



Ambui Ambari Ya Ngoru & 3 others v Unganga & 2 others (Environment and Land Case Civil Suit 393 of 2014) [2025] KEELC 101 (KLR) (21 January 2025) (Ruling)

Neutral citation: [2025] KEELC 101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 393 OF 2014**

**MD MWANGI, J
JANUARY 21, 2025**

BETWEEN

**AMBUI AMBARI YA NGORU 1ST PLAINTIFF
JOHN MWAURA KINYANJUI 2ND PLAINTIFF
JOSEPH GACHERU KARIUKI 3RD PLAINTIFF
LUCY NJERI NJUGUNA 4TH PLAINTIFF**

AND

**JEREMIAH GITANGU UNGANGA 1ST DEFENDANT
FRANCIS KIBATHI NJENGA 2ND DEFENDANT
HURUMA NGEI (II) SELF HELP – GROUP 3RD DEFENDANT**

RULING

(In respect to the Defendant’s notice of motion dated 13th December 2023 brought under the provisions of Order 17 rule 2 of the Civil Procedure Rules and Article 53 of *the Constitution* seeking the dismissal of this suit for want of prosecution)

1. The Defendants in the notice of motion dated 13th December 2023 pray for the dismissal of the Plaintiffs’ suit herein for want of prosecution. The Defendants aver that this suit has been pending for over ten (10) years and is yet to be set down for hearing. The Defendants point out that the Plaintiffs have failed to comply with the court’s orders on amendment of the plaint. They have always sought more time wherever the matter comes up for directions. The Plaintiffs have consequently held the Defendants hostage as they continue to enjoy the interim injunctive orders issued in their favour. They therefore pray for the dismissal of the suit. The application is further supported by the joint affidavit of Sammy Kang’au Karungo and Lawrence Macharia Mwangi sworn at Limuru on 13th December 2023.



2. The application is opposed by the Plaintiffs vide the replying affidavit of Joseph Gaceru Kariuki sworn at Kiambu on 4th October 2024. The deponent asserts that there is a plaint on record which has been filed online and is accessible to the Defendants' advocate through the Case Tracking System (CTS). The deponent asserts that they have at all times complied with the court's directions. They instead accuse the Defendants of failing to comply with the court's directions.
3. The Plaintiffs asserts that dismissing the suit for want of prosecution will amount to a miscarriage of justice. They pray that the suit be heard to its logical conclusion. They plead with the court to disallow the Defendants' application.
4. The Plaintiffs filed written submissions and reiterated the averments in the replying affidavit. They submit that it would be premature and unfair to dismiss the suit for want of prosecution at the behest and on the grounds raised by the Defendants.
5. I note that the Defendants who were the Applicants did not file written submissions in support of their application.

Determination.

6. Order 17 rule 2(3) of the Civil Procedure Rules gives liberty to any party to a suit to apply for its dismissal as provided for under rule 1.
7. The court in the case of Kokwo –vs- Akokor (ELCA/E016/2022) (2023) KEELC 20783 (KLR) (18th October 2023) (Judgment), observed that the statutory threshold of Order 17 rule 2 is that a suit qualifies for dismissal for want of prosecution if either party fails to take steps in it for at least one year preceding the presentation of a notice to show cause for dismissal by the court or an application by a party who seeks dismissal of the suit.
8. The court further stated that before dismissal, the test to be applied is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay.
9. The court in the above referenced case cited with approval the decision in Nilesh Premchad Mulji Shah and another T/A Ketan Emporium –vs- MD Popat and others (2016) eKLR, where the court stated 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- vs- 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.”



10. In this case, the Plaintiff in their response allege that they filed the amended plaint online through the Case Tracking System and that it was accessible to the Defendants.
11. I have taken time to peruse the documents filed through the Case Tracking System. On 17th September 2024, what the Plaintiffs filed is simply titled 'plaint' dated 11th June 2024, through their current advocates, Gakunju & Company Advocates. It is not even an amended plaint.
12. From the record of this court, the Plaintiffs through their then advocate, Mr. Wakiaga, on 10th November 2011 applied to withdraw the case against the 1st and 2nd Defendants on the premises that the two were deceased. The court allowed the application and marked the case against the 1st and 2nd Defendants as withdrawn. The court then went ahead to confirm the matter ready for hearing and set it down for hearing on 20th January 2022.
13. On 20th January 2022, the Plaintiffs sought to adjourn the hearing on the basis that they intended to add other Defendants to the case. The court reluctantly allowed the adjournment of the hearing. The court too directed that the application to add the other Defendants be filed in 30 days. The Plaintiffs indeed filed the application which was dated 15th February 2022.
14. That application dated 15th February 2022 was allowed on 30th June 2022. The Plaintiffs did not however amend the plaint to include the other Defendants as expressed in the application dated 15th February 2022. The Plaintiffs had sought leave of the court to join the intended 4th – 37th Defendants who were named in the application.
15. On 23rd March 2023, the court directed the Plaintiffs to amend the plaint accordingly to include all the Defendants who had been joined in to the proceedings within 14 days. This did not happen.
16. On 18th April 2023, the Plaintiffs sought a further 30 days to enable them amend the plaint accordingly. The court granted them a final opportunity directing them to ensure compliance in 30 days. That for sure did not happen. The Plaintiffs did not file the amended plaint including the 4th – 37th Defendants as parties to the suit. It has not been done to date.
17. The Plaintiffs in an attempt to hoodwink the court and the Defendants sneaked into the proceedings the plaint dated 17th September 2024 which as I already pointed out is not an amended plaint. It is over one year since the court granted the Plaintiffs a final opportunity to file the amended plaint.
18. The Plaintiffs have not offered a credible response to the Defendants' application dated 13th December 2023. Their explanation is actually untruthful.
19. This is a case that has been in court for over ten (10) years now. The Plaintiffs have not demonstrated willingness to prosecute it. They have instead employed every tactic in the book to delay the hearing and conclusion of this matter at every opportunity as demonstrated above. They have engaged the court in a circus for far too long.
20. Justice is a double-edged sword. The Defendants are entitled as much as the Plaintiffs are to a fair hearing. The Defendants have demonstrated that the Plaintiffs have failed to prosecute their suit. The court cannot tolerate it any longer.
21. Lord Denning, in his characteristic eloquence in *Allen v Sir Alfred McAlphine and Son*, (1968) 1 ALL ER 543 at page 547 explained the fundamental reason why courts must take action as follows;

“The delay of justice is a denial of justice...To no one will we deny or delay right or justice. All through the years men have protested at the law's delay and counted it as grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time (Hamlet, Act 3, Sc.



1). Dickens tells how it exhausts finances, patience, courage, hope (Bleak House, c.1). To put right this wrong, we will in this court do all in our power to enforce expedition.”

22. I allow the application by the Defendants and hereby dismiss the Plaintiffs’ suit in its entirety for want of prosecution with costs to the Defendants.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 21ST DAY OF JANUARY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kinuthia for the Defendants/Applicants

N/A for the Plaintiffs/Respondents

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

