



**Wambua v Kamwere & 9 others; Torab (K) Limited (Interested Party) (Environment & Land Case E328 of 2021) [2024] KEELC 551 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 551 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E328 OF 2021**

**EK WABWOTO, J  
FEBRUARY 8, 2024**

**BETWEEN**

**MUTISO WAMBUA ..... PLAINTIFF**

**AND**

**WANJIRA KAMWERE ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KAMWERE ..... 2<sup>ND</sup> DEFENDANT**

**MWIRIGI MUTHURI ..... 3<sup>RD</sup> DEFENDANT**

**KANDIMUWA LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 5<sup>TH</sup> DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 6<sup>TH</sup> DEFENDANT**

**CHIEF VALUER, NAIROBI METROPOLITAN SERVICES ..... 7<sup>TH</sup> DEFENDANT**

**CHIEF OFFICER PLANNING NAIROBI CITY COUNTY ..... 8<sup>TH</sup> DEFENDANT**

**NAIROBI METROPOLITAN SERVICES ..... 9<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 10<sup>TH</sup> DEFENDANT**

**AND**

**TORAB (K) LIMITED ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect to the 6<sup>th</sup> and 8<sup>th</sup> Defendants Notice of Motion application dated 25<sup>th</sup> July 2023 which was accompanied by a Supporting Affidavit by Abdi M Hassan.

The 6<sup>th</sup> and 8<sup>th</sup> Defendant sought the following orders:



- i. That the Plaintiff's suit herein be dismissed with costs for want of prosecution.
  - ii. That the Plaintiff to pay the costs of this application
2. The Application was made on several grounds, including that:
    - i. That the Plaintiff has not taken steps to set the suit down for hearing since then, which is far in excess of the one year contemplated by Order 17 Rule 2(3).
    - ii. The provisions of Order 17 Rule 2(3) of the Civil Procedures Rules allow the Defendants to inter alia bring such an application;
  3. The application was canvassed by way of written submission pursuant to the directions issued by this court. The 6<sup>th</sup> and 8<sup>th</sup> Respondents filed submissions dated 21<sup>st</sup> November 2023 in support of their application.
  4. It was submitted that the Plaintiff had filed the suit on 10<sup>th</sup> September 2019 and had not taken steps to prosecute the suit until 17<sup>th</sup> October 2023. Relying on the case of *Thatbini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR, it was submitted that the plaintiff acted contrary to article 159 of *the Constitution* and were indolent which had greatly prejudiced the Defendants.
  5. The Plaintiff opposed the application vide a replying affidavit and submissions dated 3<sup>rd</sup> and 4<sup>th</sup> November 2023 respectively. It was argued that this instant suit was related to ELCC E239 of 2021 (*Torab (k) limited v Wanjira Kamwere & 10 others*) which was filed on 4<sup>th</sup> July 2021. Bearing that in mind, the Plaintiff submitted that the instant suit be held in abeyance pending determination of the earlier suit or successful negotiation between the parties. It was further prayed that the most sensible solution was to consolidate the two suits to save on judicial time.
  6. I have considered the application, the rival affidavits and submissions filed. In my view, the main issues for determination is whether the 6<sup>th</sup> and 8<sup>th</sup> Defendants' application dated 25<sup>th</sup> July 2023 is merited?
  7. Order 17 rule 2 of the *Civil Procedure Rules* is very clear:
    - “(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 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. [Emphasis Mine]
  8. There is no dispute, I believe, with respect to the law on dismissal of suits for want of prosecution. Whether to exercise the power of dismissal for want of prosecution under order 17 is, however, a matter that is within the discretion of the court. In its decision in *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Papat and others & another* [2016] eKLR, the court stated as follows:
    - “11. Nonetheless, Article 159 of *the Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one



year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.

9. The application is bolstered on the alleged “laissez faire” conduct of the Plaintiff, to which the Court must analyse. My perusal of the Court proceedings confirms that after filing the suit on 11<sup>th</sup> September 2021, the matter came up nine times for directions by the Court, for which the Plaintiff never appeared. On the tenth time, 21<sup>st</sup> September 2023, the Plaintiff appeared to oppose this instant application, which was well over 1 year as prescribed in order 17, rule 2.
10. The Court record confirms that at Paragraph 32 of the Plaint dated 10<sup>th</sup> September 2021, it was averred by the Plaintiff states that there are no pending suits in relation to the subject matter-Land Reference Number 36/1/581. Contrastingly, in ELC E239 of 2021, the Plaintiff entered appearance vide Notice of Appointment by Onyango & Aywa Advocates dated 10<sup>th</sup> September 2021 and filed a defence dated 13<sup>th</sup> September 2021, where in Paragraph 22 it was admitted that there were no pending suits on relation to the same subject matter. My interpretation of the above is that at the time of filing this instant suit, the Plaintiff was represented by the same firm and therefore fully aware of an existing suit.
11. It is my opinion that any claims presented in this instant suit could have been addressed vide a counterclaim. Moreover, I find that the Plaintiff had more than enough time to formally seek abeyance of this instant suit but instead kept mum, only to be jolted into action by the application for dismissal. In the foregoing, the Plaintiff’s actions are premised in bad faith to which are not curable by the provisions of article 159 of *the Constitution*.
12. In the upshot, I find merit in the 6<sup>th</sup> and 8<sup>th</sup> Defendant’s Notice of Motion application dated 25<sup>th</sup> July 2023 and hereby make the follows orders:
  - a. This suit, ELC E328 of 2021 is hereby dismissed in its entirety for want of prosecution.
  - b. Costs shall be borne by the Plaintiff.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

**E. K. WABWOTO**

**JUDGE**

In the presence of: -

Mr. Onyango for the Plaintiff.

Mr. Gathumbi for and 1<sup>st</sup> and 4<sup>th</sup> Defendants.

Ms. Kiboi and Mr. Hassan for the 6<sup>th</sup> and 8<sup>th</sup> Defendants.

N/A for the other parties.

Court Assistant; Caroline Nafuna.

