



REPUBLIC OF KENYA



**Aruasa & 20 others v Onong’no (Environment & Land Case  
109 of 2017) [2024] KEELC 3990 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3990 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 109 OF 2017**

**A NYUKURI, J**

**APRIL 29, 2024**

**BETWEEN**

<b>PAUL TOWETT ARUASA .....</b>	<b>1<sup>ST</sup> PLAINTIFF</b>
<b>GILBERT O. MAMWACHA .....</b>	<b>2<sup>ND</sup> PLAINTIFF</b>
<b>GRACE MELISA .....</b>	<b>3<sup>RD</sup> PLAINTIFF</b>
<b>WILSON NYABUTI MONGARE .....</b>	<b>4<sup>TH</sup> PLAINTIFF</b>
<b>ROBERT MOGERE OMONI .....</b>	<b>5<sup>TH</sup> PLAINTIFF</b>
<b>SAMUEL NYARURI OMARI .....</b>	<b>6<sup>TH</sup> PLAINTIFF</b>
<b>CHRISPINE OLOO .....</b>	<b>7<sup>TH</sup> PLAINTIFF</b>
<b>ISAAH BOSIRE OMOA .....</b>	<b>8<sup>TH</sup> PLAINTIFF</b>
<b>EVANS MWAMBA .....</b>	<b>9<sup>TH</sup> PLAINTIFF</b>
<b>JONES ONGERA MOBEGI .....</b>	<b>10<sup>TH</sup> PLAINTIFF</b>
<b>ISAAH BOSIRE OMOA .....</b>	<b>11<sup>TH</sup> PLAINTIFF</b>
<b>NICODEMUS N. OKONGO .....</b>	<b>12<sup>TH</sup> PLAINTIFF</b>
<b>ABRAHAM OWIRO .....</b>	<b>13<sup>TH</sup> PLAINTIFF</b>
<b>JOHN NYAUMA GESORA .....</b>	<b>14<sup>TH</sup> PLAINTIFF</b>
<b>RICHARD NDUBI .....</b>	<b>15<sup>TH</sup> PLAINTIFF</b>
<b>JASPER OMENGE MARWANGA .....</b>	<b>16<sup>TH</sup> PLAINTIFF</b>
<b>JOHN MAKOKHA/ESTHER JELAGAT KIPTOO .....</b>	<b>17<sup>TH</sup> PLAINTIFF</b>
<b>STEPHEN TOTO JUMA .....</b>	<b>18<sup>TH</sup> PLAINTIFF</b>
<b>SINGH GETUGI .....</b>	<b>19<sup>TH</sup> PLAINTIFF</b>



**JASPER N. NDEGE ..... 20<sup>TH</sup> PLAINTIFF**

**BENSON ABUGA ..... 21<sup>ST</sup> PLAINTIFF**

**AND**

**JACK JAMES AWUOR ONONG'NO ..... RESPONDENT**

**RULING**

1. Before court is a Notice of Motion dated 18<sup>th</sup> April 2023 filed by the plaintiffs/applicants seeking the following orders;
  - a. Spent
  - b. That the court be pleased to set aside orders issued on the 8<sup>th</sup> day of March 2019 dismissing the suit for want of prosecution.
  - c. That this suit be reinstated for determination on merit.
  - d. That subject to prayer 3 above, the matter be referred to court annexed mediation.
  - e. That costs be in the cause.
2. The application is anchored on the supporting affidavit sworn by Samuel Omari, the 6<sup>th</sup> plaintiff. The applicants' case is that this suit was originally filed in Nairobi in 2016 and soon thereafter, the defendant approached the plaintiffs asking for an amicable settlement of the same, promising to ensure their individual titles are processed in their favour. That basing on this move by the defendant, the plaintiffs did not take action in the matter hoping that it will be settled out of court.
3. The applicants maintained that the defendant has all through been engaging the plaintiffs individually and collectively even as recently as February 2023. Further that although the plaintiffs have paid a considerable amount to the defendant for processing title, the defendant has failed to honour his promises, holding the plaintiff at ransom. That when the plaintiffs realized that the defendant was not honouring his promises, they instructed their advocate to fix this matter for hearing only to learn that the same was transferred from Nairobi to Machakos and dismissed for want of prosecution on 8<sup>th</sup> March 2019.
4. They averred that the delay was not intended to inconvenience the court or the defendant but was due to the ongoing negotiations. They stated that they had developed their homes on the suit property, some being senior citizens who stand to suffer irreparable loss if the suit is not reinstated and that it is equitable that the orders sought are granted. The deponent attached a copy of authority to plead; sale agreements; minutes of the meeting held on 29<sup>th</sup> January 2023; and Mpesa statement showing money sent to the defendant on 4<sup>th</sup> February 2023.
5. The application was opposed. Jack James Onong'no, the defendant herein swore the replying affidavit dated 22<sup>nd</sup> May 2023 opposing the application. He stated that the application is an afterthought and filed in bad faith. He vehemently denied ever engaging the plaintiffs in any form of negotiations. He admitted receiving Kshs. 10,000/= from the plaintiffs but stated that he was not told the purpose of that money. He denied ever talking to the plaintiffs. He insisted that if there were negotiations, his advocates could have been involved.



