



**Muchai v Makeri (Environment & Land Case 258 of 2012)  
[2016] KEELC 1305 (KLR) (28 October 2016) (Ruling)**

*Mwangi Muchai v Daniel Wainaina Makeri [2016] eKLR*

Neutral citation: [2016] KEELC 1305 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 258 OF 2012**

**MM GITUMBI, J  
OCTOBER 28, 2016**

**BETWEEN**

**MWANGI MUCHAI ..... PLAINTIFF**

**AND**

**DANIEL WAINAINA MAKERI ..... DEFENDANT**

**RULING**

1. Coming up before me for determination is the Notice of Motion dated 27<sup>th</sup> January 2014 in which the Defendant/Respondent seeks for this suit to be dismissed for want of prosecution and the costs of this Application and suit to be awarded to him.
2. The Application is premised on the ground that since the Replying Affidavit was filed on 12<sup>th</sup> June 2012 and served on the Plaintiff's counsel on 14<sup>th</sup> June 2012, the Plaintiff has lost interest in the case as he has not taken any steps to prosecute it.
3. The Application is contested. The Plaintiff/Respondent filed the Replying Affidavit of Catherine N. Njuguna, its Counsel, sworn on 12<sup>th</sup> May 2014 in which she averred that her failure to fix this suit for hearing has been occasioned by the fact that she had a difficult pregnancy between August 2012 and April 2013 which rendered her unable to work. She annexed her medical evidence. She added that she proceed to maternity leave which ended in September 2013. She further averred that they attempted to fix the matter for hearing at the beginning of the year 2014 but that the clerk who attended the fixing informed her that the court file could not be traced. She added that unbeknown to them, this Application had already been filed but her office was only served on 22<sup>nd</sup> March 2014. She stated that her failure to fix this matter for hearing was occasioned by her ill health and was not deliberate. She beseeched this court not to punish her hapless client by having this matter dismissed but added that she would be ready to secure the expeditious disposal of this matter.



4. The Plaintiff/Respondent filed his written submissions. This court has carefully considered the Application, the affidavits together with the submissions made by the Plaintiff and the issue for this court's consideration is whether or not to dismiss this suit for want of prosecution.

5. The applicable law is Order 17 Rule 2(1) of the Civil Procedure Rules, 2010 which provides as follows:

“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.”

Order 17 Rule 2(3) of the same rules provides as follows:

“Any party to the suit may apply for its dismissal as provided in sub-rule 1”

6. The dismissal of a suit for want of prosecution is meant to prevent an abuse of the court process. The test in an application for dismissal of suit for want of prosecution was laid out in the case of *Ivita vs. Kyumbu* [1984] KLR 441, where Chesoni, J. (as he then was) held 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, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff 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.”

7. Further in *E. T. Monks and Co Ltd v Evans* (1985) KL R 584 the court stated as follows,

“The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances..... If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself..... It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position.”

8. Whether or not this Application should be allowed is a matter for the discretion of the judge who will be guided by the reasons advanced by the Plaintiff as to why he did not set the suit down for hearing. In this particular case, Counsel for the Plaintiff/Respondent has explained that the reason why she was not able to fix this matter for hearing was due to her personal challenges comprising of a difficult pregnancy followed by maternity leave. Counsel for the Plaintiff/Respondent has produced medical evidence to support her assertion. The question is whether or not I am satisfied with this excuse. I certainly am. Plaintiff's counsel has ably demonstrated the reason why she was not able to fix this suit down for hearing from August 2012 up until early 2014. Her excuse is sufficient and the delay complained of



is not inexcusable. To that extent therefore, I find that it is not proper to dismiss this suit for want of prosecution.

9. It follows that this Application is dismissed. Costs shall be in the cause.

It is so ordered.

**DELIVERED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER 2016.**

**MARY M. GITUMBI**

**JUDGE**

