



**Uasin Gishu Memorial Hospital Limited v Moi Teaching and Referral
Hospital Board & 2 others (Environment & Land Miscellaneous
Case 1 of 2022) [2024] KEELC 5254 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE 1 OF 2022
OA ANGOTE, J
JULY 11, 2024**

BETWEEN

UASIN GISHU MEMORIAL HOSPITAL LIMITED APPLICANT

AND

MOI TEACHING AND REFERRAL HOSPITAL BOARD 1ST RESPONDENT

THE MINISTER FOR HEALTH 2ND RESPONDENT

HON. ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The Applicant has filed a Notice of Motion dated 16th November 2023, in which it has sought for the following orders:
 - a. That the court be pleased to set aside the orders issued on 10th May 2022 by which it dismissed the suit herein for want of prosecution when the same came up for mention before it.
 - b. That consequent upon the grant of Prayer Number (a) above, the Court be pleased to issue such other and/or further directions for the expeditious hearing of the issues as framed for determination by the Supreme Court in its judgement dated 24th March 2021.
 - c. That the cost of this application be in the main cause.
2. The grounds of the application are set out in the Supporting Affidavit sworn by Elias Masika, the Applicant's Advocate. These grounds are that this dispute was litigated in the Constitutional Court as High Court Constitutional & Constitutional Review Miscellaneous Civil Case No. 12A of 2012 Uasin Gishu Memorial Hospital Limited vs Moi Teaching & Referral Hospital & 2 others and that the dispute has been heard all the way to the Supreme Court, which in its judgement delivered



- on 24th March 2021, directed that the matter be remitted to the Environment and Land Court for determination of the issues specified therein.
3. The Applicant's counsel deposed that following the Supreme Court's directions, the parties engaged the court in various correspondence seeking the transfer of the Court file from the High Court to the Environment and Land Court and that by a letter dated 7th May 2021, the Registrar of the Supreme Court advised parties to place the request in writing to have the suit transferred.
 4. Counsel deposed that the Court never notified the Appellant of the transfer of the said file and the Applicant has been under the belief that the same had not been transferred as directed and has continued engaging the Supreme Court on the need to have the matter transferred to the Environment and Land Court.
 5. The Applicant's counsel deposed that he only became aware of the dismissal of the suit on 9th November 2023, when the 1st Respondent's Advocates drew his attention to the dismissal of the suit for want of prosecution on 10th May 2022, when the matter came up for mention.
 6. Mr. Masika deposed that the Applicant thereupon became aware of an email sent by Duncan Muusya, a Court Bailiff, on 16th February 2022 in reference to ELC Misc App. No. 1 of 2022- Katwa & Kemboy Advocates v Ooko Advocates, which suit was scheduled for mention on 10th May 2022; that the email made no mention of the previous case number or its relationship to the present case, and that the Applicant had no cause to believe that the said matter related to this matter.
 7. The Applicant's Counsel averred that in the course of corresponding with the court on the status of the transfer of the suit, they would always copy the rest of the parties and that there was however no response from the court or the advocates on record for the other parties to the suit, who were aware of the dismissal but remained silent.
 8. It was the Applicant's counsel's contention that they reasonably expected that the first business to be conducted when the suit was transferred to the Environment and Land Court was the issue of directions on how the trial was to be conducted.
 9. It was deposed that the dismissal orders made on the very first day after the matter was transferred were made in error, and that the Applicant stands to suffer irreparably as it has been deprived the use of the suit property for over 25 years following the issue of the Legal Notice No. 78 of 1998.
 10. The application was opposed through a Replying Affidavit sworn on 9th February 2024 by the Head of Dispute Settlement Services and Senior Principal Legal Officer of the 1st Respondent, who deposed that adequate notices were given for parties to pursue the suit and the Applicant failed to do so.
 11. It was deposed that there has been inordinate delay by the Applicant because the Notice of Motion comes two years after the dismissal of the suit and that under Order 17 Rule 2 of the Civil Procedure Rules, the suit was eligible for dismissal after one year of inaction, effective from the date the Supreme Court made judgement on 24th March 2021.
 12. It is the 1st Respondent's case that the Applicant has not shown sufficient cause to reinstate the suit and that the Applicant's conduct is intentional, inordinate and inexcusable; that the dispute has been pending before the courts for over 26 years and that the Applicant has failed to support its claim that all the parties were copied in the email correspondences with the court on the status of the transfer of the suit.
 13. In the Further Affidavit in response to the 1st Respondent's Replying Affidavit, the Applicant deposed that it was not proper that the matter was dismissed for want of prosecution when it came up on 22nd



