Nyaga v Gichovi & 6 others (Environment & Land Case 19 of 2019) [2024] KEELC 6013 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 6013 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 19 OF 2019

A KANIARU, J

APRIL 25, 2024

BETWEEN

KENNETH NJERU NYAGA ..... PLAINTIFF

AND

SAMMY GICHOVI & 6 OTHERS ..... DEFENDANT

RULING

1. The application before me for determination is a Notice of Motion dated 14.04.2023 and filed on 18.04.2023. It is expressed to be brought under Articles 48, 50(1), and 159 (2) of the *Constitution of Kenya*, 2010, Sections 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Order 17 rules 3 and 4 of the *Civil Procedure Rules*, 2010, and all other enabling provisions of law. The applicants are the 1st to 7th Defendants whereas the plaintiff is the Respondent. The prayers sought are as follows:

    1. The Honourable court be pleased to dismiss the plaintiff's suit for want of prosecution.

    2. Costs of the application and of the main suit be borne by the plaintiff.

    3. Such further and/or other orders be made as the court may deem just and expedient.

2. The application is premised on the grounds on the face of it and on the Supporting Affidavit sworn by the 1st Defendant - Sammy Gichovi -*inter alia*; that this suit was filed in the year 2019; that the defendants subsequently entered appearance and filed their defence; that the plaintiff has failed to list the matter for case conference and has yet to supply the defense with his pre-trial documents; that the plaintiff has failed to take any suitable steps to progress the hearing or finalization of the matter; that the plaintiff has neglected or refused to attend the past three hearing dates issued by the court despite the same being communicated to him; and that the suit has been pending in court for the past 4 years.

3. That owing to the lapse of time and the constant skipping of court dates without reasonable excuse, it is apparent that the plaintiff has lost interest in the case and therefore there is no need to maintain the

suit; that the plaintiff will not suffer any prejudice if the suit is dismissed as he has long lost interest in the suit and in any case he is guilty of laches; that conversely the defendants stand to be prejudiced if the suit is sustained as they will continue to suffer anxiety and anguish over the suit which the plaintiff has no intention of prosecuting; that the plaintiff's conduct amounts to want of diligence and care and abuse of the due process of court; that it is conduct such as the plaintiff's that contributes to unnecessary backlog of cases and such conduct should be discouraged. They urge that the application be allowed.

4. The Plaintiff filed a response to the application via a Replying Affidavit dated 12.06.2023 and filed on 19.06.2023. He deposed that when he filed the suit on 25.06.2019, he filed it together with his trial bundle. That all along he has been keen on having the matter prosecuted and that he has not refused to attend court. That there has never been a proper pre-trial in the matter since the defendants have not served him with their trial bundle todate; that it would be unfair to dismiss the suit for want of prosecution in a matter for which he and his advocate have been attending court and in respect of which he has complied with Order 11.

5. It was agreed that the application be canvassed through written submissions. The Defendants submissions were filed on 30.01.2024 whereas the plaintiff did not file any.

6. The Defendants in their submissions began by giving a summary of facts of the case before going into the issues for determination. They identified four issues for determination being; whether the plaintiff's conduct amounts to abuse of court process; whether the onus to prosecute the matter is on the plaintiff; whether the application to dismiss the suit should be allowed in the interest of justice; and who shall bear costs of the suit.

7. On the first issue, they cited the case of *London Distillers (K) Ltd v Philip Kipchirchir & 2 others* (2007) eKLR where the court observed that;

> " The plaintiff must take all the necessary steps at its disposal to achieve an expeditious disposal of its suit. That the party who instituted the suit must not be accused of laxity in the prosecution of the suit. That it is in the interest of justice to bring the claim of the plaintiff to a speedy conclusion and this can only be done if the plaintiff takes the necessary steps of bringing the claim before the eyes of the court."

8. They submitted that it is a well laid principle that the plaintiff is burdened with the onus of prosecuting their case and that the law has gone a step further to ensure that in the event the defendant fails to produce its documents or witnesses, the plaintiff is allowed to continue and the court can determine the case. That the plaintiff had all the powers to proceed with his case but failed to do so, which amounts to abuse of the court process. The case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* citing the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal no. 25 of 2002 (2009) eKLR 229 was cited to support this position.

