



Wambua v Kenya Co-operation Limited & another (Environment and Land Appeal 6 of 2019) [2025] KEELC 813 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEELC 813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 6 OF 2019
NA MATHEKA, J
FEBRUARY 26, 2025**

BETWEEN

JOHN NZYOKA WAMBUA APPELLANT

AND

KENYA CO-OPERATION LIMITED 1ST RESPONDENT

MACHAKOS DISTRICT LAND REGISTRAR 2ND RESPONDENT

RULING

1. The application is dated 27th May 2024 and is brought under Order 42 Rules 11,12,13 & 35 of the Civil Procedure Rules, Section 79B of the [Civil Procedure Act](#) seeking the following orders;
 1. That the Memorandum of Appeal dated the 7th March, 2019 and filed on the 8th March, 2019 be struck out and/or dismissed for want of prosecution with costs.
 2. That costs of this application be provided for.
2. It is based on the following grounds that Judgment was entered against the Appellant/Respondent in CMCC No. 984 of 2013 on the 18th February, 2019. That the Appellant therein being dissatisfied with the decision of the court therein filed a Memorandum of Appeal dated 7th March, 2019 and filed on the 8th March, 2019 with intent to appeal to the Environment and Land Court. That the Memorandum of Appeal was filed on 8th March, 2019, and it is now over five (5) years and no record of appeal has been filed. That there has been an inordinate delay in prosecuting the appeal by the Appellant. That litigation has to come to an end at some point. That the Applicant's rights to enjoy the fruits of the Judgment in the lower court has been unduly delayed. That the continued delay in prosecuting this appeal has greatly prejudiced the Applicant. That it is in the interest of justice to grant the orders sought.



3. This court has considered the application and the supporting affidavit. 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.”

4. 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 3rd 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. The applicant stated that this suit was first instituted in the Chief Magistrate Court in Machakos as ELC. No. 984 of 2013 through a Plaint dated the 1st October 2013 and filed in court on even date. That Judgment in that case was delivered on the 18th February 2019 in his favour. I have perused the court record and find that the plaintiff appealed to this Court in Civil Appeal No. 6 of 2019 through a Memorandum of Appeal dated 7th March, 2019 and filed on 8th March, 2019. That since the filing of the Memorandum of Appeal way back in the year 2019, no steps have been taken by the appellant. He has been served with the application but failed to attend court or file any papers. It is now over five (5) years since the Memorandum of Appeal was filed. I find that this application is merited and I grant it as prayed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF FEBRUARY 2025.

N.A. MATHEKA

JUDGE