- May 2022 for mention and not for hearing, and that the application was lodged immediately the orders of dismissal by the court on 10th May 2022 were brought to the attention of the Applicant by the 1st Respondent.
14. It is the Applicant's argument that had the 1st Respondent's Advocates acted in good faith in drawing to the attention of the Environment and Land Court the orders of the Supreme Court and the fact that the subject matter is situated in Eldoret, the court would not have issued the dismissal orders made on 10th May 2022.
 15. The Applicant's counsel contended that from the directions of the Supreme Court, it was reasonably expected that the first business to be conducted upon the transfer of the file to the Environment and Land Court was the issue of directions on how the trial was to be conducted and not the dismissal that was done.
 16. Counsel for the Applicant submitted that this court ought to exercise its discretion to set aside the dismissal orders and to restore the case for hearing. Counsel urged that the Applicant has not deliberately sought to evade, delay or obstruct the course of justice and that the Applicant is most aggrieved as its property has been unlawfully seized without compensation by the government.
 17. Counsel relied on the cases of *Shah vs Mbogo & Another* [1967] EA 116 and *Robert Kimani Ndung'u vs Kenya Deposit Insurance Corporation (Being sued in its capacity as the receiving manager of Chase Bank Limited (in Receivership))* [2022] eKLR.
 18. According to the Applicant's Counsel, the dismissal was not exercised in line with the court's jurisdiction as set out under Order 17 of the Civil Procedure Rules; that the suit had not been set down for hearing and therefore the provisions of Order 17 could not be invoked, and that further, no Notice to Show Cause was issued preceding the dismissal of the suit. Counsel relied on the Court of Appeal cases of *Wanjiku vs Esso* [1995-98] 1 EA 332 and *Nzioki vs Kitusa* [1984] KLR 487.
 19. Counsel for the 1st Respondent submitted that the Applicant does not deserve the court's discretion to set aside the orders of dismissal; that the failure to prosecute and follow through with the suit was not due to accident or inadvertence but rather a deliberate negligence and that the Applicant was fully aware of the transfer of the suit.
 20. Counsel for the Respondents submitted that the Applicant's assertion of presuming that this case was not related to Petition 20 of 2019 is unreasonable and implausible and that the Applicant's oversight regarding the Attorney General's absence and change of case numbers demonstrates a lack of diligence in prosecuting the matter and deliberate disregard for legal proceedings.
 21. Counsel submitted that the court and the 1st Respondent's advocates made diligent efforts to communicate with the Applicant regarding the suit, as evidenced by the email sent on 16th February 2022 and that the Applicant has not shown that it copied the 1st Respondent in all its email correspondences with the court.
 22. Counsel relied on Order 17 Rule (2)(1) and (2)(5) of the Civil Procedure Rules 2010 and the cases of *Nilesh Premchand Mulji Shah & Another t/a Katan Emporium vs M. D. Popat and others & another* [2016] eKLR and *Fran Investments Limited vs G4S Security Services Limited* [2015] eKLR.
 23. Counsel also relied on the cases of *Governors Balloon Safaris Ltd vs Skyship Limited & Another* [2013] eKLR, *Babs Security Services Limited vs City Council of Nairobi* [2019] eKLR and *Kestem Company Ltd vs Ndala Shop Limited & 2 Others* [2018] eKLR.



