



REPUBLIC OF KENYA



**Ikuti & 2 others v Mbithuka & 6 others (Environment & Land Case
26 of 2019) [2023] KEELC 16337 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16337 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 26 OF 2019**

**TW MURIGI, J
MARCH 8, 2023**

BETWEEN

**ANTONY MUTINDA IKUTI 1ST APPLICANT
MICHAEL MASUA 2ND APPLICANT
GIDION NDAMBUKI DAVID 3RD APPLICANT**

AND

**EDWARD NZANGI MBITHUKA 1ST RESPONDENT
PATRICK KYENDE KAMOTA 2ND RESPONDENT
JOSEPHINE SAIVA KAMOTA 3RD RESPONDENT
COSTINA MUTANU MUEMA 4TH RESPONDENT
CHARLES MUNYAO MUISYO 5TH RESPONDENT
GRACE KUTHINGA KASIMU 6TH RESPONDENT
MAKUENI LAND ADJUDICATION & SETTLEMENT 7TH RESPONDENT**

RULING

1. By a notice of motion application dated May 11, 2022 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Orders 12 Rule 7, 45 Rule 1 and 51 Rule 1 of the *Civil Procedure Rules*, Article 159 (2) (d) of the *Constitution* and all other enabling provisions of the law the applicants seek the following orders:-
 1. That the order issued by this honourable court dismissing the plaintiffs suit for non-attendance on March 21, 2022 be vacated and set aside.
 2. That the plaintiffs suit be reinstated and be heard and determined on merits.



3. That an interim order be issued by this honourable court prohibiting the defendants whether by themselves or their servants and agents from selling, trespassing, disposing off, leasing, developing, subdividing, constructing on, fencing, advertising for sale, assigning, alienating or in any other way whatsoever interfering with the suit property plot numbers 2446, 2447, 2448, 2450, 2451, 2451, 2453, 2459 and 2470 Ngai adjudication section pending the hearing and determination of this suit.
4. That the costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the applicant sworn on even date.

The applicants' case

3. A summary of the grounds and the averments is that the plaintiffs were not served with the notice to show cause why the suit should not be dismissed for want of prosecution. The applicants averred that they became aware of the dismissal order when they went to registry to fix a hearing date. The applicants contended that they are ready and willing to prosecute the suit expeditiously. In addition, the applicants argued that the parties herein have been exploring an out of court settlement though a settlement is yet to be reached. The applicants argued that the defendants will not suffer any prejudice that cannot be compensated if the orders sought are granted.

The respondents case

4. In opposing the application, the respondents vide their replying affidavit sworn on July 21, 2022 averred that they were not served with the summons to enter appearance despite the applicants being directed by the court to effect service of the same. The respondents argued that they became aware of the matter after they received an invitation to fix a hearing date. They argued that the delay in prosecuting the matter has not been explained. Finally, the respondents contended that they will be prejudiced if the application is allowed as they will be rendered homeless.
5. The application was canvassed by way of written submissions.

The applicants submissions

6. The applicants submissions were filed in Court on October 13, 2022.
7. The applicants submitted that in the present application, the court should be guided by the following principles:-
 1. Reasonable reason for delay.
 2. Whether prejudice will be suffered by the respondent if application is granted.
 3. Whether there was delay in bringing the application.
8. On the issue of delay, the applicants submitted that the parties herein were trying to negotiate the matter out of court. In addition, the Applicants submitted that they were trying to source for funds to instruct an Advocate to act on their behalf. It was further submitted that the delay was occasioned by the Survey Office which was yet to issue them with the maps which they intend to rely on in their evidence.
9. On whether the Respondent will suffer any prejudice if the application is allowed, the applicants submitted that the Respondents will not suffer any prejudice that cannot be compensated by way of



damages. Finally, the applicants submitted that the present application was filed immediately it came to their attention that the suit was dismissed for want of prosecution.

10. The applicant urged the Court to allow the application because they have an arguable case with high chances of success.

The respondents submissions

11. The Respondents submissions were filed in court on November 22, 2022.
12. Counsel for the respondents reiterated the contents of the respondents replying affidavit. Counsel further submitted that if the court is inclined to allow the application the respondents should be given time to enter appearance and file their requisite pleadings in response to the plaint.

