



Muinde & 6 others v Bogaa Investment Limited & 11 others (Environment & Land Case E016 of 2022) [2025] KEELC 4992 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E016 OF 2022**

NA MATHEKA, J

JUNE 25, 2025

BETWEEN

JONATHAN MUTISYA MUINDE 1ST PLAINTIFF
JOSEPH MUINDI MUTUA 2ND PLAINTIFF
SAMMY MUTUA 3RD PLAINTIFF
ALEX KYALO 4TH PLAINTIFF
JOHN MANZI 5TH PLAINTIFF
MUTHUI MALOMBE 6TH PLAINTIFF
DORCAS MUTUKU 7TH PLAINTIFF

AND

BOGAA INVESTMENT LIMITED 1ST DEFENDANT
MOHAMMED MUTAR NOOR 2ND DEFENDANT
ADAN MAALIM ABDULLAH 3RD DEFENDANT
ADBI OSMAN MOHAMMED 4TH DEFENDANT
MOHAMMED KULLOW 5TH DEFENDANT
DILLOH MOHAMMED 6TH DEFENDANT
**ASSOCIATION OF ISLAMIC RELIEF AND PROPAGATION OF
WAJIR 7TH DEFENDANT**
LANDS AND COOPERATIVE SOCIETY 8TH DEFENDANT
JOAKIM KANGANGI 9TH DEFENDANT
JUSTIN IRINA 10TH DEFENDANT



JAMES MWENDA KABURU 11TH DEFENDANT

RONALD KAMWIKO KARAUKU 12TH DEFENDANT

RULING

1. The application is dated 12th May 2024 and is brought under Order 17 Rule 2 [1], [2], [3] & [4] Order 51 Rules 1 Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* 2010 and seeking the following orders;
 1. That this Honourable Court do dismiss this suit for want of prosecution as the Plaintiff has not taken any necessary steps to prosecute this matter for more than one year and has further failed to comply with pre trial directions issued by this Honourable Court.
 2. That this Honourable Court do issue any further orders as it may deem fit.
 3. That the costs of this application be provided for.
2. It is grounded upon the Annexed Affidavit of JUSTIN IRINA and on the following grounds that the Applicant is the registered owner of all that parcel of land is Land Reference Number 20872 IR 68186 situate in Machakos having been issued with a grant on the 28th December 1995. The Plaintiffs/ Respondents however filed this matter by way of plaint dated 3rd March 2022 which was filed by the firm of M/s Makori Omboga & Company Advocates. The Respondents alleged in their said Plaint to be occupants of the Applicant's property claiming that the said property was public utility land. The Applicant states that the plaint sought for orders inter alia; a permanent injunction restraining the Defendants from trespassing, evicting, encroaching, occupying or interfering with the Plaintiff's possession of LR. Numbers 21218, 27805, 20870, 20871, 20868, 20875, 20872, 27805 and grant I.R 67600, a declaration that the titles in the said parcels of land be cancelled, a declaration that the Plaintiffs are entitled to the said parcels of land on account of adverse possession, general damages together with costs of this suit.
3. The Applicant states that together with the said plaint, the Plaintiff's filed a list of witnesses, witness statements by 1st, 2nd and 3rd Plaintiff and a list of documents. The said documents however were not filed with the said list of documents. The Applicant states that this matter was thereafter consolidated with Machakos ELC Civil Suit Number E327 of 2012, Machakos ELC Petition 1 of 2022 and Machakos ELC Civil Suit Number 45 of 2017. The said matters were mentioned severally in Court for case management wherein the Plaintiffs in this suit always sought more time to comply with Order 11 of the Civil Procedure Rules. The Applicant in compliance with pre trial directions filed its consolidated bundle of documents dated 8th May 2024 in preparation for hearing which was fixed for the 13th May 2024. The Applicant states that at the hearing, parties applied to have the consolidation order vacated as the consolidated matters did not relate to the same parcels of land and as such the only matter that proceeded on that day was Machakos ELC Civil Suit Number E327 of 2012.
4. The Applicant states that the parties in this suit also informed the Court that the Plaintiffs advocate on record being the firm of M/s Makori Omboga & Company Advocates had since passed on and that the law firm was no longer operational. The Applicant states that however in Court, an advocate by the name of Alphonse Mutinda who purported to be on record for the Plaintiffs confirmed that he had been instructed to come on record for and on behalf of the Plaintiffs and he thus undertook to regularize his appointment by filing a notice of change of advocates and further file documents on



