



**Mungai v Njuguna & another (Environment and Land Case
546 of 2016) [2025] KEELC 6519 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 546 OF 2016
CA OCHIENG, J
OCTOBER 1, 2025**

BETWEEN

JOHN IHUGO MUNGAI PLAINTIFF

AND

PETER KIHUHI NJUGUNA 1ST RESPONDENT

PETER GAITHO KAHUHA 2ND RESPONDENT

RULING

1. What is before the Court for determination is the Plaintiff's Notice of Motion application dated 26th October, 2022 where he seeks the following Orders:
 1. That this Honourable court be pleased to set aside the order made on the 18th February 2021 dismissing this suit for non-attendance and/or want of prosecution.
 2. That this matter be reinstated and heard on merit.
 3. That costs of this application be in the cause.
2. The application is premised on grounds on its face and on the supporting affidavit of Mwaura Shairi, Advocate (now deceased). He contended that the Plaintiff had complied with Order 11 of the Civil Procedure Rules and was ready and keen to prosecute the suit. Further, that the Plaintiff complied with the Order of the Court and served the 2nd Defendant by advertisement in the Daily Nation.
3. The application is opposed by the 1st Defendant who filed a replying affidavit. He avers that the application is an abuse of process and that the Order to dismiss the suit was based on the delay including inaction of the Plaintiff. Further, that the Plaintiff intends to reinstate a claim that is time barred by virtue of Section 7 of the Limitations of Actions Act as his claim for Adverse Possession had been brought thirty-one (31) years later from when he allegedly took possession.



4. He avers that the Plaintiff has over the last nineteen (19) years formed a pattern of filing suits seeking to adversely possess Kiambu/Minyu/2032, then abandon them halfway. He points out that he filed Nairobi High Court Civil Suit ELC No. 1049 of 2006 and Nairobi High Court Civil Suit ELC No. 596 of 2009, which were dismissed for want of prosecution. The Court is urged to find that the Plaintiff has no interest in the suit.
5. He contends that if the Orders sought are allowed, he will suffer great prejudice and will continue being burdened by legal fees. He reiterates that he shall be unable to properly defend himself as a result of illness as he now suffers from an early onset of dementia. He reaffirms that he has been in continuous occupation and exclusive possession of the suit property since 1985 to date.
6. The 2nd Defendant also filed a replying affidavit in opposition to the instant application. His averments mirror those of the 1st Defendant as far as allegations of filing multiple suits over the same subject matter are concerned. He insists that the Plaintiff does not reside on the suit land as she claims. He explains that after the 1st Defendant had his father's estate registered in his name without any objection from the Plaintiff, the 1st Defendant sold the said suit parcel to him and it was subsequently transferred to him in June 2011. He confirms that he then erected a fence, a semi-permanent house and a water tank and has since leased it to one Jane Mungai for two (2) years.
7. In rejoinder, the Plaintiff filed a supplementary affidavit where he avers that on the advice of his then Advocate (now deceased), he made an application to serve the 2nd Defendant through an advertisement in the Daily Nation. Further, that the Court granted this request on 13th December 2018 but the Order was signed and sealed by the Court on 3rd February 2020 and published in the newspaper on 10th April 2020, then he waited to be given a hearing date. He points out that he sent numerous letters to the Court seeking for a hearing date, but he got no response. Further, that at the time, COVID-19 prevention measures and lockdowns had severely disrupted Court and Registry processes, which made it extremely difficult to access the Court registry to obtain dates but he consistently followed up with his then Advocate who attributed the delay to Covid-19 prevention measures in effect at the time.
8. He insists that he personally visited the Court's registry only to discover that the suit had been dismissed on 30th January 2020, two (2) working days before the Order to serve the 2nd Defendant by advertisement was signed, despite the fact that he had complied with the Order to serve the 2nd Defendant and Order 11 of the Civil Procedure Rules.
9. He contends that in a similar manner, the registry never gave them a date to hear the instant application. Further, that since it was filed and paid for on 4th November 2022, he has had to personally follow up and ensure it was presented to the Deputy Registrar for directions in July 2024. He reiterates that on 17th September 2024, his former advocate on record passed away after a lengthy battle with pancreatic cancer and attributes previous laxity to the said Advocate, who was ailing.
10. He admits that he did file OS No. 1049 of 2006, which was assigned ELC 2024 OF 2007, but he later withdrew the case and promptly filed Suit No. 596 of 2009 (O.S), which was dismissed. He claims that if the application is not allowed, he stands to suffer prejudice as he bought the suit property in 1985 from the 1st Defendant's late father vide a sale agreement dated 31st July 1985 but the father died before transferring the property to him, despite having obtained consent of the Land Control Board to do so.
11. He also claims to have built a permanent house on the suit property in which he lived in with his family since 1985 but in an attempt to obstruct justice, the 1st Defendant demolished it in February 2025. He asserts that since the 1st Defendant's defence is on record, and the 2nd Defendant has finally appeared,



the Court should hear the matter to conclusion. Further, that the Defendants will not be prejudiced and although the 1st Defendant claims to have dementia, his reports indicate he has tuberculosis.

12. The application was canvassed by way of written submissions.

Submissions

13. The Plaintiff submits that the delay in prosecuting the suit was not intentional but due to the Court's delay in signing the Order to serve the 2nd Defendant, which was signed on 3rd February 2020, two days after the Deputy Registrar dismissed the suit. Further, that Article 50 of *the Constitution* ensures the right to a fair hearing and dismissing a suit due to a Court or Counsel's mistake undermines the right to hearing.
14. He also submits that the Defendants have not demonstrated that they stand to suffer prejudice that cannot be remedied by an award of costs, while he risks irreparable injustice if denied a chance to be heard in a suit that raises serious triable issues, which warrants determination on merit. To buttress his averments, the Plaintiff relied on the following decisions: *Ivita v Kyumbu* [1984] KLR 441, *Philip Chemowolo & Another v Augustine Kubende* [1982– 88] KAR 103 and *Andrew Mbare v Attorney General & 11 Others* [2021] eKLR.
15. The 1st Defendant submits that there has been considerable delay in the prosecution of the Plaintiff's case and that his negligence and laxity should not be placed on his shoulder. Further, that the excuse for the delay is untenable and cannot be justified. He argues that justice cannot be served where there has been inordinate and unexplained delay. He points out the Plaintiff's persistent pattern of instituting multiple suits over the same subject matter without prosecuting them to conclusion does not warrant the exercise of discretion in his favour. Further, that his conduct undermines the principle of finality of litigation and the overriding objective of the Court and that he is deliberately delaying the course of justice. To buttress his averments, the 1st Defendant relied on the following decisions: *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] eKLR, *Shah v Mbogo & Another* (1967) EA 1116, *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015) eKLR, *Charles Sing'oei and ors v Teleposta Pension Trustees* [2023] eKLR and *Tabuche v Tinga & 2 Others (Civil Appeal E003 of 2022)* [2024] KECA 551 (KLR).
16. On his part, the 2nd Defendant submits that the delay in prosecuting this matter has not been explained fully thus it is inexcusable. Further, that since the Plaintiff has filed and abandoned similar matters, he should not be allowed to blame an advocate who cannot defend himself.

Analysis and Determination

17. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the only issue for determination is whether this suit should be reinstated for hearing and final determination.
18. The Plaintiff seeks to reinstate this suit which was dismissed by the Hon. Deputy Registrar on 30th January 2020 for want of prosecution. I note the Plaintiff has however erroneously cited 18th February 2021 as the date the suit was dismissed. He blamed his former advocate for inaction and also blamed the court for dismissing the matter two (2) days before an Order to serve the 2nd Defendant by way of substituted service was signed.
19. The 1st and 2nd Defendants contend that the Plaintiff was indolent in prosecuting the matter and that before its dismissal, he had stayed over one year without taking any step to prosecute it. They were unanimous that no satisfactory excuse for inordinate delay was put forward. The 1st Defendant also



- cited old age, onset dementia, legal costs and constant and repeated litigation over the same issue to argue that he will suffer hardship, if the application is allowed.
20. It is trite that Order 12 Rule 7 of the Civil Procedure Rules gives this Court discretion to reinstate a suit dismissed for non-prosecution. However, the Plaintiff ought to establish sufficient cause to warrant reinstatement. Order 12, Rule 7 of the Civil Procedure Rules provides inter alia:
- “Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
21. In *Ivita Vs Kyumbu* (1984) KLR 441 the Court while dealing with an application to reinstate a suit which had been dismissed for want of prosecution, stated that:
- “The test applied by the courts in an application for the 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 available time. It is a matter in the discretion of the court.” Emphasis Mine
22. While the Court of Appeal stated as follows in *Tabuche v Tinga & 2 Others* (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR) (24 May 2024) (Judgment):
- “In addition to narrating the assemblage of events to justify his inaction, the Appellant sought to lay blame at his counsel’s feet. With regard to the alleged mistake of counsel, we take to mind the High Court decisions in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR; and *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR where the court correctly held that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of the litigation and that, while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by the court to exercise discretion in favour of such a party cannot be impugned.” Emphasis Mine
23. On demonstration of sufficient cause, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR *Mativo J* (as he then was) held that:
- “Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
24. In this instance, the Plaintiff has not denied that he had filed several suits in respect to the same subject matter. From a perusal of the Court record, I note Justice Eboso had granted the Plaintiff leave to serve the 2nd Defendant via substituted service on 13th December, 2018 and by the time this suit was being dismissed for want of prosecution on 30th January, 2020, the Plaintiff was yet to serve.
25. Further, the Plaintiff now seeks to blame the erstwhile advocate including the COVID pandemic but from the Court record, it was evident that even prior to the COVID pandemic he was not keen on prosecuting his claim, which had been in Court from 2016, before its dismissal in 2020, four years later. I note even the instant application was filed more than two years after the dismissal and no plausible



reasons were proffered to demonstrate why there was delay in filing it. The Plaintiff has claimed he has been following up with the Registry but not provided any proof to that effect.

26. Based on the facts as presented while relying on the legal provisions cited and associating myself with decisions quoted, I find that the Plaintiff except for blaming his erstwhile advocate has not provided plausible reasons for delay in prosecuting his suit. Further, as held in the case of Savings And Loans Limited Vs Susan Wanjiru Muritu Nairobi HCCS No. 397 of 2002 that a case belongs to a litigant and not the Advocate and a litigant has a duty to pursue the prosecution of his case. I opine that the Court cannot set aside a dismissal order only on the sole ground of a mistake to Counsel but I insist that Plaintiff had a duty to follow up on his case and ensure the same was set down for hearing.
27. To my mind, I find that the Order to dismiss this suit was based on the delay and inaction on the part of the Plaintiff. It is my considered view that this application which has been filed more than two years later has been brought after an inordinate delay. Further, the Plaintiff has not demonstrated sufficient cause why this suit should be reinstated. In the circumstance, I will decline to grant this prayer as sought.
28. It is against the foregoing that I find the Notice of Motion Application dated the 26th October, 2022 unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Rungare for 2nd Respondent

Munanie for 1st Respondent

Court Assistant: Joan

