



REPUBLIC OF KENYA



Kikumu & another v Kariuki & 2 others (Environment & Land Case 11 of 2018) [2024] KEELC 1617 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1617 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 11 OF 2018
A KANIARU, J
FEBRUARY 22, 2024**

BETWEEN

CHARITY MARIGU KIKUMU 1ST PLAINTIFF

MONICA WAMWARI NJOKA 2ND PLAINTIFF

AND

EPAPHIUS KARIUKI 1ST DEFENDANT

SEVERINO NYAGA MACHECHO 2ND DEFENDANT

ROBERT NDWIGA NTHIGA 3RD DEFENDANT

RULING

1. Before me for determination is a Notice of Motion application dated 21.10.2022 and filed on 24.10.2022. It is expressed to be brought under Order 17 Rule 2, Order 51 of the civil Procedure Rules and Section 26 of the [Land Registration Act](#) 2012 and all other enabling provisions of the law. The Applicant – Severino Nyaga Machecho is the 2nd Defendant in the suit whereas the Respondent – Erasmus Ireri Njeru is the plaintiff in the suit. The Applicant is seeking the following orders:
 - i. That this Honourable Court be pleased to dismiss the plaintiff’s suit as filed for want of prosecution.
 - ii. That as a result an order be issued declaring the 2nd Defendant/Applicant as the absolute owner of the suit property known as Evurore/Nguthi/2294.
 - iii. The costs of the suit be awarded to the 2nd Defendant.
2. The grounds in support of the application are set out on the face it and on the Supporting Affidavit sworn by the said Severino Nyaga Machecho on 21.10.2022. The grounds include; that he is the absolute proprietor of the suit property being Evurore/Nguthi/2294, which was registered in his name



on 03.08.1979 and a Title deed issued in the year 1980; that he has been in actual possession and has enjoyed uninterrupted occupation of the suit land prior to this case; that the respondent brought this suit in the year 2020 in Siakago Law Courts where he was ordered to prosecute the same in the High Court. That however no action has ever been taken since then; that it's been three years now and the case is not proceeding yet he is of old age and cannot exercise any of his rights on the suit land; that the respondent's claims are baseless and that their intention was to waste courts time and frustrate his enjoyment and peaceful existence on his land, which should not be entertained by this court. That also the respondent has slept on this case to his detriment and has caused him emotional anguish; that it is in the interest of justice that this case be dismissed with costs; that the respondent's case be dismissed for want of prosecution and that the applicant be declared the absolute owner of the suit land.

3. The application was responded to by the Respondent through a Replying Affidavit sworn by him on 07.02.2023. He deposed that he filed this suit in November 2020 at Siakago as a representative of Nditi Clan; that he filed the same under Certificate of Urgency for reasons that the current registered owners of Evorore/Nguthi/2294 and 1255 begun bringing the 3rd Defendant a surveyor to subdivide the parcels; that the 1st & 2nd Defendants proprietorship was cancelled in Land Adjudication Appeal Case No. 1 of 1976; that the land parcel no. 1255 was to be registered in the names of Kinga Njiru and parcel No 2294 was ordered to be registered in the names of Severino Nyaga & Hesbon Mthuni who is his deceased father; that after the said decision, the current title holders, who are members of the Mukera Clan, raised various appeals which were dismissed; and that they also filed JR 1 of 2014 before this court and the same was also dismissed on 14.12.2019.
4. He further deposed that when the decision on his application for injunction dated 27.11.2020 was to be made, that is on 09.11.2021, the court directed that it cannot proceed with the matter and that the same be placed before the ELC judge for directions; the court administrator was to notify the parties or their advocates; that he was neither notified nor informed of the transfer of the file until 16.12.2022 when he was served with a mention notice by Eddie Njiru Advocate reporting that the case was coming up on 10.03.2022, which he says was a past date. He said that he is ready to proceed with the case and the 2nd Defendant cannot be declared the owner of the suit land as the case has not been heard. He said further that both the 1st & 2nd Defendant have not even complied with Order 11 of the Civil Procedure Rules and that the pending application dated 27.11.2020 has never been decided on upto date; and that he is ready to proceed with the case to conclusion once the defendants comply with pretrial rules.
5. It was agreed that the application be disposed by way of written submissions. The Applicant filed his submissions on 06.06.2023 and he gave a brief background to the application. He then submitted that it is the duty of the respondent to prosecute their case to avoid falling afoul of Order 17 Rule 2 (1) of Civil procedure Rules which provides that "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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit." That it is clear that the Ruling that transferred the matter from the lower court was delivered way back on 03.11.2021 and the Respondent took no action until the filing of the instant application to ensure that the file was made available in the High Court for the case to proceed. That the Respondent in their replying affidavit fails to explain to court the reason for the inordinate delay and that the delay is meant to punish and take advantage of the 2nd Defendant who is an elderly person. That the matter should be dismissed as it is not the duty of the Applicant to assist the Respondent in prosecuting their suit.
6. It was further submitted that they have annexed a Land Certificate to show the ownership of the suit land Evurore/Nguthi/2294 and there is no order cancelling the Applicants registration as the absolute owner. That the Applicant is the person who has and is still in ownership, possession and actual occupation of Evurore/Nguthi/2294 and thus he has all the overriding interests in the suit



