



**Kithi & 2 others v Tuva (Environment & Land Case 183 of 2017)
[2024] KEELC 494 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 183 OF 2017
SM KIBUNJA, J
FEBRUARY 7, 2024**

BETWEEN

KAZUNGU KOMBE KITHI 1ST PLAINTIFF

KAZUNGU K. KAZUNGU 2ND PLAINTIFF

HARUN SHAURI KITHI 3RD PLAINTIFF

AND

FRANCIS TUVA DEFENDANT

RULING

Notice of Motion dated the 2nd September 2022

1. The defendant moved the court through the application dated the 2nd September 2022, brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, chapter 21 of Laws of Kenya and Order 17 Rule 3 & Order 51 Rule 1 of *Civil Procedure Rules*, seeking for the suit to be dismissed for want of prosecution and costs. The application is supported by the affidavit of Francis Tuva, the defendant, sworn on the 2nd September 2022 deposing inter alia that the suit was filed on the 28th May 2017 and it last came up in court on the 11th October 2018 for a ruling. That since that date, the plaintiffs have not taken any other step to prosecute their case for over three years and hence this application.
2. The application is opposed by the 2nd plaintiff through his replying affidavit sworn on the 22nd September 2023 inter alia deposing that his advocate failed to take steps to prosecute the suit as they had no information on who was running the law firm of Gunga & Co. advocates after the death of Gunga Mwinga advocate in 2020; that it was after his advocates were served with the instant application on 6th April 2023 that they learnt the said firm was in operations and that this application is therefore premature.



3. The court issued directions on filing and exchanging submissions on the 30th October 2023. The learned counsel for the defendant filed their submissions dated the 22nd November 2023 that the court has considered. The learned counsel for the plaintiffs informed the court during the mention of 11th December 2023 that they will rely on the replying affidavit.
4. The following are the issues for the determinations by the court:
 - a. Whether there has been any steps taken to prosecute this suit since the 11th October 2018.
 - b. Whether a period of over one year had lapsed from the date of the last step to prosecute this suit to the date of filing of the instant application.
 - c. Whether the plaintiffs have shown reasonable explanation for not taking any steps to prosecute their case for over one year since the ruling date of 11th October 2018.
 - d. Who pays the costs?
5. The court has carefully considered the notice of motion, affidavit evidence by the defendant and 2nd plaintiff, submissions by the learned counsel, the superior courts decisions cited thereon, the record and come to the following determinations:
 - a. The court has perused the record and confirmed the defendant's contention that the plaintiffs have not taken any steps to prosecute their case since the ruling of the 11th October 2018. The court has also confirmed from the record that the defendant was then acting in person until the 6th March 2019 when Ms. Gunga & Co. Advocates filed the notice of appointment of advocates to come on record for the defendant.
 - b. That one year from the 11th October 2018 when the ruling on the defendant's preliminary objection was delivered, lapsed on or about the 10th October 2019. It follows that by the time the instant application dated the 2nd September 2022 was filed, a period of over two years, ten months had lapsed. The 2nd plaintiff contends that his counsel failed to take steps to prosecute the case as they did not know whether Ms. Gunga & Co. advocates, the defendant's counsel, was in operations since the death of Gunga Mwinga Advocate in 2020. The plaintiffs have however not annexed any documentary evidence in support of their claim that they were waiting for information on the operations of the defendant's counsel after the alleged death of Gunga Mwinga advocate in 2020 or to show what enquiries they made from the said firm or Mombasa Law Society or the Law Society of Kenya on the fate of the said firm.
 - c. The learned counsel for the defendant has in their submissions pointed out that Gunga Mwinga Chea had before passing on in December 2020, nominated Godfrey Mutubia Advocate to be the sole administrator of his legal practice under Regulation 14(1) of the [*Law Society of Kenya \[General Regulations\] 2020*](#), and that the Law Society of Kenya had issued a legal notice to that effect after the demise of Gunga Mwinga Shea. The foregoing goes to show that had the plaintiff made any enquiries by writing or in any other formal way communicating with the said firm, Mombasa Law Society or Law Society of Kenya, they would have been notified on the counsel taking over the conduct of the defendant's defence after the demise of the said Gunga Mwinga.
 - d. There is also no evidence on the court record to confirm that the plaintiffs ever invited the defendant in person or through counsel to come to court to fix the suit for trial conference or written to the Deputy Registrar to set the suit down for mention after the delivery of the ruling on the 11th October 2018. The plaintiffs have therefore failed to show any reasonable



explanation that may have prevented them from taking any steps to prosecute their suit against the defendants since the 11th October 2018. The court finds merit in the defendant's dismissal application.

- e. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that provides that costs follow the events unless otherwise directed by the court for good cause, the defendant is awarded costs in the application and suit.
6. Having come to the foregoing determinations on the application dated the 2nd September 2022 filed on the 26th September 2022, the court finds and orders as follows:
- a. That the defendant's application is allowed with costs as prayed.
 - b. That consequently, the plaintiffs' suit commenced through the plaint dated the 25th May 2017 is hereby dismissed for want of prosecution with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 7TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs: Mr. Okanga.

Defendant: M/s Juma For Mutubia.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