Analysis and Determination

24. The Applicant has through its application sought to set aside the orders of this court issued on 10th May 2022 and to have this suit reinstated for hearing.
25. The background to this suit is that the suit was filed and heard before the High Court as High Court Constitutional & Judicial Review Miscellaneous Civil Case No. 12A of 2006 (O.S) Uasin Gishu Memorial Hospital Limited vs Moi Teaching & Referral Hospital & 2 others.
26. In the suit, the Applicant sought to nullify Legal Notice No. 78 of 1998 which purported to vest the suit properties in the 1st Respondent, which properties were registered in the name of the Applicant.
27. Judgement in this matter was delivered on 19th March 2010, dismissing the suit. Aggrieved by the decision of the High Court, the Applicant filed an appeal before the Court of Appeal Nairobi Civil Appeal No. 184 of 2012.
28. In its judgement, the Appellate court found that the Applicant was a company and not a government entity and that the suit property belonged to it. The Court then found that the inclusion of the Appellant in the Legal Notice was in violation of its right to property and was unconstitutional, illegal, null and void.
29. The Hon. Attorney General and the Minister for Health appealed to the Supreme Court against the determination of the Court of Appeal. In its determination delivered on 24th March 2021, the Supreme Court set aside the judgement of the Court of Appeal and found that the Appellate court erred in determining issues before it without having them exhaustively determined by the High Court, and without affording parties an opportunity to test the evidence presented by affidavit.
30. The Supreme Court also set aside the judgment of the High Court and ordered that the suit be remitted to the Environment and Land Court for determination of the issues it had specified in its determination.
31. Following the Supreme Court's Judgement, the Applicant asserts that it diligently followed up with the court to confirm whether the matter had been transferred to the Environment and Land Court. The Applicant's counsel deponed that it was only on 9th November 2023, that it was brought to his attention by the 1st Respondent's counsel that the suit had indeed been transferred and had subsequently been dismissed by this court on 10th May 2022 for want of prosecution.
32. The Applicant asserts that that the email forwarding the mention notice made no mention of the Supreme Court case number or the High Court Case number, and that the Applicant had no cause to believe that the said matter related to this suit.
33. Further, it was argued by the Applicant's counsel that they expected that the Environment and Land Court would first issue directions; that the dismissal orders which were made on the very first day when the matter was transferred were made in error and that the Applicant stands to suffer irreparably because it has been deprived the use of the suit property for over 25 years following the issue of Legal Notice No. 78 of 1998.



34. Order 17 Rule 2 of the Civil Procedure Rules outlines the court’s power to dismiss a suit for want of prosecution. The process of such dismissal is set out therein as follows:

“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) The court may dismiss the suit for non-compliance with any direction given under this Order.
- (5) A suit stands dismissed after two years where no step has been undertaken.
- (6) A party may apply to court after dismissal of a suit under this Order.”

35. While the 1st Respondent has submitted that this court has authority to dismiss a suit for want of prosecution under Order 12 of the Civil Procedure Rules, this provision is not applicable to these circumstances. This is because Order 12 concerns hearing and the consequence of non-attendance. In this case, however, there is no contention that on 10th May 2022, this matter did not come up for hearing but for mention. The dismissal of the suit could only have been effected under Order 17 of the Civil Procedure Rules.

36. The exercise of the power to dismiss a suit for want of prosecution under Order 17 is a matter that is within the discretion of the court. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs MD Popat and Others & Another* [2016] eKLR, the court stated as follows:

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“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. This is what the case of *Ivita vs. Kyumbu* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

37. The test for reinstating a suit which has been dismissed under Order 17 of the Civil procedure Rules is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.



