



**Mbugua & 2 others (Suing as Administrators of Moses Mbugua Mwangi alias Mbugwa Mwangi - Deceased) v Kavingo & 3 others (Environment & Land Case 161 of 2018) [2024] KEELC 3362 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3362 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 161 OF 2018  
NA MATHEKA, J  
APRIL 24, 2024**

**BETWEEN**

**ISAAC GICHIA MBUGUA ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH MBAI MBUGUA ..... 2<sup>ND</sup> PLAINTIFF  
ELIZABETH WANJIKU MBUGUA ..... 3<sup>RD</sup> PLAINTIFF  
SUIING AS ADMINISTRATORS OF MOSES MBUGUA MWANGI ALIAS  
MBUGWA MWANGI - DECEASED**

**AND**

**SAMMY KAVINGO ..... 1<sup>ST</sup> DEFENDANT  
MUNGA RWAMBI ..... 2<sup>ND</sup> DEFENDANT  
KANZE POPO ..... 3<sup>RD</sup> DEFENDANT  
JOSEPH REUBEN MNAZI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated 26<sup>th</sup> September 2023 and is brought under Section IA, 1B and 3A of the [Civil Procedure Act](#) cap 21 Laws of Kenya and Order 17 Rule 3 and Order 51 Rule 1 of the [Civil Procedure Rule](#) 2010 seeking the following orders;
  1. That this suit be dismissed for want of prosecution.
  2. That the costs of this Application be provided for.



2. It is supported by the Affidavit sworn by Munga Rwambi and is made on the grounds that the Plaintiff's has failed to list the case or take any steps towards the hearing of this suit for a period of over Four (4) Years.
3. The Respondents state that this matter was being handled by their previous Advocate E. N. Waithira & Co. Advocates whom they had instructed to prosecute to its conclusion. That they had given their co-administrator authority to pursue this matter on their behalf and expected that he would update them on the progress. However, they have been making numerous follow ups with both their co-administrator, the 1<sup>st</sup> Plaintiff herein, and the said advocate who informed them that the matter was still in court and is yet to be determined. That they later lost the advocate's contact and only came to learn that he relocated his office from Mombasa when they physically visited Mombasa sometime early this year and they do not have his current address. That sometime in the month of January 2024 they instructed their current Advocate Gitahi Gathu & Co. Advocates to find out the position in respect of this matter and it is after this inquiry that they learnt of this application by the 2<sup>nd</sup> defendant. That the parties to this suit contest ownership of the suit property and it will only be fair to have the matter heard on merits to determine ownership of the suit land.
4. This court has considered the application and the submissions therein. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, 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.”

Further Order 17 Rule 2(3) states thus:

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

5. The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and others & another* (2016) eKLR, the court held that;

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 vs Kyumba* [1984] KLR 441 espoused that:

“ 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.”



6. In *Argan Wekesa Okumu vs Dima College Limited & 2 others* (2015) eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows;

“The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3<sup>rd</sup> Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of *Ivita –vs-Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

7. In *Naftali Opondo Onyango vs National Bank of Kenya Ltd* (2005) eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

“However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.”

8. In the present case, that court has perused the court record and finds that the matter was last in court (before this current application) in 2019. The Respondent states that they lost contact with their lawyer and it appears that this matter is being handled by three administrators. This is a land matter which ordinarily are very emotive and though the delay appears inordinate, I find that the interests of justice lie in allowing the Plaintiff to prosecute their claim. I find that this application for dismissal of the suit is not merited and I dismiss the application dated 26<sup>th</sup> September 2023 with no order as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**N.A. MATHEKA**

**JUDGE**