behalf of the Plaintiffs in compliance. The matter was then fixed for pre trial conference to confirm the Plaintiffs compliance on the 10th July 2024.

5. The Applicant states that when the matter came up before the Deputy Registrar on the 10th July 2024, the Plaintiffs' said advocate Alphonse Mutinda informed Court that he was yet to regularize his appointment and thus sought 7 days to file a notice of change of advocates and to file a list of documents with the Defendants being granted 21 days corresponding leave and the matter was thereafter fixed for a further pre trial conference on the 2nd October 2024. The Applicant avers that similarly when the matter came up before the Deputy Registrar on the 2nd October 2024, the Plaintiffs were absent and still yet to comply prompting the Defendants to seek for the matter to be certified ready for hearing. This matter was thus certified ready for hearing and a mention date issued for the parties to appear before the Judge on the 26th November 2024. The Applicant states that it was consequently ordered to serve the Plaintiffs' advocates with a mention notice which the Applicant did and further filed an affidavit of service dated 25th November 2024. The Court however did not sit on the 26th November 2024 as it was engaged in the Environment and Land Court week long conference and the same was rescheduled to the 3rd March 2025 for mention. The Applicant states that on the date of the mention, the Plaintiffs were once again absent and were still yet to comply and as such the Applicant sought to have the matter dismissed for want of prosecution but the Court directed the Applicant to file a formal application hence this current application. The Applicant states that the Plaintiffs have been indolent in prosecuting their case which was filed more than 3 years ago.
6. The Applicant states that the pendency of this suit before this Honourable Court is highly prejudicial to the Applicant as he has expended time and money to defend himself whereas the Plaintiffs are not interested in prosecuting their case. It is in the interest of justice that the orders sought herein are granted as this suit is an abuse of the Court process and should thus be dismissed forthwith as its only aimed at clogging the justice system.
7. This court has considered the application and the supporting affidavit therein. The application was served but the respondent failed to file any response and the same proceeded ex parte. Order 17 Rule 2[1], which governs dismissal of suits for want of prosecution, provides as follows:
8. 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. Further Order 17 Rule 2[3] states thus:

“ Any party to the suit may apply for its dismissal as provided in sub-rule 1”
10. The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR, the court held that;

“Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2[3] gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious



prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

11. In *Argan Wekesa Okumu v Dima College Limited & 2 others* [2015] eKLR the court considered the principles for dismissal of a suit for want of prosecution and 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 v 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.”

12. In *Naftali Opondo Onyango v National Bank of Kenya Ltd* [2005] eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.”

13. I have perused the court file and find that the matter came up in court on the 10th July 2024 an advocate by the name of Alphonse Mutinda who purported to be on record for the Plaintiffs confirmed that he had been instructed to come on record for and on behalf of the Plaintiffs and he thus undertook to regularize his appointment by filing a notice of change of advocates and further file documents on behalf of the Plaintiffs in compliance. The matter came up severally thereafter but the plaintiffs never complied and did not appear. It has been 11 months since they were last before the Court. Steps have been taken by the Applicant as late as 2nd November 2024 before filing this application. From the court record the Plaintiff has failed and/or neglected to fix the matter for hearing and no excuse has been given. However, as per Order 17 Rule 2[1], one year have not lapsed and this being a land matter I find that the suit cannot be dismissed at this stage. I therefore dismiss this application and order that the parties fix a hearing dated within the next 30 days. Cost of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF JUNE 2025.



N.A. MATHEKA
JUDGE

