



REPUBLIC OF KENYA



**Nyoike & another v Ng'era & 3 others (Civil Suit 460 of 2005)
[2023] KEHC 3079 (KLR) (Civ) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 460 OF 2005

AN ONGERI, J

APRIL 14, 2023

BETWEEN

ALICE WANGUI NYOIKE 1ST PLAINTIFF

JOHN KAGWI 2ND PLAINTIFF

AND

SAMMY NGUGI NG'ERA 1ST DEFENDANT

WILFRED NGUNJIRI NDERITU T/A NDERITU & PARTNERS

ADVOCATES 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated 8/12/2021 seeking for the orders that this suit be dismissed against the 1st defendant for want of prosecution.
2. The application is based on the grounds on the face of it which are as follows: it has been over eight years since any steps have been taken by the plaintiff to set down the suit for hearing. As a result, the 2nd defendant filed an application and the suit against it was dismissed. That it is clear that the plaintiffs have lost interest in the suit.
3. The application is supported by the affidavit of Elias Masika of even date in which it is deposed that the suit herein was filed against the 4th defendant in the year 2005 and the plaintiffs obtained orders of injunction restraining the 1st defendant from occupying and using the suit property which is registered



- in his name. That since the last time the suit was partly heard before Justice H Okwengu the plaintiffs have taken no steps to have it listed for hearing but have continued to enjoy the orders for injunction.
4. He indicated that it is now over 8 years since the plaintiffs took any steps to have it listed for hearing. The 1st defendant is the party most affected by the orders of injunction since its depriving him of the use of his property of over 16 years.
 5. The application was opposed by the replying affidavit of John Kagwi dated July 18, 2022 where he averred that he is desirous in prosecuting the case herein. He indicated that the delay in prosecuting this matter was occasioned by the mistake of his advocate.
 6. He deposed that the net effect of the dismissal would enable the 1st defendant to alienate the suit property to his detriment and thus render the suit herein nugatory. He would stand to suffer irreparable harm and damage with the dismissal of the suit since the 1st defendant shall not hesitate to dispose of the suit property. He further indicated that the 1st defendant will not suffer prejudice if the matter is heard on its merits.
 7. He averred further that the honorable court ought to consider the overriding principles of proportionality and equality and opt for the lower rather than the higher risk of injustice by not dismissing the suit.
 8. The parties filed written submissions in the application as follows: the 1st defendant submitted that it is not in dispute that this suit was last in court on June 8, 2011 before Lady Justice Hannah Okwengu. That since that time the plaintiff has not taken any step towards the prosecution of the suit and is now well over 11 years since the suit was last in court.
 9. As a result of the failure by the plaintiff to set down the suit for hearing since the last time it was in court, vide a notice of motion dated June 29, 2015 Justice Serگون dismissed the plaintiff suit against the 2nd defendant for want of prosecution on December 8, 2021. The honorable judge noted that the delay by the plaintiffs in prosecuting this suit was inexcusable and inordinate and showed that they had lost interest in the suit.
 10. The 1st defendant submitted that the present application is anchored upon the same grounds as the application by 2nd defendant and the court record shows that the plaintiffs have not taken any steps to have the suit set down for hearing since June 8, 2011. That additionally the plaintiffs have not given any reasonable excuse for why they have not prosecuted the case and the replying affidavit just confirmed indolence on their part.
 11. The plaintiffs in their submission argued that the court record confirms that on April 11, 2011 the matter herein proceeded for hearing when a handwriting expert testified in support of the plaintiff's case and a further hearing was scheduled for 8th and June 9, 2011. It is not disputed that on June 8, 2011 the hearing proceeded with the 1st plaintiff testifying after which upon the counsel for the 1st and 2nd defendant's application, the court disqualified Mr Eric Mutua Advocate from acting for the plaintiffs in the matter and the hearing adjourned. The plaintiffs preferred an appeal against the disqualification which is still pending at the court of appeal.
 12. The plaintiff submitted that the delay in prosecuting the suit was occasioned by the pendency of the appeal which position was duly communicated to the 1st defendant's advocates when the said advocates sought directions for hearing.
 13. I find that the 2nd defendant filed a similar application dated 29/6/2021 which was allowed on 8/12/2021.



14. I find that there has been inordinate delay by the plaintiff to prosecute this matter. In *Argan Wekesa Okumu vs Dima College Limited & 2 others* [2015] eKLR, the court considered the principles for dismissal of a suit for want of prosecution, where it stated as follows: -

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita vs Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

15. On whether the delay is inordinate and inexcusable, the court in *Mwangi S Kimenyi Vs Attorney General & another* [2004] eKLR considered what constitutes inordinate delay, and said as follows:

“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 that it should be an amount of delay which leads the court to an inescapable 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.”

16. The delay herein has been inordinate and beyond acceptable limits and I find that litigation must have an end.

17. I allow the application dated 8/12/2021 and I accordingly dismiss the plaintiff’s suit against the 1st defendant’s with costs to the 1st defendant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 14TH DAY OF APRIL, 2023.

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A. ONGERI

JUDGE

In the presence of:

- for the 1st Plaintiff
- for the 2nd Plaintiff
- for the 1st Defendant
- for the 2nd Defendant
- for the 3rd Defendant
- for the 4th Defendant

