



**Choyo v Tsuma (Environment & Land Case 149 of 2018)
[2023] KEELC 21160 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 149 OF 2018
SM KIBUNJA, J
NOVEMBER 1, 2023**

BETWEEN

LEWA CHOYO PLAINTIFF

AND

JULO TSUMA DEFENDANT

RULING

1. The plaintiff has moved the court through the notice of motion dated the 16th January 2023 seeking for inter alia the reinstatement of the plaintiff's suit that was dismissed for want of prosecution on the 28th June 2022 and transfer it to ELC Kwale for hearing and determination. The application is based on the eight (8) grounds on its face and is supported by the undated affidavit of Lewa Choyo, the plaintiff *inter alia* deposing that he filed this suit through his the advocates and was waiting to be notified of the hearing date by his counsel; that he learnt that the suit had been dismissed for want of prosecution on the 28th June 2022 when the defendant showed him a copy of a letter dated the 29th November 2022 from his advocate; that he went to his advocates chambers but did not get him; that he has called his advocate by phone severally without any answer, and he instructed the current advocates to make a follow up; that the ineptitude of his then counsel should not be visited upon him, and this reinstatement application should be allowed to give him a chance to present his case and suit transferred to ELC Kwale.
2. The application is opposed by the defendant through the replying affidavit he swore on the 17th February 2023 inter alia deposing that the plaintiff filed this suit at the Mariakani Principal Magistrate's Court on the 8th August 2014 and in July 2016 applied for it to be transferred to this court; that later the plaintiff unsuccessfully sought for the suit to be transferred back to Mariakani Law courts; that the plaintiff then failed to take steps to prosecute his case making the defendant seek for it to be dismissed for want of prosecution; that the plaintiff has been indolent and has been using the pendency of the suit to threaten the local administration for subjudice; that the suit land is ancestral family land that



is yet to be adjudicated; that the adjudication process, through which the interests over the land will be ascertained will soon get under way; that the adjudication process will resolve the disputes thereof under the statutory dispute mechanisms under the law and therefore, the dismissal order should be upheld. The defendant also filed grounds of opposition raising two grounds. First that the application is belated, mala fides, vexatious and otherwise an abuse of the court process; and secondly that the suit property is now subject matter of the [Land Adjudication Act](#), chapter 284 of Laws of Kenya.

3. The learned counsel for the plaintiff and defendant filed their submissions dated the 13th April 2023 and 5th July 2023 respectively, which the court has considered.
4. The following are the issues for the determinations by the court;
 - a. Whether the plaintiff's application for reinstatement of the suit dismissed for want of prosecution on 28th June 2022 has merit.
 - b. Whether the plaintiff has made out a reasonable case for the transfer of this suit to ELC Kwale.
 - c. Who pays the costs.
5. The court has carefully considered the grounds on the application and opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited and come to the following determinations:
 - a. That indeed the record confirms that this suit was commenced as Mariakani PMCC No 276 of 2014. The plaint filed on the 8th October 2014 sets out the prayers as order for vacant possession and mandatory injunction for defendant to demolish and remove the developments from the suit land described at paragraph 3 as "unregistered customary land at Maruphesa Samburu area." The suit was then transferred to this court vide the order of 9th November 2016 issued in Mombasa ELC Misc Appl No 22 of 2016, upon the application made by the plaintiff, and given the current reference.
 - b. That the plaintiff did not take any steps to prosecute his suit for over one year prompting the defendant to file and serve the notice of motion dated the 7th September 2020 for dismissal of the suit for want of prosecution. However, the defendant did not take steps to serve and prosecute the application.
 - c. The court issued and served to both parties' counsel several notices under Order 17 Rule 2 of the *Civil Procedure Rules* to show cause why the suit should not be dismissed for want of prosecution and on the 28th June 2022 the court made the following order;

"This matter was last in court in 2018. Four years later, there has been no activity. It is dismissed for want of prosecution. Costs to the defendant."

The record confirms that the last time the matter was in court before the court proceedings of the 28th June 2022, was on the 13th June 2018 when the lower court directed the file to be forwarded to this court. This clearly confirms that after the plaintiff got the order of 9th November 2016 in Mombasa ELC Misc Appl No 22 of 2016, transferring the suit from Mariakani Law Courts to this court, and after the lower court ordered the file to be transmitted to this court on the 13th June 2018, he simply went to slumber. He did not even attend the court in person or through counsel to show cause why the suit should not be dismissed when the court issued notices under Order 17 Rule 2 of the *Civil Procedure Rules*.



- d. The plaintiff in his application blames his then counsel on record for the failure to take steps to prosecute his case. He has alleged to have tried to contact his advocate by visiting his chambers and by phone without success but there is no evidence presented before the court to show that he was indeed free from blame for the delay. The defendant has countered the plaintiff's claim stating that he was aware of the status of his suit and had used the existence of the matter in court to threaten the local administration through his advocate. He has gone further and indicated that the suit land is now under adjudication process through which the parties' interests and those others will be ascertained, and therefore the dismissal order should be upheld. It would appear the plaintiff's interest was to just file the claim in court and keep it pending indefinitely. The plaintiff has not placed any evidence before the court to show the nature and frequency of any engagements he may have had with his counsel on record to be appraised on the progress of his case. The defendant's position that the land is in an area that is now under adjudication process that is likely to settle the conflicting interests between the parties herein and others has not been disputed. That having considered the facts and submissions presented for and against the application I find the plaintiff has failed to convince the court that he was without blame for the failure to take steps to prosecute his case. The application is therefore without merit.
- e. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless for good cause otherwise ordered by the court. I do not find any cause to deviate from that edict in this application.
6. Flowing from the foregoing conclusions, the court finds and orders as follows:
- a. That the plaintiff's notice of motion dated 16th January 2023 is without merit.
 - b. The said application is hereby dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 1ST DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: Mr. Kabiaro.

Defendant: M/s Nduku.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

