Ramadhan & another v Mwangisi & 11 others (Land Case 251 of 2017) [2024] KEELC 1627 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1627 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

LAND CASE 251 OF 2017

EK MAKORI, J

MARCH 19, 2024

BETWEEN

RAMADHAN IDDI RAMADHAN & ANOTHER ..... PLAINTIFF

AND

BROWN MWANGISI & 11 OTHERS ..... DEFENDANT

RULING

1. The application dated 17th February 2023 is brought by the 1st, 3rd, 4th 6th 7th, and 8th defendants/ applicants seeking the dismissal of the current suit for want of prosecution. It is supported by the annexed affidavit of Ms. Lucy Mwangi – learned counsel for the applicants deposed on the even date.

2. The application is opposed through the replying affidavit of one Ramadhan Idd Ramadhan sworn on the 7th of July 2023.

3. The main issue to determine is whether this suit should be dismissed for want of prosecution with the attendant costs.

4. Learned Counsels Ms. Lucy Mwangi for the defendants/applicants and Mr.Gitonga Muriuki ably submitted the considerations this Court needs to factor before dismissal of a suit for want of prosecution.

5. Significantly Ms. Mwangi in her affidavit in support of the application stated that this suit was filed sometime on 18th December 2017, contemporaneously with an application for an injunctive order. In its ruling dated 6th February 2020, this Court – Olola J. granted the same.

6. Since the orders were issued, according to the applicants, the respondents went through a lull and have never set the suit down for hearing at the detriment of the applicants. It is argued that the order in place has emboldened the respondents particularly the 1st respondent who has now concocted and lodged criminal-related complaints at the Malindi police station and has levied criminal charges against

some of the applicants while holding in abeyance the current suit. That the order before this Court lapsed - 12 months after its issuance, nonetheless is used only to further the plaintiffs' malicious plans to illegally remove the defendants from the suit property.

7. Learned Counsel for the applicants referred this Court to Order 17 Rule 2(3) of the *Civil Procedure Rules* on the dismissal of suits where no action has been taken for over one year. The Court was also referred to the decisions in *Investment Limited v G4S Security Services Limited* [2015] eKLR and *Thathini Development Co. Limited v Mombasa Water & Sewerage Co. & Another* [2022] eKLR, which cases articulated the aspects to consider before the dismissal of a suit for want of prosecution. It is the opinion of the applicants that this matter has remained without any action being taken by the respondents towards its disposal since 2017 which is over 6 years since initiation and 4 years after the injunctive order was issued by this Court. The applicants believe that the respondents are comfortable with the status quo on the ground hence the reasons for failure to prosecute.

8. Mr. Gitonga learned counsel for the respondents is of a contrary view stating that there are genuine reasons why the suit remains dormant to date, foremost that the respondents are indigent, illiterate, old, frail, and persons of very limited means. They have little understanding of the law, especially as far as the implications of certain rules of procedure are concerned. Secondly, they have been struggling with their former counsel who initially was keen to represent them but suddenly developed cold feet and failed to take steps to propagate the matter. Thirdly the respondents have not had an opportunity to access Court proceedings for purposes of their use and conferencing on the way forward with the current counsel on record. Fourthly the respondents were incarcerated for a year or so regarding criminal proceedings as they could not raise punitive bail and bond terms, which took the intervention of the High Court to have them released on reasonable bail and bond terms. Fifthly they were hindered by the COVID-19 pandemic, which slowed down the Court processes and operations.

9. Mr.Gitonga further raised the issue of the pending counter-claim by the applicants which remains latent and blames it on the applicants who have not also taken steps to set it down for hearing.

10. Like the applicants, the respondents referred this Court to the provisions of Order 17 Rule 2 of the *Civil Procedure Rules* on the grounds to deliberate before dismissal of a suit for want of prosecution. Various judicial precedents in this realm were also cited significantly this Court was referred to the following cases – *Agip (Kenya) Limited v Highlands Tyres Limited* [2001] eKLR, enumerating concisely the aspects the Court has to contemplate before the dismissal of a suit for want of prosecution. The case of *Invesco Assurance Co. Limited v Oyange Barrack* [2018] eKLR, regarding the exercise of discretion judiciously by the Court before dismissal for want of prosecution, which should include adherence to Article 159 of the *Constitution* to do substantial justice to parties. The dictum in *Mwangi S. Kaimenyi v Attorney General & Another* [2014] eKLR, where 'inordinate' delay was expounded.

11. The respondents conclude that this is not one of those cases that ought to be dismissed for want of prosecution.

12. I have considered the averments and submissions from the rivaling parties on the single question as to whether this suit ought to be dismissed for want of prosecution. As submitted by the parties, there are lots of judicial precedents to track on this issue which I need not replicate here, but suffice to state that the test for dismissal of a suit for want of prosecution is as laid in the case of *Thathini Development Company Limited v Mombasa Water & Sewerage Company & another* [2022] eKLR:

> "It is the duty of court to do justice between the parties, Section 1B of *Civil Procedure Act*, Cap. 21 provides that there should be just determination, effective and timely disposal

of proceedings, and effective use of judicial time and resources. It is upon this duty of overriding objective does this court, takes time and puts in resources to dismiss suits that have been unprosecuted for more than one year to ensure that other active cases have ample time to be determined. The court will not allow matters to be filed and whereby once the parties obtain interim orders then proceed to keep the file idle. This causes the clogging of the justice system and unacceptable for nothing.

