



REPUBLIC OF KENYA



KENYA LAW
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**Chisonzo & 3 others v Chesaina & 4 others (Environment & Land Case
287 of 2012) [2023] KEELC 17294 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17294 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 287 OF 2012**

NA MATHEKA, J

MAY 10, 2023

BETWEEN

ALI HASSAN CHISONZO 1ST PLAINTIFF
SALIM ATHUMAN MWABANDARI 2ND PLAINTIFF
ALI SWALE-HE MWAKUSEMWA 3RD PLAINTIFF
SALIM ABDALLAHI MWAMANUKO 4TH PLAINTIFF

AND

JANE CIARUNJI CHESAINA 1ST DEFENDANT
BHARAJ GIRDHARLAL THAKER 2ND DEFENDANT
GANGHYAM PREMJI PABARI 3RD DEFENDANT
REGISTRAR OF LANDS, KWALE 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The application is dated November 2, 2022 and is brought under Order 12 rule 7 of the *Civil Procedure Rules* and Section 1A, 1B & 34 of the *Civil Procedure Act* seeking the following orders;
 1. That the Court be pleased to set aside or vary its orders issued on the October 3, 2022, dismissing the Plaintiffs case for want of prosecution.
 2. That this Honourable Court be pleased to reinstate the Plaintiffs' suit and the Plaintiffs be allowed to prosecute the claim unconditionally.
 3. That costs be provided for.



2. The application is based on the following grounds that the Plaintiffs instituted this suit against the Defendants for cancellation of title Kwale/Diani/1955-1974 being original Plot No Kwale/Diani/477 in the names of the 1st, 2nd and 3rd Defendants and have the same be registered in the Plaintiffs names as Plot No Kwale/Diani/477 and a declaration that the Registration was obtained through fraud on Kwale/Diani/1955-1974 original Plot No Kwale/Diani/477. That the 2nd and 3rd Defendants never entered appearance and an interlocutory judgment was entered on August 11, 2014 and after full hearing a judgment was entered on November 17, 2017. That the 2nd and 3rd Defendants filed an application dated January 4, 2019 to have the interlocutory judgment dated August 11, 2014 and Judgment dated November 17, 2017 be set aside which was allowed on orders that they file and serve their defence within 14 days. Consequently, without prejudice, the suit was not ripe for hearing since the Defendants failed to file and serve their defence up to date and as such they relied on the Court's directions to accord the Defendants' their right to a fair hearing. That the 2nd and 3rd Defendants filed another application dated April 21, 2022 to have the Plaintiffs' suit dated December 7, 2012 be struck out and the Plaintiffs' suit be dismissed for want of prosecution. From the foregoing, the 2nd and 3rd Defendants cannot purport to have the Plaintiffs' suit dismissed for want of prosecution. That when the matter came for hearing of 2nd and 3rd Defendants Application on the June 8, 2022, the same did not proceed because the previous Advocate requested to file an application to withdraw. Consequently, the matter was set down for hearing on the July 19, 2022.
3. That on July 19, 2022, the previous Advocate requested for more time and the Court granted a final adjournment and the matter was set for hearing on October 3, 2022. That however, on the October 3, 2022, the matter was to proceed virtually, the previous advocate did not inform the Plaintiffs who went physically to court. No appearance was made virtually which led the Court to dismiss the suit for want of prosecution. That the Plaintiffs moved timeously to the registry, precisely on the same day, after they learnt that the suit had been dismissed for want of prosecution hence no inordinate delay can be attributed to the Plaintiffs. They were given another a date to have the matter mentioned on October 25, 2022.
4. That the Plaintiffs appointed the current advocates to take over the conduct of the matter from the previous advocates and represent their interests. That the advocates filed a Notice of Change of Advocates on October 24, 2022. That the Plaintiffs have a good and arguable case and should be afforded an opportunity to prosecute the same. That the mistake of an advocate should not be meted on the innocent Plaintiffs when the situation can be remedied. That the Defendants will not suffer any prejudice if the suit is reinstated. That dismissal of a suit does not speak to its merit and they urge this court in observance of the rules on natural justice to reinstate the suit for hearing on its merit so that the Plaintiffs are not condemned unheard or suffer miscarriage of justice which was occasioned by the former advocate.
5. The 2nd and 3rd Defendants/Respondents stated that by a ruling delivered by the Court (Yano J) on February 17, 2020 the Court set aside the default judgement that had been entered against the 2nd and 3rd Defendants and directed the 2nd and 3rd Defendants to file and serve their defence within 14 days. That on February 27, 2020 the 2nd and 3rd Defendants filed their defence which was served upon the Plaintiffs' advocates Messrs Okanga & Company on February 28, 2020. A copy of the said defence is annexed hereto and marked "BGT 1". Therefore the allegation made in paragraphs 3 and 4 of the affidavit under reply that the 2nd and 3rd Defendants failed to file and serve defence and consequently the case was not ripe for hearing is without basis as it is untrue. That since the date of ruling of February 17, 2020 for a period of more than 2 years the Plaintiffs did not take any step to prosecute the suit hence our application to dismiss the suit for want of prosecution. That the Plaintiffs have not explained why for more than 2 years they did not take any step to prosecute their case. The Plaintiffs' case was properly



dismissed for want of prosecution. That the Plaintiffs do not have a good and arguable case as alleged. In fact the Plaintiffs' case is hopelessly time barred. The Plaintiffs claim that the suit premises namely title number Kwale/Diani/477 is their ancestral land and the 1st Defendant obtained title to the suit premises fraudulently. The 1st Defendant's title was issued on October 3, 1994. A copy of the said title is annexed hereto and marked "BGT 2". The Plaintiffs' case was filed on December 7, 2012 more than 18 years after the 1st Defendant's title to the suit premises was issued. Therefore the Plaintiffs' claim is time barred. That the 2nd and 3rd Defendants purchased the suit premises from the 1st Defendant and the same was transferred to the 2nd and 3rd Defendants per the Transfer of Land dated October 16, 2008 a copy of which is annexed hereto and marked "BGT 3". The 2nd and 3rd Defendants are innocent purchasers for value without notice of the Plaintiffs' alleged claim to the land and there is no allegation of fraud against them. The Plaintiffs have no arguable case against the 2nd and 3rd Defendants.

6. This court has considered the application and the submissions therein. In the case of *Mwangi S Kimenyi vs Attorney General and Another*, Civil Suit Misc No 720 of 2009, the court restated the test as follows;

- "1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

7. In the case of *Ivita vs Kyumbu* (1984) KLR 441 the court held as follows:

"The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay".

8. I have perused the court record and find that on the October 3, 2022, the matter was to proceed and there was no appearance from the Plaintiffs and the Court dismissed the suit for want of prosecution. This was their final adjournment. The Plaintiffs stated that they were physical in court when the matter was mentioned virtually in their absence hence they moved timeously to the registry, on the same day, after they learnt that the suit had been dismissed for want of prosecution hence no inordinate delay can be attributed to the Plaintiffs. They were given another a date to have the matter mentioned on October 25, 2022. That the Plaintiffs appointed the current advocates to take over the conduct of the matter from the previous advocates and represent their interests. That the advocates filed a Notice of Change of Advocates on October 24, 2022. I find that the reasons given for their absence excusable and this application was brought without undue delay. I find this application is merited and I grant



the same. Parties are advised to comply with order 11 and take a hearing date in this matter. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