9. It was submitted further, that the plaintiff failed to take any action to advance the prosecution of this case since 20.08.2020. That upon being served with the defendant's application to dismiss the suit, the plaintiff without good reason opposed the motion. That in his opposition, he made claims of not having received the defendant's trial bundle and cited inadequate pre-trial procedures. That the plaintiff equally acknowledged and admitted not having complied with Order 11. That this behavior signifies a misuse of the court processes which has the potential to cause injustice by delaying proceedings and obstructing the timely administration of justice for the defendants. The cases of *Trade Circles Ltd v Family Bank Ltd & Anor* 2021 eKLR citing the case of *Richard Ncharpi Leiyagu v IEBC & 2 others*: CA 18/2013 and *Gideon Sitelu Konchella v Daima Bank Ltd* (2013) eKLR were also cited to support the submissions.

10. On the second issue which is whether the onus to prosecute the matter is on the plaintiff, it was submitted that the onus to prosecute a matter is on the plaintiff and such burden ought not be shifted to the defendants. That despite the burden being on the plaintiff to prosecute his suit, the defendants took the burden on their shoulders to set down this matter for hearing on occasion and issued hearing notices to the plaintiff who thereafter was a no show. The cases of *Thomas Mwaura Gitau & Anor v Eric Muhati & 2 others* (2012) eKLR citing the case of *Mobile Kitale Service Station v Mobil Oil Kenya Ltd & Anor* Civil Case No. 205 of 1990, *Ochola Kamili Holdings Ltd v Guardian Bank Ltd* (2018) eKLR, among others, were cited to support this position.

11. On the third issue, which is whether the application to dismiss the suit should be allowed in the interest of justice, it was submitted that the most recent court appearance took place on 24.07.2020 with legal representation from both sides. That subsequently, the plaintiff's counsel filed an application on the 20.08.2020 to set aside the order dated 24.07.2020. That the plaintiff initiated this suit on 24/07/2019 and no significant action has been taken by him in advancing the case since 20.08.2020. That the inaction spans a period exceeding 1 year . That it was only after receiving the application for dismissal that the plaintiff woke up. However, his response has failed to adequately show cause why the suit should not be dismissed. The defendant urge that the suit be dismissed and the application dated 14.04.2023 be allowed with costs as it is settled law that costs follow the event.

12. The cases of *Thathini Development Company Ltd v Mombasa Water & Sewerage Company & Anor* (2022) eKLR, *Thomas Mwaura Gitau & Anor v Eric Muhati & 2 others* (2012) eKLR, *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Anor* (2016) eKLR among others were cited to support this position.

13. I have considered the application, the response filed to it as well as the defendant's submissions. The issue for determination is whether the suit should be dismissed for want of prosecution.

14. The defendant's argument is that the plaintiff has not taken any steps to prosecute his matter and that the same was last in court on 20.08.2020, which is over a year ago. They also argue that he has not complied with Order 11 of the *Civil Procedure Rules* and that he has not been attending court, which conduct signifies that he has lost interest in the suit. The plaintiff on the other hand denies this. He says that he has complied with the said Order as he filed his trial documents when he was filing his suit. He also says that the reason there has not been a proper pre-trial in the matter is because the defendants have not served him with their trial bundle. He also further says that together with his advocate, they have been attending court.

15. I have looked at the court record, I do not agree with the defendants that the matter was last in court on 20.08.2020. There was a notice of motion filed by an interested party seeking to be joined in the suit, which motion was dated 20.08.2020 and whose ruling the court delivered on 15.10.2020. Thereafter there was inaction until 19.03.2021 when the deputy registrar issued a notice to the parties to take directions before this court on the matter. The matter was set down for mention on 17.05.2021 when all the parties were represented except for the 5th defendant who appears in person. The court was unable to confirm whether the 5th defendant had been served with pleadings and therefore gave a further mention on 30.09.2021.

16. On 30.09.2021 the parties were again all represented except for the 5th defendant who was absent. The plaintiff was present in person and the court directed that he serves the 5th defendant with pleadings. The court then gave a further mention date being 24.11.2021. On that date, the parties were all represented except for the 5th defendant who was absent. The advocate for the other defendants

requested for time to comply with pre-trial requirements and the court directed that the matter be mentioned on 17.02.2022.

