



Bamboo Twist Limited v Tember & 14 others; National Land Commission (Interested Party) (Environment and Land Case Civil Suit 178 of 2014) [2024] KEELC 5009 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEELC 5009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 178 OF 2014**

LL NAIKUNI, J

JUNE 24, 2024

BETWEEN

BAMBOO TWIST LIMITED PLAINTIFF

AND

JUMA SALIM TEMBER 1ST DEFENDANT
SAHA TSOMWAKA MTORO 2ND DEFENDANT
GATSI GOJAMA 3RD DEFENDANT
MWATSUMO SALIM MWAMJENI 4TH DEFENDANT
MASOOD SALIM MWAMJENI 5TH DEFENDANT
MATANO SALIM JUMA 6TH DEFENDANT
ALFANI SALIM MWAMJENI 7TH DEFENDANT
SHEE SALIM MWAMJENI 8TH DEFENDANT
HAMISI SALIM MWAMJENI 9TH DEFENDANT
MWICHANDE SALIM MWAMJENI 10TH DEFENDANT
MWANAHAMI SALIM MWAMJENI 11TH DEFENDANT
JOSEPH LWAMBI 12TH DEFENDANT
AWALE TRANSPORTERS LTD 13TH DEFENDANT
REGISTRAR OF TITLES MOMBASA 14TH DEFENDANT
WILLIAM KAMITI GITHINJI 15TH DEFENDANT

AND



RULING

I. Introduction

1. This Honourable Court is tasked to make a determination of the Notice of Motion application by Bamboo Twist Limited, the Applicant herein dated 1st December, 2022 brought under a certificate of urgency. It was brought by the Applicant under the provisions of Article 159 (1) (d) of *the Constitution* of Kenya 2010, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21.
2. Upon service of the Application to the Respondents the 13th Defendant/Respondent filed a Replying Affidavit dated sworn on 13th January, 2023. Despite all efforts made through checking from the Judiciary Case Tracking System, the Honourable Court was not able to access the grounds of opposition which other Defendants/Respondents claim to have filed and served.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:-
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That the order made on 1st March, 2022 dismissing the Plaintiff suit herein be set aside.
 - e. That the Plaintiff suit be reinstated, and all consequential orders made in the suit proceedings be reinstated.
 - f. That upon reinstatement of this suit the same be consolidated with ELC Petition 3 of 2020 Bamboo Twist vs National Land Commission and others.
 - g. That the costs of the application in the cause
4. The application by the Applicants is premised on the grounds, facts and testimony on the face of the application and further supported by the 19 paragraphed annexed affidavit of Harji Govind Ruda an advocate of the High Court of Kenya and one of the Directors of the Plaintiff /Applicant herein with six (6) annexures marked as "A to F". The Applicant averred that:
 - a. Unbeknownst to him this suit was dismissed on 1st March 2022, following Notice to Show Cause issued on 6th January 2022 which notice was not served on him neither was it served on his advocates on record the Law firm of Messrs. Borona & Associates Advocates.
 - b. His advocates were made aware of the dismissal of the suit on 14th July 2022 while attending to another related suit being "ELC Petition 3 of 2020 Bamboo Twist – Versus - National Land Commission & others before Justice Munyao.
 - c. He was shocked to learn of the dismissal since his advocate on record Mr. Borona had already filed an application in the civil suit "ELC PET 3 of 2020 (formerly Const. Petition no. 40 of 2017), seeking to consolidate all related matters which included "HCC ELC 178 of 2014,



HCC ELC 40 of 2015 and Const Petition 219 of 2018; (Annexed and marked as “A” was a copy of the Application to consolidate filed on 27th January 2022).

