Nderi & 1709 others v County Government of Kirinyaga & 4 others (Environment & Land Case 33 of 2018) [2025] KEELC 954 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 954 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT & LAND CASE 33 OF 2018

JM MUTUNGI, J

FEBRUARY 27, 2025

BETWEEN

OCTAVIOUS MURIUKI NDERI & 1709 OTHERS & 1709 OTHERS & 1709 OTHERS & 1709 OTHERS ..... PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KIRINYAGA ..... 1ST DEFENDANT

THE CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

THE NATIONAL LAND COMMISSION ..... 3RD DEFENDANT

THE COUNTY SURVEYOR ..... 4TH DEFENDANT

THE HON ATTORNEY GENERAL ..... 5TH DEFENDANT

RULING

1. This Ruling is in regard to the Plaintiffs/Applicants' Notice of Motion application dated 21st December 2023, seeking for the following orders:

    1. Spent

    2. That this Honourable Court be pleased to stay execution of the order issued on 20th March 2023 pending inter parties hearing.

    3. That this Honourable Court be pleased to set aside the proceedings of 20th March, 2023 and all other consequential orders arising therefrom.

    4. That upon the granting of prayer No. 2 above, this Honourable Court be pleased to reinstate the case for hearing on the merits.

    5. That costs of the application be provided for.

2. The Plaintiffs/Applicants initially commenced this suit vide a plaint dated 20th June, 2018 seeking Judgment against the Defendants/Respondents for;

    a. Immediate settlement of the Plaintiffs on their land parcel Ngariama/Lower Ngariama/13963 and an order for removal of all those illegally settled on the said land.

    b. That the Defendants give effect to the Judgment and/or decree of the Embu High Court Civil Case Number 71 of 2006.

    On 20th March 2023, the Court issued orders for the dismissal of the suit for want of prosecution and the Plaintiffs/Applicants dissatisfied and aggrieved by the dismissal of the suit, have filed the current application, which is based on the grounds set out on the body of the application and is supported by the affidavit of Octavius Muriuki Deri, sworn on 21st November 2023.

3. The Applicants aver that on 20th March 2023, the matter proceeded in the absence of both the Applicants and their previous Advocates when the same was dismissed for want of Prosecution. The Applicants aver they were not aware the matter had been scheduled for hearing of Notice to show cause why it should not be dismissed for want of prosecution. They stated they expected their Advocate then on record to have been diligently following up on the matter but he did not keep them abreast of the progress in the matter. The Applicants claim they only came to learn about the dismissal of the suit on the 18th December 2023 when they visited the Court Registry to find out the status of the matter.

4. The Applicants after learning their suit had been dismissed for want of prosecution, instructed the Firm of M/s F. K. Omenya & Co. Advocates to act for them in place of their previous Advocates and on their instructions the said Firm filed the present application.

5. The Applicants aver the failure to attend Court on 20th March 2023 when the suit was dismissed was not deliberate on their part and it was their expectation their then Advocate on record was looking after their interest in the case. They argue that the mistake of their erstwhile Counsel should in the interest of Justice not be visited on them.

6. The 1st Respondent's in its Grounds of Opposition, dated 16th April 2024, argued that the Applicants' failure to advance their case was inexcusable and aver the Applicants had no credible reasons for not prosecuting the case and assert that clients ought to do a follow up of their cases where they have instructed Counsel. The 1st Respondent avers that a lapse of nearly 2 years was inexcusable. It was the 2nd Respondent's position that without evidence of the Plaintiff's active pursuit of the matter, the application was baseless and ought to be dismissed.

7. The Court, on 23rd May 2023, gave directions that the application be canvassed by way of written submissions.

Submissions, Analysis And Determination

8. In their written submissions dated 5th June 2024, the Applicants contended that their absence at the hearing of the Notice to show cause why the suit should not be dismissed for want of prosecution, as well as their failure to take necessary legal steps to advance their case, was unintentional. They explained that they had delegated responsibility for the case to their chosen Advocate, but unfortunately, a persistent communication breakdown occurred between them and their Advocate over nearly a two-year period.

