



**Board of Trustees ACK Diocese of Embu v Macumo Day Secondary School & 3 others
(Environment & Land Case 66 of 2016) [2024] KEELC 3524 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 3524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 66 OF 2016
A KANIARU, J
JANUARY 25, 2024**

BETWEEN

BOARD OF TRUSTEES ACK DIOCESE OF EMBU APPLICANT

AND

MACUMO DAY SECONDARY SCHOOL 1ST RESPONDENT

THE PRINCIPAL MACUMO DAY SECONDARY SCHOOL .. 2ND RESPONDENT

COUNTY GOVERNMENT OF EMBU 3RD RESPONDENT

**THE BOARD OF MANAGEMENT MACUMO DAY SECONDARY
SCHOOL 4TH RESPONDENT**

RULING

1. The application under consideration is a Notice of Motion dated 23.03.2023 filed in court on the same date. It is expressed to be brought under Order 9(b) (though there is no such order that exists) Order 10 and Order 12 Rule 7 of the *Civil Procedure Rules*. The Applicant in the suit – Board of Trustees, ACK Diocese of Embu – is the plaintiff whereas the 1st to 4th Respondents – The Macumo Day Secondary School, the principal Macumo Day Secondary School, The Board of Management Macumo Day Secondary School, and the County Government of Embu - are the 1st to 4th Defendants in the suit respectively. The Applicants are seeking the following prayers:

- a. Spent.
- b. That the firm of Beth Ndorongo & Co. Advocates be allowed to represent the plaintiff in place of Rugaita & Co. Advocates.
- c. Spent.
- d. Spent.



- e. That the court be pleased to set aside and/or vacate the orders issued on 28.02.2017 dismissing the Plaintiff/Applicants suit and the suit be reinstated.
 - f. That the court be pleased to reinstate the interim orders issued on 28.02.2017 restricting the defendant/respondent from evicting or in any way interfering with the plaintiff/applicant use and/or occupation of land parcel No Kagaari/Weru/1005 until this case is heard and determined.
 - g. That the cost of this application be provided for.
2. The grounds on which the application is anchored are set out on the face of the Notice of Motion and they include; that the plaintiff's suit was dismissed on 26.01.2023 for want of attendance by both the plaintiff and their former advocate; that the plaintiff's failure to attend court on the said date was occasioned by ill advise from their former counsel's office; that they have been diligent, active and vigilant in the prosecution of their case; that they have invested more than twenty million Kenya Shillings in the development of the suit premises and have running projects in the suit land which have been there since 1976; that upon learning of the dismissal of the plaintiff's case, the defendants are now demanding that the plaintiffs vacate from the land and are even demanding that the plaintiff demolish a permanent church which is on the land; that if the orders herein are not granted, the plaintiff will not only loose the land legally allocated to it but also the developments thereon, which loss cannot be compensated by way of damages; and that it is only fair and just that the orders sought be granted.
 3. The application came with a supporting affidavit dated 23.03.2023 sworn by Dr Jackson Ngari Peter who is the Education Secretary of the ACK Diocese of Embu. He deposed that they were aware of the hearing date on 26.01.2023 as they were informed of the date by their advocate at the time; that they were ready to appear in court as requested but their advocate wrote to them prior to the hearing date informing them that the matter would not proceed for hearing on the said date as she was out of the country; that he called the said firm and the secretary informed him that since the matter would not be proceeding for hearing, it would not be necessary to appear in court; that the secretary also informed him that the firm would be sending an advocate to represent them on the said date; and that acting on those instructions, they did not send any representative of the Diocese.
 4. He further deposed that on 17.03.2023, he received a call from a church elder at Kagaari Arch – Deaconry where the suit premises is situate informing him that they were being told to demolish the church that is built on the suit premises as their case had been dismissed; that on enquiring from their advocate at the time, she informed him that to their knowledge the matter was still active in court; and that they decided to engage the services of another advocate who upon perusing the court file, discovered that the matter had indeed been dismissed on 26.01.2023 as there was non – appearance on the part of the plaintiff. He deposed that they have been keen on prosecuting the matter as they have been in occupation of the suit premises where they have carried out extensive developments; that learning activities are still ongoing in the property and dismissal of the suit would result in great, irreparable and unrecoverable loss to the Diocese and the community which benefits from the plaintiff's institutions. He mentioned what is to be affected as : A church, oil refining, hostels, farming and rice handling activities among others. He urged that the suit as well as the orders restricting the defendant from interfering with its activities on the land be reinstated.
 5. The 1st, 2nd and 3rd Defendants responded to the application by way of a Replying Affidavit. The affidavit was sworn on 09.05.2023 by Jeremiah Wanjau Ileri, who is the Chairman of the Board of Governors, Macumo Day Secondary School. He deposed that the plaintiff's interest in the suit is questionable as it never attended court personally but instead it was always their counsel or its representative showing up in court; that at the time of taking the hearing date of 26.01.2023 all parties



were present except for the 4th Defendant and thus the hearing date was taken by consent; that despite knowing that the matter had been set down for hearing, the plaintiff never showed up in court and therefore failed to act in an honorable manner towards the court; that equity dictates that he who seeks equity must do equity; that the plaintiff's application has been brought with inordinate delay as it was filed 3 months after the suit was dismissed. They urged that the application be dismissed.

