



**Kibisu v Imbuye (Environment & Land Case 82 of 2014)
[2023] KEELC 20381 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 82 OF 2014
DO OHUNGO, J
OCTOBER 3, 2023**

BETWEEN

KABATESI KIBISU PLAINTIFF

AND

JOSEPH OYOLLO IMBUYE DEFENDANT

RULING

1. The plaintiff filed this suit on 18th March 2014, through plaint dated 17th March 2014. At that time, he was represented by Nandwa & Company Advocates. The matter went dormant and a notice to show cause why it should not be dismissed for want of prosecution was issued on 30th November 2017. Ultimately, it was listed for dismissal on 5th December 2017 and was dismissed on that date, after parties failed to attend court.
2. It again remained dormant until 4th July 2022, when the plaintiff changed advocates to Lugano & Lugano Advocates and filed Notice of Motion dated 17th June 2022, which is the subject of this ruling. The application seeks setting aside of the order of 5th December 2017 pursuant to which the suit was dismissed for want of prosecution. The plaintiff also prays that costs of the application be in the cause.
3. The application is supported by an affidavit sworn by the plaintiff who deposed that after filing this suit on his behalf, Nandwa & Company Advocates failed to update him on the progress of the suit despite severally visiting their offices thereby prompting him to write letters to the court inquiring on the status of the suit but there was no response. He further deposed that he was surprised to learn sometime in May 2022 that the file had been taken to the archives as the matter had been dismissed for want of prosecution and without being notified.
4. The defendant did not file any response to the application. The application was canvassed through written submissions.



5. The plaintiff argued that the defendant has not filed any affidavit showing how he will be prejudiced if the suit is reinstated. He added that he has demonstrated that the delay was excusable as he took steps to follow up on the suit by sending letters directly to the court and that the mistake of his counsel in not setting down the suit for hearing ought not to be visited upon him.
6. In response, the defendant filed his submissions on 3rd May 2023 and argued that the plaintiff filed the present application about five years after dismissal. That despite blaming his former advocates on record for his predicament, the plaintiff has not particularised how the former advocates contributed to the misfortunes. He concluded by deposing that the reasons given by the plaintiff for the delay in making efforts to reinstate the dismissed suit are inexcusable and that any reinstatement will be prejudicial to him since he disposed of the suit property to a third party following the dismissal. He relied on *Ivita v Kyumbu* [1984] KLR 441, he argued that the delay is prolonged and inexcusable.
7. I have considered the application and the submissions. The plaintiff is seeking setting aside of the order of dismissal of the suit for want of prosecution. When dealing with such an application, the court is called upon to exercise discretion pursuant to the principles laid down in *Mbogoh & Another v. Shah* [1968] EA 93 and reiterated in *James Kanyitta Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. Simply put, the court has unfettered discretion and will consider such factors as the reason for the failure to prosecute the case, the length of time that has elapsed since the dismissal, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside.
8. The plaintiff contends that Nandwa & Company Advocates were not updating him and that he wrote letters to the court. It is convenient to blame Nandwa & Company Advocates now that they are no longer on record. Nandwa & Company Advocates have not denied that they received the notice to show cause or that they were aware of its date. The plaintiff has stated that he wrote to the court personally. I note that first of the letters which he has annexed is dated 15th Jan 2015 while the last is dated 23rd October 2019. He has not explained what he did between 23rd October 2019 and 4th July 2022 when he filed Notice of Motion dated 17th June 2022. While he blames Nandwa & Company Advocates for inaction, a perusal of the file shows that Nandwa & Company Advocates were active as of 3rd January 2015 when they wrote a letter to the County Physical Planner and copied it both to the court and the plaintiff. I am thus not satisfied that there is any mistake of counsel that would provide solace to the plaintiff. Equally, there was inordinate delay in both prosecution of the matter and in bringing an application for reinstatement of the suit following its dismissal.
9. I find no merit in Notice of Motion dated 17th June 2022, and I accordingly dismiss it. Considering that defendant did not file any response, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 3RD DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

Ms Ikhumba for the Defendant

Court Assistant: E. Juma

