A Emmanuel/Slyvia

Mr. Kirui h/b for Mr. Mutai for the Plaintiff

Mr. Daniele Langat acting in person