9. The Applicants submitted that despite their repeated inquires about the status of their case, they received nothing but vague promises of future updates from their Advocate, who also failed to return

calls and messages. The Applicants argued that their non-appearance in court on 20th March 2023, was due to a forgivable error or mistake, rather than negligence or laziness on their part.

10. The Applicants further asserted that they had provided their Legal Representatives with adequate instructions and had made efforts to keep in touch with their Counsel regarding the progress of their case after it was filed. However, they found themselves trapped in a cycle of ineffective legal proceedings. It was only after conducting a thorough review of the court file at the registry that they became aware of the dismissal of their case.

11. The Applicants urged the Court to set aside the proceedings of 20th March 2023, stay the execution of the orders issued on 20th March 2023, and reinstate the suit for a hearing on its merits.

12. The 1st Respondent, in their written submissions dated 26th August 2024, argued that the Applicants had not provided adequate justification for their inability to actively pursue the case. They contended that a breakdown in communication between the Applicants and their Legal Representative did not constitute a valid excuse for the inaction. The 1st Respondent stated that the responsibility of a case does not solely rest on the Advocate; rather, it remains with the litigant. As such, the 1st Respondent submitted that it was incumbent upon a party, even when they have engaged an Advocate, to monitor the progress of their case routinely.

13. Moreover, the 1st Respondent pointed out that the Applicants failed to show that they had made any verifiable effort to check in on the status of their case with their Advocates, especially during the times when communication had supposedly broken down. This would have included making visits to their Advocates' offices in person to inquire about their case. The 1st Respondent argued that the Applicants' Advocate's lack of diligence in advancing the case does not excuse the Applicants' own negligence in ensuring their case was being properly managed.

14. The 2nd to 5th Respondents filed their written submissions on 19th July 2024, arguing that the Applicants should have acted promptly upon learning of the dismissal of their suit on 20th March, 2023. They contend that the Applicants should have sought to rectify the situation if they had issues of communication with their previous Advocates by either appointing another Advocate and/or filing a Notice of Change of Advocate. However, the Respondents highlight that the Applicants failed to take any remedial steps or adhere to Order 9 of the Civil Procedure Rules, 2010. The delay in filing a Notice of Change of Advocates until 21st December 2023, nearly ten months later, was cited as evidence of the Applicants' diminished interest in pursuing their case.

15. Further, the Respondents argued that the Applicants have not shown any initiative in correcting their mistakes since 20th March 2023, thereby displaying a lack of diligence. The reasons furnished by the Applicants for their inaction, the Respondents aver were unreasonable, untenable, and delatory delayed, rendering them insufficient to warrant the Court to exercise its discretion in the Applicants favour.

16. After careful consideration of the Notice of Motion application, the grounds of opposition and the written submissions of the parties, the Court is called upon to determine whether the Applicants have satisfied the threshold upon which the Court can exercise its discretion to allow the application and reinstate the suit to be heard on merit.

17. The power to dismiss a suit for want of prosecution is governed by Order 17 of the Civil Procedure Rules. Order 17 Rule 2(1) of the Civil Procedure Rules 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."

18. The setting aside of an order of dismissal of a suit for want of prosecution under Order 17 Rule 2(1) of the Civil Procedure Rules would call for the same consideration as would be necessary if the Order of dismissal of the suit had been made under the provisions of Order 12 of the Civil Procedure Rules. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:-

> " 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."

19. In the case of Nilesh Premchand Mulji Shah & Another T/A Ketan Emporium v MD Popat and Others & Another [2016]eKLR, the Court stated as follows:

> " 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 Kyumbu [1984] KLR 441 espoused that:
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> "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."

20. Consequently, the Court's discretion in vacating a dismissal order should be exercised with careful Judgment. Dismissal for lack of prosecution indicates that the parties involved have not assisted the court in achieving its primary objective. The party seeking to overturn this dismissal must provide the Court with a compelling explanation for why their request is justified and persuade the Court to use its discretion favorably.