16. In the case of *Josphat Oginda Sasia – Versus - Wycliffe Wabwile Kiiya* [2022] eKLR, the court held "But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to "give notice" of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the Cause Lists, Websites, or even court notice boards. (see the cases of *Fran Investments Limited vs. G4S Security Services Limited* [2015] eKLR and *Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others* [2018] eKLR)."

17. The Counsel for the Plaintiff/Applicant has pleaded in the supporting affidavit that the parties have been negotiating with the aim of settling the suit out of court. However, they have been looking for the file to take a mention date but released the same was dismissed for want of prosecution. In the case of "*Ivita – Versus - Kyumbu* [1984] KLR 441, the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated: -

> "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 the lapse of time. The Defendant must however satisfy the court that it 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".

13. I have reviewed the intention of the application and considered the reasons for the delay as aptly captured by Mr. Gitonga for the respondents. The delay as enumerated in paragraph 8 (supra) ranges from the respondents being illiterate, persons of little means, struggling with their former advocate, failure to access Court pleadings and proceedings, incarceration due to other pending criminal cases, COVID-19 and there is pending counter-claim.

14. This has to be factored in considering that the suit was filed in 2017, which is over 6 years since the filing and 4 years after the issuance of an injunction which the respondents are enjoying and it seems that the respondents will wish the status quo on the ground as it is to persist to their benefit at least according to the applicants.

15. In my view, I see an inordinate delay after considering the reasons as proposed for the delay, but then as held in the leading decision in *Ivita v Kyumbu* [1984] KLR 441:

> " 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;"

16. When I balance the scale of justice weighing on the delay and as to which side it should tilt to for or against, my mind tells me it should be in the favour of the applicants. The five or so grounds as proposed by the respondents do not promptly and persuasively explain the inordinate delay. The Judiciary has put in place measures to mitigate the factors that are said to have led to the delays in the progression of this suit. For instance, the Social Transformation Through Access to Justice (STAJ) advocates that all civil suits however complex ought to be determined at most within 3 years, but ideally within 1 year. In this matter, we are going to the 7th year after initiation. A backlog in this Court requiring this Court to be censured by the Judiciary Administration in the Performance Contracting Matrix for this Court. We cannot for example be talking of Court records and proceedings being inaccessible at this stage. The Court record shows so far that we only have pleadings from both sides and a ruling by this Court on the injunction application rendered in early 2020. What is this record the respondents will want that resides in our Court for their use which they don't have and which has taken 6 years to access?

17. There is the injunction issued by this Court which the applicants think is hurting them with the respondents ignoring to respond to the same. As it hurts the applicants, the respondents should not also benefit from the same as the Swahili idiom goes – mkuki kwa nguruwe lakini kwa binadamu mchungu (a spear for a pig but hurting to a human). Loosely put it this way - all the parties in these proceedings should be treated with equality during the hearing under the aegis of the equality of arms doctrine. The trial should not take too long as to visit an injustice to any one of them. And that all parties should enjoy the protection of the order(s) issued by this Court during the pendency of this suit. That is why the current application is germane.

18. Further for the reasons proposed, change of advocates, illiteracy, indigence, long incarcerations, and COVID-19. These are reasons that could hold sway before the pandemic. At this age and time, the reasons proposed are not fashionable and will run contra the mechanisms put in place by the Judiciary in the access to justice quest. We now have the ingenious Virtual Courts, the innovative online platforms, the gratuitous Mahakama Popote, the progressive Active Case Management Strategy and toolkit et al. I dare say that in Kenya these days, you only need a kabambe or mulika mwizi mobile phone to access court services. You will only require a few internet bundles as a discomfort. We are even moving to the Huduma Centre – a one-stop-shop Kenyan experience!

19. The circumstances of this case are that there is an inordinate delay in the prosecution of this matter. I can see elsewhere the parties are resorting to the use of police and criminal prosecutions to resolve their issues which will not be a permanent panacea in determining the land question at hand. The present suit ought to be adjudicated to finality in one way or another.

20. Balancing the interest of justice further and having stated that I ought to rule in favour of the applicants, and considering this is a land matter, I will think in the exercise of judicial discretion that I will allow the application partially but with a rider as proposed in the final orders hereunder:

    i. This suit be set down for hearing in the next 60 days hereof on a date to be provided by this Court forthwith.

ii. On the appointed date if the plaintiffs do not prosecute the same the suit be marked as dismissed automatically and the orders proposed in the current application be allowed wholesome.

iii. As the Respondents are to blame for the delay, they will shoulder the costs of the current application.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 19TH DAY OF MARCH 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Lucy Mwangi for the Applicants

Mr.Gitonga Muriuki for the Respondents

Court Assistant: Happy