- d. He was shocked by the fact that Mr. Makuto who was on record for the Attorney General never informed the court on 1st March 2022 of the application to consolidate all the related matters despite being served with the Application on 27th January 2022 and instead applied for the suit to be dismissed. (Annexed and marked as “B” was a copy of the proceedings).
- e. Upon further due diligence by his advocate on record Mr. Borona it was discovered that this suit was indeed dismissed on 1st March 2022 pursuant to Notice to Show cause issued on 6th January 2022. (Annexed and marked as “C” was a copy of the Notice to Show Cause).
- f. The Law firm of Messrs. Waithera and Company advocates who were previously on record were served with the notice to show cause, but they failed to appear when the matter was mentioned neither did, they notify him or his current advocate Mr. Borona.
- g. It was clear from the Notice to show cause that the same was not served on him neither was it served on his Advocates on record.
- h. The effect of non-service was that most parties were not aware of the notice to show cause as only the Attorney General appeared in court on 1st March 2022 when the matter was mentioned.
- i. This suit had been consolidated with another civil suit “ELC Civil Suit no 40 of 2015 Awale Transporters – Versus - Bamboo Twist Limited. (Annexed and marked as “D” was a copy of the consolidation order by Lady Justice Amollo issued on 17th June 2015).
- j. The National Land Commission had also been enjoined to this suit as an interested party on 12th March 2018.
- k. By virtue of the consolidation all affected parties should have been served with the notice to show cause which was not done in this case.
- l. Dismiss the suit was prejudicial to the Plaintiff for the following reasons:-
 - a. The notice to show cause issued on 6th January 2022 was not served on relevant crucial parties to this suit.
 - b. That at the time of dismissing the suit, the Applicant herein had already filed and served his application to consolidate this suit together with other related suits being in “ELC PET 3 OF 2020 Bamboo Twist Limited – Versus - National Land Commission & others.
 - c. That there were injunctive orders in force that were Issued by the Honorable Court on 14th November 2014 by the late Justice Mukunya preserving the subject matter of this suit and the Applicant herein ought to have been notified of the Notice to Show Cause before this suit was dismissed to provide the Applicant a fair hearing. (Annexed and marked as “E” was a copy of the order).
- m. The ends of justice would only be served by giving the Plaintiff a chance to prosecute his case.
- n. Furthermore, in light of the Director of Criminal Investigations Report dated 6th July, 2022 and attested to by Inspector Eliud Njuki it was more crucial that the suit herein be reinstated. (Annexed and marked as “B” was a copy of the Affidavit and Report).



- o. The Plaintiff had a good case with high chances of succeeding which would be rendered null if the Plaintiff was not allowed to prosecute this case.
- p. The Plaintiff stood to suffer irreparable harm if the orders sought herein were not granted.

III. The Response by the 13th Defendant/ Respondent

5. The 13th Defendant opposed the Application through a 16th paragraphed Replying Affidavit sworn by SALAD AWALE on 13th January, 2023 where he averred that:-
- a. The Plaintiff had not adduced any substantive evidence or grounds in order to entitle it to the orders sought in the Notice of Motion application under reply. Further, the Application under reply was fatally flawed and defective, misconceived and incompetent, and amounted to an abuse of Court process and ought to be dismissed or struck out with costs.
 - b. The decision by this Honourable Court to dismiss the Plaintiffs case for want of prosecution was within this courts power as provided by the Order 17 of the Civil Procedure Rules 2010 and promotes the Overriding Objectives of the Courts in civil matters as provided by Section 1A of the *Civil Procedure Act* 2010 which states that: “The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.
 - c. The dismissal of the suit was wholly attributable to the cunning acts of the Plaintiff who had filed multiple suits in different courts involving the same subject matters in dispute and raising similar issues for determination which amounted to forum shopping and abuse of the court process.
 - d. This tactic of filing multiple suits resulted in the Plaintiff not being able to prosecute all his cases diligently and therefore the dismissal of the suit in our opinion was merited and justified to achieve the ends of justice.
 - e. The dismissal of the Plaintiff’s suit was wholly attributable and caused by the Plaintiff’s action of instituting multiple suits which were all pending at the same time before different courts which amounted to abuse of the court process and the same should not be entertained or abetted by this Honourable Court.
 - f. The Plaintiff had so far filed three (3) suits including ELC No. 178 of 2014 which was dismissed for want of prosecution and ELC Petition No. 3 of 2020 and Constitutional Petition 219 of 2018 which involve the same subject matter, involving similar parties and raising substantially similar issues for determination.
 - g. The dismissal of ELC No. 178 of 2014 would not prejudice the Plaintiff nor the Defendants as the three (3) other similar suits was pending in court for determination which involve the same subject matter, involving similar parties and raising substantially similar issues for determination.
 - h. This application filed by the Plaintiff on the 1st December 2022 was an afterthought and the same was brought after a long delay on the Plaintiff’s part. The Plaintiff in paragraph 3 his Supporting Affidavit stated that his Advocate on record learnt of the dismissal of the suit on 14th July 2022 which contradicted the averments in Paragraph 6 (v) of the Notice of Motion Application which stated that the Application was made without undue delay while the same was filed nearly six months later after learning of the dismissal of the suit.



- i. The Plaintiff's prayer that the suit be reinstated and all consequential orders made in the suit proceedings be reinstated is misguided. The Plaintiff's prayer that the injunctive orders issued by the Honourable Court on 14th November 2014 by the late Justice Mukunya preserving the subject matter of the suit be reinstated is misguided as Order 40 Rule 6 of the Civil Procedure Rules 2010 provides that: "Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise".
- j. The injunctive orders issued by Honourable Court on 14th November 2014 by the late Justice Mukunya preserving the subject matter of the suit had since lapsed since the suit had not been determined within a period of 12 months and the Court had not extended the same, therefore this injunctive orders would not be revived by the reinstatement of this suit.
- k. The reinstatement of this suit would be prejudicial to the Defendants as they would have to incur enormous legal costs to defend the multiple suits filed by the Plaintiff.
- l. The reinstatement of this suit would hinder and delay the administration of justice as there were already multiple suits pending before different courts for determination which involve the same subject matter, involving similar parties and raising substantially similar issues for determination.
- m. The Notice of Motion Application dated 1st December 2022 was without merit and ought to be dismissed with costs to the 13th Defendant.

IV. Submissions

6. On 29th February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 1st December, 2022 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and a ruling date was reserved on 28th May, 2024 by Court accordingly.

A. The Written Submissions by the Plaintiff/Applicant

7. The Plaintiff/ Applicant through the Law firm of Messrs. Borona & Associates Advocates filed the written submissions dated 25th February, 2023. Mr. Borona Advocate submitted that Application before this Honourable court was brought under the provisions of Article 159(1)(d) of the Constitution of Kenya 2010, Order 12 Rule 7, Order 51 rule 1 of the Civil Procedure Rules, Sections 1A & Section 1B of the Civil Procedure Act, Cap. 21 and sought for the above stated orders.
8. Following, a notice to show cause issued on 6th January, 2022 by Justice Naikuni, orders were made by the Honourable court dismissing the Plaintiffs suit on 1st March, 2022. The Applicant as well as other parties to this suit herein were not made aware of the notice to show cause and thus the suit was dismissed without affording the Applicant an opportunity to be heard on the same. They had set out in detail the reasons why this suit ought to be reinstated in the grounds of our application as well as the supporting affidavit of Harji Govind Ruda.
9. On whether this suit ought to be reinstated. The Learned Counsel relied on the case of:- "Reynolds Construction Co (Nig) Limited – Versus - Festus Marithi Mmboroki (2022) eKLR", the court in allowing the reinstatement of the suit stated:-

“ Articles 48 and 50 of the Constitution guarantees every Kenyan the right to access justice and fair hearing. Article 159 requires that justice shall be administered without undue regard to



technicalities whereas Sections 3, 4 and 13 of the *Environment and Land Court Act* as read together with Sections 1A,1B, and 3A of the *Civil Procedure Act* expects the court to strive towards substantive justice. See “Lochab Brothers Limited (Supra)”. Looking at the totality of the circumstances in this matter, my considered view is the route of lesser risk of injustice is to allow the application otherwise the applicant would be more prejudiced if denied a chance to prosecute the application dated 22.9.2022.” Further in the case of *Abdinoor Shurie – Versus - Halima Bundid (2020) eKLR* the court in reinstating the suit noted, “It is a serious matter to shut out a party from being heard unless such party is deliberately seeking to undermine or obstruct the course of justice. See *Shah & Another vs Mbogo (1967) EA 117* and *Ivita – Versus - Kyumbu (1984) KLR 44*. In the premises, and for the foregoing reasons, the court is satisfied that it is in the interest of justice to allow the said application in view of the fact that the Plaintiff has filed his documents, albeit late in compliance with Order 11 of the Rules in preparation for the trial of the suit. The upshot of the foregoing is that I allow the instant application in the interest of justice.....”