21. In the case of Investment Limited –Versus - G4s Security Services Limited (2015) eKLR the Court held:

> " This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of *the Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice. This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial "Sword of the Damocles". But in reality should be checked against yet another equally important constitutional demand that case should

be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of *the Constitution* of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties not only to the Plaintiff."

22. To successfully have a case reinstated, a party is required to demonstrate good faith, file the reinstatement application promptly, and ensure that the reasons for failing to actively pursue the case are significantly compelling when weighed against any potential prejudice to the Defendant. In Simion Waitim Kimani & Three others vs Equity Building Society (2010) eKLR, Koome J held;

> "The Courts have discretion generally to reinstate a suit which is dismissed for nonattendance, but in all matters involving the exercise of the Courts discretion, it must be exercised judiciously based on facts and law. The party seeking to reinstate the suit must also demonstrate good faith and the application should be brought to Court without unreasonable delay. This suit was filed on 12th March 2002 and since 29th November 2004 no steps were taken to prosecute it. It is the Court on its own motion that issued the notice to show cause why the suit should not be dismissed for want of prosecution. The Plaintiff now claims that his lawyer who was on record Messrs Cerere Mwangi & Co. left the country to settle in the United States in the year 2004. The Plaintiff who instituted this suit never enquired about their lawyer or their matter for the last 6 years.
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> Even if this Court were to exercise its discretion in favour of the Plaintiff that would be against the principle of equity which does not aid the indolent but aids the vigilant. Secondly, this suit was dismissed by the court on its own motion pursuant to the provisions of Order 16. The notices were sent. No cause was shown and the Court dismissed the suit for want of prosecution. According to rule 6 of order 16, if the suit is dismissed when no steps were taken for a period of three years the plaintiff can only bring a fresh suit subject to the Law of Limitation....."

23. In the case of Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) eKLR Kimaru J stated;

> " This Court has unfettered discretion to set aside any order which was entered exparte. This discretion however, has to be exercised judicially. The Applicant must satisfy this court that she has good reasons why she failed to attend Court when the said application for dismissal was heard and determined in her absence...In the first place, she cannot blame her counsel who was then on record for failing to attend Court when the said application was listed for hearing. This court has ruled in several cases that a civil case once filed, is owned by a litigant not his advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to Court and say that he was let down by his Advocate when a decision adverse to him is made by the Court due to lack of diligence on the part of his Advocate. I think it has been ruled by the Court of Appeal that where an Advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an Advocate for professional negligence. The mistake of counsel will not, per se, make this court to exercise its discretion in favour of an aggrieved litigant."

24. In the case of Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR) (unreported) Waki J.A, held that;

> "With respect, l think the applicant and his counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended

to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation. It is for the reason that it was a land matter that it should have been handled with the sensitivity and diligence that entails such matters. Instead the Applicant and his advises exhibited undesirable nonchalance, which l am not inclined to countenance''.

25. The Applicants' reason for not actively pursuing their case was a significant communication breakdown with their Advocates spanning over two years. They reported that despite their repeated attempts to inquire about the status of their case, they were met with vague promises of future updates, while their calls and messages remained unanswered.

26. The Applicants seem to focus heavily on the argument that the suit is a class action related to a land dispute, suggesting that this fact alone warrants the approval of their application. However, I believe that if the Applicants truly considered this issue to be of significant importance, given its relation to land, they should have approached the matter with greater diligence and sensitivity.

27. Upon reviewing their arguments, I find the reasons presented by the Applicants to be unreasonable and unconvincing. Merely stating that there was a lack of communication between them and their Legal Representatives cannot suffice. Parties must always be prepared to prosecute their matters once they come to Court. The Applicants were complacent in their approach and are not deserving of the Courts discretion. If parties were to routinely be permitted to scapegoat their legal representatives whenever they are called upon to account for their inaction, the Courts would be somewhat be converted into supervisors and/or Managers of the parties litigation. The Courts have no such role and it is up to the litigants to keep their legal advisers focused on the brief they have been entrusted with. If a party's Advocate fails to diligently handle the client's matter in Court, such party has a recourse against such an Advocate.

28. The application lacks merit and is ordered dismissed.

29. Each party to bear their own costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 27TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE