



Ndegwa & 2 others v Kang’ethe & 2 others (Environment & Land Case 12”A” of 2013) [2023] KEELC 17132 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 12”A” OF 2013**

JM MUTUNGI, J

MAY 4, 2023

BETWEEN

DUNCAN MAINA NDEGWA 1ST PLAINTIFF

STEPHEN MWANGI NDEGWA 2ND PLAINTIFF

MARY WAMBUI MUGO 3RD PLAINTIFF

AND

NDEGWA INEGENE KANG’ETHE 1ST DEFENDANT

TIMOTHY NDORIA IKUA 2ND DEFENDANT

WACHUKA WANJIRU IKUA 3RD DEFENDANT

RULING

1. The plaintiff/applicants by a notice of motion application dated 16/11/2021 brought under section 1A, 1B and 3A of the *Civil Procedure Act* prays for orders:-
 1. That the Honourable Court be pleased to set aside the suit dismissal orders issued on December 20, 2016.
 2. That the costs of the application be in the cause.
2. The application is supported on the grounds appearing on the body of the application and on the annexed Supporting Affidavit sworn by Mary Wambui Mugo. The Plaintiffs inter alia aver that the suit was dismissed on December 20, 2016 for want of prosecution but deny that neither themselves or their Advocates were served with the requisite Notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiffs aver that the suit touches on land ownership and that the issue being emotive ought to be determined by the Court. The Plaintiffs further aver the Court has



the discretion to grant the orders sought and that no prejudice will be occasioned on the Defendants if the order reinstating the suit is granted.

3. The 3rd Plaintiff in her Affidavit in support of the application depones that she became aware for the first time that the suit had been dismissed for want of prosecution on October 25, 2021 and when she contacted their Advocate he indicated he was not aware as he had not received any notice from the Court. The 3rd Plaintiff further invited the Court to take notice that the Covid-19 pandemic had between the years 2019 and 2020 disrupted Court functions and the Courts were closed for long durations. She urged the Court to exercise its discretion and grant the prayers sought in the interest of justice.
4. The 2nd defendant, timothy ndoria ikua, swore a replying affidavit dated October 6, 2022 in opposition to the application. He deponed that the Plaintiffs were not interested in the suit and were guilty of inordinate delay not only in prosecuting the suit but also in filing the present application. For instance, he deponed that even though the application is indicated to have been drawn on November 16, 2021, it was not filed until February 15, 2022 (3 months later). He asserted the delay by the Plaintiffs in prosecuting the suit was inordinate and was not explained. The 2nd Defendant discounted the impact of Covid -19 pandemic as a valid reason for the inaction by the Plaintiffs asserting that the Courts were only temporarily disrupted by the effects of the pandemic in 2020 but continued to operate and even during the pandemic, court services were accessible.
5. The application was canvassed by way of written submissions. The Plaintiffs submitted that no notice was issued to them to show cause and that they only learnt of the dismissal of the suit on October 25, 2021 at the Court Registry when they had invited the Defendants to fix a hearing and were then informed the suit had been dismissed on December 20, 2016 for want of prosecution. The Plaintiff submitted that the 2nd Defendant in his response in opposition to the application, did not demonstrate or affirm the Plaintiff had been served with the Notice to Show Cause for dismissal of the suit. The Plaintiff contended they had explained the delay in filing the application and urged the Court to exercise its discretion in favour of the Plaintiff and allow the application. The Plaintiffs in support of the application placed reliance on the case of *David Bundi v Timothy Mwenda Muthee* [2022] eKLR where the Applicant sought the reinstatement of an application dismissed for non attendance on the date fixed for interparties hearing on the ground that the date for the interparties hearing had not been communicated and/or notified to him by the Court. In allowing the application the Court stated that the Court had unfettered discretion and that its duty is to ensure justice was done to the parties. In circumstances where the delay in prosecuting the suit is explained and is not inordinate the Court ought to exercise its discretion in allowing the Plaintiff to prosecute the suit.
6. The 2nd and 3rd Respondents in their submissions in opposition to the Plaintiff's/Applicants application maintained that the delay on the part of the Plaintiff in prosecuting and/or applying for the reinstatement of the suit after the dismissal of the suit for want of prosecution was unexplained, inordinate and not excusable. The Respondents argued where the delay was inordinate and no reasonable explanation for the delay is given, the Applicant would not be deserving of any discretion in his favour. The Respondents placed reliance on the case of *Nilesh Premchand Mulji Shah & another v MD Popat & others* (2016) eKLR and *Mwangi S Kimenyi v Attorney General & another* (2014) eKLR. In the latter case the court considered what constituted inordinate delay. The court stated:-

“There is no precise measure of what amounts to inordinate delay. inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus



test being it should be an amount of delay which leads the Court to an escapable conclusion that it is inordinate and therefore, inexcusable, ----- Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases”

7. In present matter the Plaintiff's suit was dismissed for want of prosecution at the instance of the Court on December 20, 2016 following the issue of a NTSC under order 17 rule 2 of the Civil Procedure Rules. The NTSC issued is shown to have been dated November 25, 2016 and was addressed to Kirubi Mwangi Advocates PO Box 60 Murang'a for the Plaintiffs and copied to Ikahu Ngangah & Co Advocates PO Box 638 Kerugoya for the Defendant. On the date of hearing of the NTSC on December 20, 2016 only the Defendant's Advocate attended Court. The Defendant's Advocate supported the dismissal of the suit for want of prosecution. As no cause was shown, the Court ordered the suit dismissed with costs to the Defendant.
8. Incredibly there was no further action in the matter until the Plaintiff filed the present application on 15/2/2022 seeking to have the dismissal order of the suit for want of prosecution set aside. Before the NTSC the matter was last in Court on 22/4/2015 when it was fixed for mention on 11/5/2015 to confirm compliance with Order 11 of the Civil Procedure Rules. On 11/5/2015 the Court record does not indicate any proceedings took place meaning that as at December 20, 2016 a period of more than 18 months had elapsed and after December 20, 2016 upto 15/2/2022 when the Plaintiff filed the present application, a further period of more than 5 years had elapsed without the Plaintiff taking any action to prosecute the suit.

Order 17 rule 2(1) 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.”

9. The Court in the instant matter duly issued a notice in writing for the parties to show cause and the Plaintiff did not attend on the appointed date prompting the dismissal of the suit for want of prosecution. The Plaintiff woke up more than 5 years later to make the present application to have the dismissal order set aside and the suit reinstated for hearing. His explanation was that he was not served with the NTSC explaining that if he had been served he would have attended Court and shown cause. However, the Plaintiff did not give any viable explanation why for 5 years since the suit was dismissed, he had not taken any action to have the suit prosecuted. Even assuming he may not have been served with the NTSC for hearing on December 20, 2016 what explanation did he have for not taking any action to prosecute the suit for the following 5 years after the order of dismissal. The Plaintiff had an obligation to offer a viable and credible explanation for the delay. The Plaintiff attempted to lay blame on the Covid-19 pandemic that ravaged the Country in 2020/2021 but I do not suppose that explanation can hold. During the year 2020 and 2021 there were periods when court services were somewhat interrupted and/or were scaled down but court operations were nonetheless accessible. The Plaintiff in my view was not vigilant and was not keen in prosecuting his case. A delay running to 7 years cannot be wished away without some good explanation.
10. A party who files suit has a duty and indeed an obligation to pursue the prosecution of his case and in my view there can be no reasonable explanation for failure to prosecute a suit for a period in excess of 5 years. The Defendant is entitled to have any suit instituted against him determined and resolved without undue delay. I am satisfied the Plaintiff was guilty of inordinate delay in prosecuting his suit and the delay was inexcusable. I decline to exercise my discretion in favour of the Plaintiff/Applicant.



The Notice of motion dated November 16, 2021 is devoid of merit and the same is ordered dismissed with costs to the 2nd and 3rd defendants.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 4TH DAY OF MAY, 2023.

JOHN M. MUTUNGI

JUDGE