6. The application was canvassed through written submissions. The Applicant's submissions were filed on 04.09.2023. The Applicant in its submissions set out the grounds of its application and regretted to have found itself in the prevailing circumstances; that it was ready to proceed with the hearing as its advocates had filed its documents on 13.07.2022; that the deeds of an advocate or an advocate's office should not be visited upon a litigant; and that it is only fair and just that it be allowed to follow up on its claim.
7. The Respondents on the other hand filed submissions on 13.10.2023. They gave brief facts of the matter and identified two issues for determination viz; whether the matter ought to be reinstated and if the suit is reinstated, is it arguable? On the first issue, they submitted that Article 159 of the Kenya Constitution envisages a justice system that is efficacious and ardent in the delivery of justice and that for that to work, every party, be it the litigants or the bench must play their role diligently; that it is incumbent on every party to a suit to be vigilant in the conduct of its matters in order to prevent the delay of justice which delay is tantamount to denial of justice. They cited the case of Thatbini Development Company Ltd v Mombasa Water & Sewerage Company & another (2022) eKLR which describes the importance of parties being vigilant in the conduct of matters.
8. They submitted further that the suit was instituted in 2016 and that between the said year and 2017, the plaintiff's took little action to prosecute the suit and it wasn't until sometime in 2017 that they filed an amended plaint; that the plaintiff's took no action on the matter between 2017 and 2021 prompting the Deputy Registrar to mark the matter dormant and issue them with a Notice to show cause why the suit should not be dismissed for want of prosecution; that to date the trial bundle has not been served on the 1st, 2nd and 3rd Defendants notwithstanding the long duration since the court ordered that they serve the defendants; that the reasons given for failing to appear in court are flimsy and the conduct by counsel and the plaintiff's shows neglect on their part; that delay defeats equity and that equity aids the vigilant not the indolent; and that therefore the plaintiffs are not befitting to benefit from the reliefs sought.
9. On the second issue, they submitted that the plaintiff's suit is extremely weak. They took issue with the plaintiff's admission in the plaint that the suit parcel herein was public land set aside specifically for the construction of schools and for educational purposes; that the plaintiffs are highly elusive in explaining how the this public land was converted into private land for their use; and that they have not provided any evidence to show that due process was followed in converting the public land into private land. For this they sought to rely on the case of Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8(E10) of 2021) (2023) KESC 30KLR (21 April 2023). They further urged the court to dismiss the application with costs.
10. I have considered the application, Replying Affidavit and rival submissions filed. The issues for determination are whether;
 - a. The firm of Beth Ndorongo & Co. Advocates should be allowed to represent the plaintiff in place of Rugaita & Co. Advocates.
 - b. The plaintiff's suit and the interim orders issued on 28.02.2017 should be reinstated.



11. On the first issue, the law under Order 9 Rule 5 of the *Civil Procedure Rules* provides for the process to be followed when a party intends to change representation. The same provides as follows;

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Order 9 Rule 9 of the *Civil Procedure Rules* states that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall be effected by order of the court—

- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
12. From the above provisions it is clear that at the point in which this suit is, the plaintiffs need to seek an order from this court to change their advocate. This is because the suit was dismissed and that amounts to its determination. I feel persuaded that the court should grant this prayer. I hereby grant it.
13. On the issue whether the plaintiff's suit should be reinstated, I wish to point out at this stage that I note that the Plaintiff's application in prayer No (e) speaks of vacating orders issued on 28.02.2017 dismissing the plaintiff's suit. However, the orders dismissing the plaintiff's suit were issued on 23.01.2023. The quoted date is therefore not accurate. Nevertheless, in the rest of the application and supporting documents, the plaintiff seems to refer to the correct date so I will presume that that was just an error that can easily be rectified, so I will not dwell so much on it.
14. Reinstatement of a suit is discretionary. Section 3A of the *Civil Procedure Act* gives the court inherent power to make such orders as may be necessary for the ends of justice to be met. What the court is to consider while exercising discretion was emphasized in the case of *Patriotic Guards Ltd. v James Kipchirchir Sambu* [2018]eKLR where it was stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”



15. In the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR, the Court outlined the test to be considered in a case for reinstatement of suit where it stated as follows:-

“The decision whether a suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. See the case of *Ivita v Kyumbu* [1984] KLR 441, Chesoni J. (as he then was) that:-

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too.

The defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

16. This suit was filed on 12.10.2016 by way of plaint which was accompanied by an application for restraining orders. The application was certified urgent and set down for interpartes hearing on 21.11.2016. On that day, the Defendants sought for time to respond to the application, which time was granted and the matter was set down for hearing on 13.12.2016. On that day more time was granted upon request for time to file a supplementary affidavit. The application was then disposed of by way of written submissions and the court’s ruling was delivered on 28.02.2017 allowing the application and thus granting the plaintiff an interim injunction. The court then directed that the parties comply with Order 11 of the *Civil Procedure Rules* and prepare the suit for trial.
17. The matter was set down for mention on 26.09.2018 when the parties informed the court that they had yet to comply with Order 11 of the *Civil Procedure Rules*. The court directed that the same be done within 90 days and further directed that, thereafter the parties would wait in the queue for hearing dates for suits filed in 2016. No further action was taken by any of the parties until this matter was flagged as dormant on 16.03.2021 and a Notice To Show Cause was issued for hearing on 06.05. 2021. When the matter came up for hearing, the court found it not to be ripe for dismissal as the parties acted on the court’s directions to wait in line for matters that were 5 years old at the time to be determined. The parties also sought time for out of court negotiations.
18. The matter was mentioned severally to confirm settlement but as the same was not forthcoming, on 08.06.2022 the court set down the matter for hearing on 25.10.2022 and directed the plaintiff to file a trial bundle and serve the same. The plaintiff’s trial bundle was filed on 13.07.2022 whereas the Defendants trial bundle was filed on 25.05.2022. On 25.10.2022, the plaintiff’s advocate informed the court that she was unwell and that she had not served the 4th Defendant who was the only party absent on that day. The court then gave the date of 26.01.2023 for hearing. On 26.01.2023 both the plaintiff and the 4th Defendants were absent and on application by the 1st to 3rd Defendant’s advocate, the suit was dismissed for non-appearance.
19. The plaintiffs explained to this court that the reason for failing to appear in court on that day was due to misdirection by its advocates at the time, who informed it that the matter would not proceed for hearing as she was out of the country; that it needed not attend court on that basis as the advocate promised to send a representative to court to inform the court of the same. That relying on those



instructions, the plaintiff did not appear in court and neither did its advocate's representative which led to the dismissal of its suit. It urged that the mistakes of an advocate ought not to be visited on an innocent litigant.

20. From the courts record, it is clear that the plaintiff upto the time its suit was dismissed, had been diligent in pursuing its claim as it was always represented in court. The only time it was absent was on the day its suit was dismissed. I also note that it had complied with the courts orders to file its trial bundle though the Defendants deny being served with the same. The plaintiff did not address this in its application but apart from that, and in all fairness, the plaintiff's overall conduct cannot be said to be that of a litigant who is not interested in its claim. It gave an explanation for its absence in court on the day the suit was dismissed which this court finds to be satisfactory.
21. Further, the suit was dismissed on 26.01.2023 whereas the plaintiff's application to reinstate suit was filed on 23.03.2023, which is about two months later. The plaintiff explained that it was not aware that the suit was dismissed until 17.03.2023 when it was threatened with eviction by the defendants. Before then, it had still been pursuing its advocate to find out the status of its case without success as evidenced by its correspondence with the said advocates. I find this delay not to be inordinate given the circumstances. In addition to this, I am obligated to balance the injustice that will be suffered by the plaintiff should the suit not be reinstated against the injustice that will be occasioned to the defendants if the suit is reinstated. I am of the view that should the suit be reinstated, the defendants do not stand to suffer any injustice as they will have an opportunity to defend themselves. However, should the plaintiff's suit be dismissed, it stand to suffer injustice as it will have been driven from the seat of justice permanently without being heard which act courts have been encouraged only to resort to as a last option.
22. I am guided by the case of *Kinyua v Go Ombachi* [2019] eKLR as cited in the case of *Chesire & 4 others v Kwambai & 3 others; Rono & 3 others (Interested Party); Sawe & another (Applicant)* (Environment & Land Case 520 of 2012) [2022] KEELC 120 (KLR) where the court made the following observation:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
23. It is on this basis that I find that the Applicant's prayer to have the interim orders issued on 28.02.2017 reinstated to be merited and I allow the same. I further direct that the suit be set down for hearing within the next 60 days.
24. Ultimately, I hereby issue the following orders:
 - a. The suit herein is reinstated.



- b. The suit shall be set down for hearing within the next 60 days.
- c. The interim orders issued on 28.02.2017 are reinstated to last until the suit is heard and determined.
- d. The Plaintiff to file and serve a Notice of Change of Advocates within the next 14 days.
- e. The costs of this application to be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF JANUARY, 2024.

A.K. KANIARU

JUDGE

In the presence of;

Mutua for 1st, 3rd, 2nd respondents/ defendants, Kiranga for Ms Ndorongo for applicant, Leadys – Court Assistant.

25. 01.2024