Analysis and determination

13. Having considered the pleadings, the application, the affidavits and the rival submissions, I find that the only issue that arises for determination is whether this suit should be reinstated for hearing and determination.
14. The legal framework on dismissal of suits for want of prosecution is found in order 17 rule 2 which provides as follows:-
 - 2(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 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 by sub-rule 1.
15. Order 17 rule 2(6) which allows the making of an application to reinstate a suit that has been dismissed for want of prosecution provides as follows;
 6. A party may apply to court after dismissal of a suit under this order.
16. The plaintiff commenced this suit against the defendants vide an originating summons dated July 6, 2017 and sought the following orders:-
 1. A declaratory order that the surveying and creation of new numbers P/Nos 2247/2243/2244/2241/2958/2959/2960 & 2961 Ndiani adjudication section in the plaintiff family land was illegal, null and void.
 2. Order cancelling the above said entries and an order directing the 1st defendant to subdivide the subject matter land in accordance with the land dispute tribunal award issued on November 5, 2007 and confirmed on November 19, 2007.
 3. An order against the 3rd defendant to stop further dealings in respect of P/Nos 2247/2243/2244/2958/2959/2960 and 2961 Ndiani Adjudication Section.
 4. Cost of the suit and interest at court rates.
 5. Any other relief that this honourable court may deem fit and just to grant.
17. Summons to enter appearance were issued on July 7, 2017.



18. The defendants argued that they were not served with the summons to enter appearance and the plaint.
19. The record shows that on October 3, 2019, the plaintiffs were directed to effect service upon the defendants. The court issued the notice to show cause why the suit should not be dismissed for want of prosecution on February 3, 2022.
20. The matter was listed for Notice to show cause why the suit should not be dismissed for want of prosecution on March 21, 2022. From the record, it is crystal clear that both parties were absent. The Court proceeded to dismiss the suit for want of prosecution. The Plaintiff moved to reinstate the suit on May 13, 2022.
21. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution was laid down in the case of *Ivita v Kyumbu* [1975] eKLR, ZR Chesoni J held as follows;

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.”
22. Further, in the case of *Ecobank Ghana Limited v Triton Petroleum Co Limited & 5 others* [2018] eKLR the Court of Appeal observed as follows:-

“...it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly, whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.” (Emphasis supplied).
23. It is without doubt that significant delay has been occasioned in this suit. It is clear from the record that the suit was dismissed as there was inordinate delay in prosecuting the same. The applicants stated that the prolonged delay in prosecuting this suit was attributed to attempts by the parties to settle this matter out of court, lack of funds to instruct counsel and non-availability of documents from the survey office. The applicants contended that they were not served with the notice to show cause.
24. Order 17 rule 2 (1) of the *Civil Procedure Rules* provides that: -

“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.”
25. It is clear from the above provisions that it does not require service of notice. The above provision uses the words “give notice in writing”. The notice can be effected through the cause list, the judiciary and Law Society website. The court confirmed that the parties herein were served with the notice to show cause why the suit should not be dismissed for want of prosecution.
26. I find that the applicants’ explanation on the delayed prosecution of the matter is reasonable and plausible.
27. To avoid injustice to both parties and to prevent prejudice to the applicants who will be locked from the seat of justice, this court finds and holds that the suit should be heard and determined on its merits.



In so finding I am persuaded by the holding in the case of *Essanji & Another v Solanki* [1968] EA 218 where it was observed as follows;

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”

28. In the end I find that the application dated May 10, 2022 is merited and the same is allowed in the following terms:-

1. The order issued on March 21, 2022 dismissing this suit be and is hereby vacated.
2. The plaintiff is directed to serve the defendant with the summons to enter appearance and the plaint within the next 7 days from the date hereof.
3. The defendants shall file and serve their statement of defence within 14 days after service.
4. That upon the exchange of documents, the parties herein shall comply with order 11 of the CPC within 30 days from the date hereof.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS COURT THIS 8TH DAY OF MARCH, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Onesmus Masua holding brief for Patrick Maina for the Applicant.

Hassan for the Respondent.