- land which cannot be defeated. That the person registered jointly with the Applicant in the year 1998 named Esbon Thuni passed on in the year 1985; that the other suit land being Evurore/Nguthi/1255 is registered in the name of Simon Kiura who is deceased and therefore no action can proceed regarding the said suit land. They opine that the Respondents claim against the Defendants lacks merit and dismissing the same will not prejudice the Respondent in any manner.
7. It was further submitted that they rely on the provisions of Sections 1A, 1B and 63(e) of the Civil Procedure Act which provide for just, efficient, effective and proportionate determination of cases by courts. They further cited the case of Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Ltd (2010) Eklr to support their submissions. They urged that the Applicant is desirous of enjoying his constitutional rights to own property and to exercise other rights thereto and the Respondent has become a stumbling block since the year 2020 and that that the court ought to allow the application.
 8. The Respondent on the other hand filed submissions on 04.04.2023. He gave a chronology of events leading to the application and submitted that the application lacks merit for reasons that the Respondents case was transferred to Embu E.L.C Court from Siakago and neither him nor his counsel was notified when the matter was placed before the judge by the Court Administrator; that since discovering the mention date on 10.03.2022 after being served by Eddie Njiru, the respondent through his counsel has been appearing in this suit; that there is a pending application dated 27.11.2020 which parties have submitted on and the court is yet to issue a ruling on it; that one year of inactivity of the suit has not lapsed; and that the defendants have not complied with Order 11 of Civil procedure Rules. They cited the cases of Kisuse V. Mohamed Matari (2021) eklr citing Vita V Kugumba (1984) Klr 441 and Utalii Transport and Others v NIC Bank & Another (2014) Eklr to support their submissions.
 9. I have considered the application, the replying Affidavit, and the rival submissions filed. The issue for determination is whether this suit should be dismissed for want of prosecution.
 10. The law, under Order 17 Rule 2 of the Civil Procedure Rules, provides;
 - (1) 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 dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 11. In the cases of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR as cited in Invesco Assurance Company Limited v Oyange Barrack [2018] eKLR, the court stated as follows:

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- “ 11. 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.”

15. 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-Kyumba* (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. It is clear from the above that for an Applicant to be successful in an application for dismissal of suit for want of prosecution, he must satisfy the one year threshold required by the law. He must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the Court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial.
13. The matter herein was transferred from Siakago Law Courts to the Environment & Land Court at Embu by the Senior Principal Magistrate at Siakago as the court was apprehensive that they lacked the pecuniary jurisdiction to hear the matter. This was done through a ruling delivered on 10.11.2021. The Environment and Land Court at Embu on its own motion on 28.12.2021 set down the matter for mention on 02.02.2022 for directions. On that day no party appeared. The court then directed that the matter be mentioned again on 03.05.2022 and the court registry was directed to notify both parties.
14. It appears that the matter was instead issued with another mention date on 30.05.2022 and on that day, the court issued the date of 19.10.2022 for mention and the court registry was again instructed to notify both parties. On 19.10.2022, only the applicant’s advocate appeared in court and informed the court that the respondent’s advocate had been served with the mention notice. The court directed that the respondent’s be served again and if they do not appear in court, then the court would consider dismissal of the matter. The date of 15.12.2022 was given for mention for directions but the trial court on that day did not sit and therefore parties were issued with a new date of 02.02.2023. It is on that date that it was brought to the attention of the court that the Applicant had filed the instant application to dismiss the suit for want of prosecution on 24.10.2022.
15. From the above, a period of 11 months and 14 days had lapsed between the order transferring the suit from the lower court to the Environment & Land Court. Order 17 Rule 2 provides that a matter should have been pending for 12 months before the court, either on its own motion or on the application of a party, makes an order for its dismissal for want of prosecution. The Respondent submitted correctly,



that the period has not expired. He also submitted that he only came to learn that the matter had been transferred to the ELC Court too late in the day because the same was not communicated to him by the Court Administrator as had been directed. I have looked at the lower court's ruling and it is clear that the ruling was delivered in the presence of the respondent's advocate and in the absence of all the other parties as well as their advocates. The respondent's claim that he did not know that the suit had been transferred to the Environment and Land Court is therefore false and a bit misleading to this court.

16. However, I do find that the delay of 11 months though inordinate given that the court had to, on its motion, move the parties for directions in the matter, it does fall below the time period provided in law. I therefore find that the interests of justice lie in allowing the respondent to prosecute his claim. The respondent is however required to expeditiously move to fix the matter for hearing. The matter has not been shown to be ripe for dismissal for want of prosecution.
17. Accordingly, I decline to allow the application for dismissal of the suit and dismiss the application dated 21.10.2022 but with no order as to costs.

RULING DATE, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22ND DAY OF FEBRUARY, 2024 IN THE PRESENCE OF;

Plaintiff/ Respondent – present

Defendant / applicant – present

Mageto for 2nd defendant

Ms Muthama for Muriuki Mureithi for plaintiff

Court Assistant - Leadys

A. KANIARU

JUDGE - ELC, EMBU