38. The record shows that following the referral of this matter to the Environment and Land Court on 24th March 2021, this file was transferred to the Environment and Land Court on 22nd December 2021.
39. The then Presiding Judge of the Environment and Land Court, Justice Samson Okong'o, issued orders on 17th January 2022, that this matter be mentioned before this court on 15th February 2022 for directions on hearing. Parties were to be notified of the mention date.
40. When the matter came up for mention before this court on 15th February 2022, none of the parties nor their advocates were in attendance. The court ordered that the matter be mentioned on 10th May 2022, and a mention notice was to be served upon the parties by the court.
41. It was on the basis of this directions that the mention notice was sent to the parties via their respective emails on 16th February 2022 by the court's bailiff, Duncan Muusya. On 10th May 2022, only Counsel for the 2nd Respondent appeared in court. This court proceeded to dismiss the suit for want of prosecution.
42. The 1st Respondent is of the opinion that under Order 17 Rule 2 of the [Civil Procedure Act](#), the suit was eligible for dismissal after one year of inaction, effective from the date the Supreme Court delivered its Judgement on 24th March 2021. However, it is clear that the matter was only transferred to the Environment and Land Court on 22nd December 2021 and was first mentioned before this court on 15th February 2022.
43. This delay was indubitably on the part of the court and cannot be attributed to any action or inaction of the parties in this matter. It would therefore be inequitable and unjust to hold such delay against the parties herein. The calculation on the period of delay by the Applicant in prosecuting its suit should therefore run from 15th February 2022, when the matter first came up before this court, the same having been transferred from the Supreme Court.
44. Considering that the suit was dismissed on 10th May 2022, it is the finding of the court that it was not eligible for dismissal under Order 17 Rule 2 of the Civil Procedure Rules.
45. In addition, service of a notice to show cause why the suit should not be dismissed is a requirement under Order 17 Rule 2, and if cause is not shown to the satisfaction of the court, it may then dismiss the suit. In this matter, no notice to show cause was ever issued to the Applicant or the 3rd Respondent, preceding the dismissal of the suit.
46. There then remains the matter of the delay on the Applicant's part in filing this application. Despite this court rendering its orders on 10th May 2022, this application was made on 18th November 2023, one year and six months after the dismissal of this suit.
47. The Applicant asserts that it was not made aware of the transfer of this suit or the dismissal order, and in fact engaged in several correspondences with the Supreme Court and the High Court Constitutional and Human Rights Division, following up on the transfer of this matter.
48. The Applicant has annexed various correspondences, including emails to the Deputy Registrar of the Constitutional and Human Rights Division between 6th January 2022 and 13th January 2022, in which Counsel for the Applicant and the 1st Respondent sought a mention date with respect to the matter.
49. The Applicant has also annexed a letter dated 28th June 2022 in which it sought for a mention date to take directions on the suit. The letter was forwarded via email to the Milimani Constitutional Division, and was copied to the Attorney General, the Supreme Court and the Advocates of the 1st Respondent, Katwa & Kemboi Advocates.



50. The Applicant's Counsel later sent a letter from its advocates to the Registrar Supreme Court dated 9th November 2023, seeking an update as to whether the file had been transmitted to the Environment and Land Court and to know which registry the file had been transferred.
51. The Registrar responded by way of a letter dated 10th November 2023, advising the Applicant's Advocates to pursue the matter with the Deputy Registrar of the High Court Constitution and Judicial Review Division. This letter was forwarded on email to all the parties to the suit.
52. The 1st Respondent's Advocates thereafter sent an email on 14th November 2023 and notified the Applicant that the matter had been dismissed on 10th May 2022 for want or prosecution. They also indicated that the matter had been allocated Case number ELC Misc App. No. 1 of 2022 and enclosed the notice dated 16th February 2022 and the dismissal order dated 10th May 2022.
53. With respect to the mention notice, the Applicant's counsel does not dispute that the said notice was sent to them. His contention is that the email did not mention the Supreme Court suit and did not list the names of all of the parties to this dispute. Indeed, the email listed the parties as Katwa & Kemboy Advocates vs Ooko Advocates, rather than Uasin Gishu Memorial Hospital Ltd vs Moi Teaching and Referral Hospital Board & 2 others.
54. The email did not list the name of the parties to the suit but indicated the advocates as parties. Further, the body of the email made no reference to the Supreme Court suit or the previous High Court case number. For a busy advocate, the email was not sufficient to bring to the attention of counsel that he was dealing with the same matter that was in the Supreme Court, and that the same matter had been transferred to this court.
55. In the circumstances of this case, the Applicant has satisfied the court that there are sufficient grounds to exercise its discretion in its favour, in order to avoid hardship resulting from the excusable mistake or error of the Applicant and his counsel.
56. For those reasons, it is the finding of this court that the application dated 16th November 2023 is merited, and the following orders do issue:
 - a. The orders of this court issued on 10th May 2022 dismissing this suit for want of prosecution are hereby set aside.
 - b. This suit is reinstated and shall be heard on priority basis.
 - c. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Masike for Applicant

No appearance for 1st and 3rd Respondents

Mr. Motari for 2nd Respondent

Court Assistant: Tracy