10. According to the Learned Counsel in the instant case, an observation of the Notice to show cause annexed to the Plaintiffs Application showed that the Law firm of Messrs. Borona & Associates, who are now on record for the Applicant in all related matters was not served with the Notice to show cause. Equally, the Law firm of Messrs. Garane & Somane Advocates as well as the National Land Commission who were parties to this suit were not served. This misstep in service, was extremely prejudicial to the then Plaintiffs considering the fact that there were preservative orders over the subject properties issued on 14th November 2014. It was their humble submission that if this suit was not reinstated then the proceedings in ELC PET 3 OF 2020 would be rendered nugatory. The failure to serve the Notice on their law firm, effectively denied the Applicant the opportunity to be heard before the suit was dismissed. It was also noteworthy, that by the time the suit was being dismissed on 1st March 2022, the Applicant had equally filed an application seeking to consolidate all the suits related to this matter. This Application dated 27th January, 2022 was filed in the Civil suit – “ELC Petition No. 3 of 2020, Bamboo Twist – Versus - National Land Commission and Others”. The Applicants action of consolidating the suits showed that it was making attempts to have the matters heard more efficiently and expeditiously and in a manner that allowed all parties to be heard on the merits of the case. They therefore invited this court in the interest of justice to reinstate this suit.
11. In the case of “*Mohamed Ali Isaak – Versus- Garissa Maize Millers (2021)eKLR*, the court reinstated the suit, saying

“I’m further guided by the provision set out by the Court of Appeal in “*D.T Dobie & Co (K) Limited – Versus - Joseph Mbaria Muchina CA 37 of 1978*” where the court stated that: “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
12. In the instant case, it was the Learned Counsel’s contention that reinstating this suit would enable the court to dispense justice between the parties as it would get a sound factual base of the issues surrounding the ownership dispute over the subject parcels of land. The Learned Counsel relied on



the case of “Joseph Kinyua – Versus - GO Ombachi (2019) eKLR”, where Justice Gikonyo in his concluding remarks found “inter alia”:-

“However, as I stated, dismissal is a draconian order which drives away the litigant from the seat of justice. Therefore, in spite of the gaps I have noted, I still think that justice would be served in reinstating the appeal but with strict condition. No prejudice will be suffered by the Respondent in reinstating the appeal. Accordingly, I set aside the dismissal order and reinstate the appeal.”

13. According to the Learned Counsel, in the instant case, it was not in dispute that not all parties were served with the notice to show cause. It was their submission that no party would be prejudiced by the reinstatement of the suit. This was because reinstating this suit effectively reinstated the suit filed by Awale Transporters being ELC Civil suit no. 40 of 2015 Awale Transporters – Versus - Bamboo Twist Limited which was consolidated with ELC 178 of 2014 on 17th June 2015. In fact, they were puzzled as to why the 13th Defendant was opposing their application. Perhaps it's because they intend to steal a march on the Plaintiff by adversely dealing with the suit properties if the suit herein and consequential orders are not reinstated.
14. Be that as it may be, in conclusion, they urged the Honourable Court to reinstate the suit herein for the benefit of all the parties herein.

B. The Written Submissions of 13th Defendant

15. The 13th Defendant through the firm of Messrs. Garane & Somane Advocates filed their written submissions dated 16th March, 2023. M/s. Abdi Advocate submitted that the Applicant had filed this Application before this Honourable Court seeking the above set out orders. With regard to the Application dated 1st December 2022, the 13th Respondent shall wholly rely on the Replying Affidavit dated 30th January 2023, sworn by SALAD AWALE.
16. On the background, the Learned Counsel submitted that the Plaintiff herein instituted this suit sometime in the year 2014 while the 13th Respondent filed ELC No 40 of 2015 sometime in the year 2015. That both suits involved the same subject matter. Therefore both suits were consolidated vide an Order issued on the 18th June 2015 by the Honourable Lady Justice A. Amollo. The Judge also ordered that the civil case ELC 178 of 2014, the suit herein to be the lead file. The Plaintiff failed to prosecute his case since the year 2015 and the Court issued a Notice to Show Cause on the 6th January 2022 why the case should not be dismissed for want of prosecution. The suit was last in court on the 12th July 2015 and there had been no further steps taken to prosecute the suit. The suit was then duly dismissed on the 1st March 2022 after all the parties had been served with the notice failed to provide sufficient reason why the suit should not be dismissed. The Plaintiff herein was duly served with the Notice to Show Cause as clearly stated in paragraph 7 of HARJI GOVIND RUDA Supporting Affidavit dated 1st December 2022 as the notice was duly served upon its advocate on record which was the Law firm of Messrs. Waithera & Company Advocates.
17. For its determination, the Learned Counsel relied on whether this suit ought to be reinstated. The Learned Counsel submitted that the factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in “Ivita – Versus - Kyumbu [1984] KLR 441” (Chesoni J), where the court 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 lapse of time.”

18. According to the Learned Counsel the case above was then cited with approval in “Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR” (Muchemi J), where the court said:

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

19. The Learned Counsel humbly submitted that the Plaintiff herein was guilty of prolonged and inexcusable delay as the Plaintiff failed to prosecute it's case for nearly Seven (7) after the suit had been instituted. The Plaintiff herein was duly served as his advocates on record was served with the Notice to Show Cause. The decision by this Honourable Court to dismiss the Plaintiffs case for want of prosecution was within this courts power as provided by the provision of Order 17 of the Civil Procedure Rules 2010 and promotes the Overriding Objectives of the Courts in civil matters as provided by Section 1A of the Civil Procedure Act 2010 which states that:

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.

20. The Learned Counsel further averred that the dismissal of the suit herein would not be prejudicial to the Plaintiff since there was another suit (ELC Petition no. 3 of 2020) pending before the Environment and Land Court involving the same subject matter of this suit and involving similar parties. The dismissal of the suit was wholly attributable to the cunning acts of the Plaintiff who had filed multiple suits in different courts involving the same subject matters in dispute and raising similar issues for determination which amounts to forum shopping and abuse of the court process. This tactic of filing multiple suits resulted in the Plaintiff not being able to prosecute all his cases diligently and therefore the dismissal of the suit in our opinion is merited and justified to achieve the ends of justice and to promote the overriding objectives of the Civil Procedure Act. The Plaintiff has so far filed 3 suits including ELC No 178 of 2014 which was dismissed for want of prosecution and ELC Petition No. 3 of 2020 and Constitutional Petition 219 of 2018 which involve the same subject matter, involving similar parties and raising substantially similar issues for determination.

21. According to the Learned Counsel this application filed by the Plaintiff on the 1st December 2022 was an afterthought and the same was brought after a long delay on the Plaintiffs part. The Plaintiff in paragraph 3 his Supporting Affidavit states that his Advocate on record learnt of the dismissal of the suit on 14th July 2022 which contradicted the averments in Paragraph 6 (v) of the Notice of Motion Application which states that the Application was made without undue delay while the same was filed nearly six months (6) later after learning of the dismissal of the suit.

22. The reinstatement of a suit was at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in the case of:- “Bilha Ngunyo Isaac – Versus - Kembu Farm Ltd & another



& another [2018]eKLR” ((JN.Mulwa J), which echoed the decision of the court in “Shah – Versus - Mbogo & Another (1967) EA 116” (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

23. Further, the Learned Counsel contended that the Plaintiff had deliberately sought to obstruct or delay the course of justice by filing multiple suits in court and therefore he was not entitled to the reinstatement of the suit. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, was the need for expeditious conclusion of suits. To support her point of view, the Counsel cited the case of:- “Mobile Kitale Service Station – Versus -Mobil Oil Kenya Limited & another [2004] eKLR” (Warsame J) where it was held:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore if it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the defendant. The consequences must be placed on their shoulders.”