6. He took the position that the plaint did not disclose any cause of action against him and that if the matter is reinstated he stands to suffer prejudice as he is currently staying in Kisumu.
7. He blamed the plaintiffs saying they were the authors of their own predicament having failed to pay costs of subdivision, consents, stamp duty and other costs related to title processing.
8. According to him, the plaintiffs are not interested in prosecuting this suit and are guilty of laches and that the 3<sup>rd</sup> defendant is deceased. He attached his defence; Mpesa statement; WhatsApp extract between him and one of the plaintiffs; minutes by the plaintiffs dated 29<sup>th</sup> January 2023 and the sale agreement between himself and the plaintiffs.
9. In a rejoinder Samuel Omari and Jones Ongera Mobegi, the 6<sup>th</sup> and 10<sup>th</sup> plaintiffs respectively filed supplementary affidavit dated 13<sup>th</sup> June 2023, while Singh Getugi, the 19<sup>th</sup> plaintiff filed an affidavit dated 31<sup>st</sup> May 2023. They stated that the plaintiffs filed the instant application on realizing that the defendant had no intention of settling this matter and that it is the defendant who engaged the plaintiffs directly without involving their respective advocates. They stated that the engagements were done in good faith without anticipating this scenario and therefore they did not keep a record of earlier negotiations and only began documenting the engagements recently. They stated that the sum of Kshs. 10,000/= sent to the defendant was from the plaintiffs' treasurer who is well known to the defendant.
10. They maintained that the defendant had agreed to meet the plaintiffs at Ruai on 12<sup>th</sup> February 2023 to start the process of subdivision but that the defendant failed to show up. That the 19<sup>th</sup> defendant recorded the telephone conversation with the plaintiff which took place on 11<sup>th</sup> February 2023 and 12<sup>th</sup> February 2023 when he failed to attend the meeting. That the 1<sup>st</sup> and 7<sup>th</sup> defendants had sworn affidavits showing that they are proper parties to this suit. They stated that as courts hear cases virtually, the allegation that the defendant had moved to Kisumu was not an issue and would not bar him from participating in these proceedings. They averred that the defendant took advantage of the fact that he was in possession of the mother title and was therefore holding the plaintiffs at ransom. They stated that some parcels had changed hands from the original purchasers to third parties and that the death of the 3<sup>rd</sup> plaintiff cannot be the reason why the suit would abate.
11. Parties filed their respective submissions. On record are submissions filed by the plaintiffs on 30<sup>th</sup> June 2023 and those filed by the defendant on 11<sup>th</sup> June 2023, both of which this court has considered.

### **Analysis and determination**

12. The court has carefully considered the application, the response thereto and the rival submissions. The sole issue that arise for determination is whether the plaintiffs have met the threshold for setting aside orders dismissing this suit for want of prosecution and reinstating this suit for hearing on merit.
13. The power of this court to set aside orders dismissing a suit for want of prosecution is provided for in Order 12 Rule 7 of the *Civil Procedure Rules* 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.
14. The principles for setting aside orders dismissing a suit for want of prosecution are well settled. The power to set aside dismissal orders are discretionary and ought to be exercised judiciously and fairly and not whimsically. In considering such application, the court considers the reason for the delay and



whether justice can be done despite the delay. In the case of *Investment Limited v G4S Services Ltd* (2015) eKLR, the court held as follows;

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 a 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 cases 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.

15. In the instant matter, the record shows that when this matter came up in Nairobi on 6<sup>th</sup> March 2017, the court transferred it to this court. It appears that upon receipt of the file, the court suo motto issued Notice to show cause by EMS to counsel for the parties and on 8<sup>th</sup> March 2019 the court dismissed this suit for want of prosecution in the absence of counsel for both parties.
16. The reason given by the plaintiffs for failure to prosecute their suit was that they were engaged in negotiations which were initiated directly by the defendant. While the defendant vehemently denied there being any negotiations or engaging the plaintiffs in any way, the latter produced an Mpesa Statement showing that the defendant received Kshs. 10,000/= from them. They also demonstrated by transcribed telephone conversation, that the defendant had been talking to the 19<sup>th</sup> plaintiff about the two parties meeting to settle the matter. Having considered those two documents and the defendant's own annexures which include the plaintiff's minutes, WhatsApp messages and Mpesa statement, it is clear that indeed the parties herein were negotiating directly without involving their advocates. It appears from those telephone conversations that both the plaintiffs and the defendant were unaware that this suit had been dismissed for want of prosecution. The conversation shows that it is the defendant who had been promising to meet the plaintiffs but he had not been showing up, even when the plaintiffs travelled to see him. He cannot therefore reap from his own mischief. The parties were within the law to try and negotiate this matter with intention to settle it out of court as Article 159 (2) (c) encourages promotion of alternative dispute resolution mechanisms.
17. Having noted that the only concern of the defendant is that he has relocated to Kisumu, and that that would prejudice him, the court takes into account the defendant's deposition that the plaintiffs have not paid costs for “processing title”. Therefore, the defendant does not dispute the fact that the plaintiffs paid the purchase price of the suit property. In the premises, I am satisfied that despite the delay, substantive justice would require that the dismissal orders be vacated and the suit reinstated. As the parties have for 8 years negotiated without a settlement, the prayer for referring this matter to court annexed mediation will not serve any purpose. Therefore, this is a matter that should be reinstated and determined expeditiously by court in view of the age of the suit.
18. In the premises, I find and hold that the application dated 18<sup>th</sup> April 2023 is merited and the same is hereby allowed as follows;
  - a. The orders made herein on the 8<sup>th</sup> day of March 2019 dismissing the suit herein for want of prosecution are hereby set aside.
  - b. This suit is hereby reinstated for determination on merit.
  - c. A hearing date on priority shall be fixed by the plaintiff.



d. I make no order as to costs.

19. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the Presence of;

Mrs. Kiarie for defendant/respondent

Mr. Isoe for plaintiffs/applicants

Court assistant – Abdisalam