17. On 17.02.2022, the plaintiff and his advocate were absent as well as the 5th defendant. The advocate for the other defendants again requested for time to comply with pre-trial requirements which request was granted and a mention date of 03.05.2022 was given. The said date happened to be a holiday and the court on its own motion directed that the matter be mentioned on 30.06.2022 and ordered that the registry notify both sides. On 30.06.2022, all the parties except for the 5th defendant were present and the advocate for the plaintiff now requested for time to comply with pre-trial requirements. The request was granted and the court directed that the matter be mentioned on 17.11.2022. On that day, only the 1st, 2nd, 3rd, 4th, 6th and 7th defendants advocate was present and she notified the court that the plaintiff had not complied with pre-trial requirements. She asked that the plaintiff be granted one more chance to comply. The court directed that both parties file trial bundles and directed that the matter be mentioned on 14.02.2023.

18. On 14.02.2023, only the 1st, 2nd, 3rd, 4th, 6th and 7th defendants advocate appeared in court. She requested for a hearing date and the court set 20.04.2023 as the date for hearing. On that day, only she appeared and she notified the court that the 5th defendant has never entered appearance. She also notified the court that the application before me now for determination that is, the application for dismissal of the suit, had been filed on 18.04.2023. The court directed that the plaintiff's advocate do respond to the application and issued a mention date of 22.06.2023. The plaintiff's advocate on that date confirmed that he had responded to the application and it was agreed that the application was to be disposed of by way of written submissions.

19. The law under Order 17 Rule 2 provides as follows on dismissal of suits;

    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 should not be 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.

    5. A suit stands dismissed after two years where no step has been undertaken.

    6. A party may apply to court after dismissal of a suit under this Order.

20. From the above, it is clear that any party may apply to the court to dismiss a suit for want of prosecution after the lapse of one year of inactivity. The court can also move the parties after the lapse of the said period to show cause why the suit should not be dismissed and if no cause is shown to its satisfaction, the court may dismiss the suit. The suit can also expire automatically after two years of inactivity. In this case, the court has noted that the period of inactivity was between 15.10.2020 when the court delivered its ruling on the interested parties application to be joined in the suit and 19.03.2021 when the deputy registrar directed that parties take directions before this court. That period was around 5 months which does not amount to the statutory period of one year.

21. The law requires that there has to be a period of one year of inactivity before a suit can be dismissed for want of prosecution. In this case, though the plaintiff and his advocate failed to attend court on a few occasions, the matter was still actively in court and the plaintiff would participate in some of

the proceedings. It cannot therefore be said that there was a period of inactivity of up to a year as argued by the defendants. It is however notable that the defendants have been more active in the matter as compared to the plaintiff. They have also filed their trial bundle as directed by the court on 17.11.2022 whereas the plaintiff admittedly has not filed his. I can see why the defendants would equate the plaintiff's conduct to lack of interest in the suit. However, the law is clear that a period of one year of inactivity in a suit must lapse before the suit can become ripe for dismissal. That is not the case herein and therefore it can be said that the defendant's application was made pre-maturely.

22. But in spite of that, this court notes that the suit herein was filed on 25.06.2019, which is about 4 years ago, and that is a long time for a matter to be at the pre-trial stage. The plaintiff is therefore urged and directed to expedite the hearing of the case, which means filing his trial bundle and setting the matter down for hearing at the earliest. The defendants notice of motion application dated 14.04.2023 shall not be allowed for the reasons given above, however the court makes the following orders:

    a. The plaintiff shall file and serve his trial bundle within the next 14 days of this ruling to all the defendants inclusive of the 5th defendant.

    b. The matter shall be set down for case conference within the next 21 days.

    c. After case conference the suit shall be prosecuted within 90 days failure to which the suit will stand dismissed.

    d. The defendants shall have the costs of this application.

    The timelines given herein should be adhered to unless the respondent, for good reason to be given to court, is unable to comply.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF APRIL, 2024.

In the presence of Kemboi for Ms Wacheke for defendants and Muchangi for plaintiff.

Court Assistant - Leadys

A. KANIARU

JUDGE, ELC - EMBU

25. 4.2024