24. Due to the extreme pressure put on the judiciary arising from the backlog of cases, the Counsel urged this Honourable Court to dismiss the Plaintiff's application for reinstatement of the suit herein, She opined that it was the Plaintiff who was solely to blame for failing to prosecute his case for a period of nearly seven (7) years. Reinstatement of this suit would be prejudicial to the Defendants as they would have to incur enormous legal costs to defend the multiple suits filed by the Plaintiff. The said reinstatement of this suit would hinder and delay the administration of justice as there were already multiple suits pending before different courts for determination which involve the same subject matter, involving similar parties and raising substantially similar issues for determination.

25. In conclusion, based on the foregoing submissions and guided by the various authorities cited, it was the Learned Counsel's humble submission that this Court be pleased to dismiss the Application dated 1st December 2022 with costs to the 13th Defendant.

V. Analysis and Determination

26. I have carefully read and considered the pleadings herein, the written submissions and the cited authorities by the Learned Counsels and the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. In order to arrive at an informed, just, fair and reasonable decision, the Honourable Court has crafted three (3) following salient issues for its determination.

- a. Whether the Honourable Court ought to set aside the order that dismissed with the suit for want of prosecution and subsequent reinstatement of the suit.
- b. Whether the Applicant has met the threshold for consolidations of suits.



c. Who will bear the Costs of Notice of Motion application 1st December, 2022.

ISSUE No. a). Whether the Honourable Court ought to set aside the order that dismissed with the suit for want of prosecution and subsequent reinstatement of the suit.

27. The main substratum in this matter is whereby the Honourable Court has been called upon to set aside its own orders and thus reinstate of a suit that had already been dismissed for want of prosecution. This court is a court of law and justice. In determining the matters before it, it is guided by *the Constitution* of Kenya, the provisions of law and equity and the principles of natural justice. Given these, the Court is enjoined to give effect to the overriding objective both Sections 3(1) of the Environment and *Land Act* and 1A (1) of the *Civil Procedure Act*, that it to say, to facilitate “... the just, expeditious, proportionate and accessible resolution of disputes”. That has to be done without procedural technicalities, as contemplated in the provision of Article 159 (2) (d) of *the Constitution* of Kenya 2010.
28. It is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and IB, of the *Civil Procedure Act*, Cap 21, Laws of Kenya, are relevant, with regard to this and they state as follows:

“ 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”
29. The provision of Section 3A of the *Civil Procedure Act*, Cap. 21 gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not



reinstate a suit dismissed on account of unreasonable delay on the part of the parties to prosecute it. Section 3A reads:

“3A. Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

30. When a party wishes to set aside an order of dismissal of suit for non attendance or want of prosecution are guided by the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010. It provides that:- “Where under this Order Judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the Judgement or order upon such terms as may be just.”
31. The main Legal pith and substance substratum for dismissal of suits for want of prosecution is founded on the Principles that litigation must be expedited, and concluded by parties who come to court for seeking justice. To assist in clearing backlogs in court and the ever increasing over-loads restoring bad public confidence and trust on the judiciary. Upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination. There should be no delay at all based on legal maxim – “Justice delayed is justice denied” Nonetheless, should there be any delay arising from one substantive and justifiable logistical cause or reason, the same should not be inordinate, unreasonable and inexcusable. I say so, as that would be doing grave injustice to one side or the other or both and in such circumstance, the Honorable May in its discretion dismiss the action straight away.
32. Additionally, the dismissal was pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, which provides, inter alia:-
 2.
 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 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..
33. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In the case of:- “Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium – Versus - M.D. Popat and others & another [2016] eKLR”, the court stated as follows:

“11. 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 – Versus - 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.”

34. As to what constitutes notice under the provision of Order 17 Rule 2, the court in “Kestem Company Ltd – Versus - Ndala Shop Limited & 2 others [2018] eKLR” was of the view that it did not require service of notice:

“Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ‘give notice’. The court may give notice of dismissal through its official website or through the cause-list.

I do find that the notice of dismissal of the suit was given through the judiciary website and cause-list prepared which to the court, was adequate notice to the parties.”

35. The factors taken into account or consideration for the purpose of reinstatement of suits are numerous, and were addressed in “Ivita – Versus - Kyumbu [1984] KLR 441” (Chesoni J), where the court 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 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.”

36. In the case of:- “Ivita – Versus -. Kyumbu [supra]” (Chesoni J) was followed in “Jim Rodgers Gitonga Njeru – Versus - Al-Husnain Motors Limited & 2 others [2018] eKLR” (Muchemi J), where the court said:

“It is my view that such would be valid considerations in an application for dismissal of suit for want of prosecution, which in this case has already been done; and it is manifest from the record that the reason why the suit was dismissed in the first place was that the Court was satisfied there was inordinate delay of 3 years for which there was no explanation.”

37. Further in the case of “James Mwangi Gathara & another -Versus - Officer Commanding Station Loitoktok & 2 others [2018] eKLR” (Nyakundi J), the court said:

“Before I conclude this matter, I need to bring to the attention of the plaintiff the manner in which he is pursuing his rights. In my view the proceedings in this claim seems to be focusing on interlocutory applications without addressing the main dispute which brought the parties to court in the first instance. It is time the plaintiff decides categorically whether he has a claim to be heard on the merits or continuous slumbering only to rise up when he has been stripped of certain rights during the adjudication processes. In my assessment and



based on the history of this case the plaintiff is guilty of laches. I think I have said enough on this point.”

38. Reinstatement of a suit is at the discretion of the court, which discretion ought to be exercised in a just manner, as was held in “Bilha Ngonyo Isaac – Versus - Kambu Farm Ltd & another & another [2018] eKLR” ((JN. Mulwa J), which echoed the decision of the court in “Shah – Versus - Mbogo & Another (1967) EA 116” (Harris J), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

39. One of the issues that usually confront the courts with respect to dismissal of suits for delays and the subsequent applications for reinstatement, is the need for expeditious conclusion of suits. In the case of:- “Mobile Kitale Service Station – Versus - Mobil Oil Kenya Limited & another [2004] eKLR” (Warsame J) where it was held:

“I must say that the Courts are under a lot of pressure from backlogs and increased litigation, therefore it is in the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice caused by delay would be a thing of the past. Justice would be better served if we dispose matters expeditiously. Therefore, I have no doubt the delay in the expeditious prosecution of this suit is due to the laxity, indifference and/ or negligence of the Plaintiff. That negligence, indifference and/or laxity should not and cannot be placed at the doorsteps of the Defendant. The consequences must be placed on their shoulders.”

40. I am not entirely convinced by the arguments out forward by the Plaintiff that there was a non – service of the Notice to show cause to his advocate on record as a result of which as only the Attorney General appeared in court on 1st March 2022 when the matter was mentioned. But, be that it may, the Court is rather persuaded with the realization that this matter had been consolidated with ELC Civil Suit no 40 of 2015 Awale Transporters – Versus - Bamboo Twist Ltd as seen in annexure “D” which is a copy of the consolidation order by Lady Justice Amollo issued on 17th June 2015).

41. For that reason, I will accord the Plaintiff some benefit of doubt and grant it a second bite of the cherry by allowing the application, and reinstate its suit on conditions that I shall discuss further in conclusion and disposition. Therefore, I find that the Application for reinstatement is meritorious upon fulfilment on the given conditions by the Honourable Court.

ISSUE No. b). Whether the Applicant has met the threshold for consolidations of suits.

42. The jurisdiction to consolidate suits is donated by the provision of Section 81 (h) of the [Civil Procedure Act](#), 2010 and order 11 Rule 3 of the Civil Procedure Rules which states as follows:-

3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—

(a) -----

(h) Consider consolidation of suits.



43. In the case of:- “Prem Lala Nahata & Anor – Versus - Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551”, the India Supreme Court held:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

44. Additionally, in the case of:- “Law Society of Kenya – Versus - Center for Human Rights & Democracy & 12 Others [2014] eKLR”, the Supreme Court of Kenya held: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”

45. Further, in “Nyati Security Guards & Services Limited – Versus - Municipal Council of Mombasa [2000] eKLR”, the court held: -

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where: -

- a. Some common questions of law or fact arises in both or all of them.
- b. The rights or reliefs claimed in them are in respect of the same transactions;
- c. For some other reasons, it is desirable to make an order for consolidating them.”

46. From the foregoing, it is clear that the Court has a wide discretion in ordering consolidation. Consolidation will be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the *Civil Procedure Act*, Cap 21 Laws of Kenya. See the case:- “John *Gakure & 148 Others – Versus - Dawa Pharmaceuticals Company Ltd CA 299 of 2007*”.

47. Therefore, it is clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice, and expeditious disposal of matters, consequently promote judicial economy, so long as it is not to prejudice any of the Parties.

48. The Applicant seeks the consolidation of ELC Petition 3 of 2020 Bamboo Twist vs National Land Commission and others. I have considered the averments in each pleading filed in the subject suits and I note as follows on the mentioned issues:-

- a. The parties are the same
- b. The Plaintiff is the same in both the suits;



- c. The interested party in this suit is the 1st Respondent in the Petition.
 - d. The subject matter is similar in both suits
 - e. The issues for determination are the same
49. The grounds upon which the present application was made were inter-alia, that the suits raise a common question of law and fact, that the transactions are inter-related and it would be convenient to try all the suits together. The Motion was opposed on the grounds that the was filing multiple suits on the same suit property and the dismissal of this instant suit would not affect the others.
50. Further, as aforesaid and based on the authorities cited above, the Court has a broad discretion to order for consolidation of suits even on its own motion and can consolidate to tie more than one action together for separate individual actions into one and get a single judgment, where the issues and witnesses are the same and the rights of the parties can be determined in one suit. (See “Tommie – Versus - La Chance 412 SO 2nd 439 (Fla 4th DCA 1982)”.
51. To support this position the Court held in the case of; “Korean United Church of Kenya & 3 Others – Versus - Seng Ha Sang (2014) eKLR” that:
- “consolidation of suits is done for purposes of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”
52. In the Court’s view, it would be convenient and expedient to try all the suits together as it would obviate the multiplicity of suits. It will lead to the determination of all the issues arising in all the 2 suits at the same trial. It will be less costly and save the Court precious judicial time. As regards to the opposition to the application that the Plaintiff herein has filed multiple suits on the same suit property per se cannot be a bar to an order for consolidation. I would reiterate the foregoing here and add that, there would be no prejudice to be suffered by any of the parties herein if the consolidation sought is granted.
- ISSUE No. c). Who will bear the Costs of Notice of motion application dated 1st December, 2022
53. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
54. In the present case, the Honourable Court elects to have the costs in the cause.



VI. Conclusion & Disposition

55. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the Applicant have made out their case as per the Notice of Motion application dated 1st December, 2022.
56. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-
- a. That the Notice of Motion application dated 1st December, 2022 is found to have merit and is hereby allowed entirely.
 - b. That the Honorable court be and is hereby pleased to dismiss the order made on 1st March, 2022 dismissing the Plaintiff's suit hereby reinstating the suit on the following conditions:-
 - i. The Plaintiff shall pay throw away costs Kshs 50,000/- to the Interested Party who was the author of the Notice to show cause before the suit is fixed for hearing.
 - ii. Hearing to be fixed within 12th November, 2024, in default of which the reinstatement order shall elapse. Mention on 31st July, 2024 for further directions.
 - iii. The registry is hereby directed to allocate this matter a date for hearing as a matter of priority.
 - c. That an order do and is hereby issued consolidating the instant suit with the civil case Numbers "ELC Petition 3 of 2020 Bamboo Twist – Versus - National Land Commission and others" this suit will be the head file.
 - d. That the cost of this application will be in the cause.

It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JUNE 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, Court Assistant.
- b. Mr. Borona Advocate for the Plaintiff/Applicant.
- c. No appearance for the 1st, 2nd, 4th, 5th, 7th, 9th, 10th, 11th & 12th Defendants.
- d. Mr. Makuto Advocate for the 8th Defendant.
- e. M/s. Abdi Advocate for the 13th Defendant/Respondent

