



**Mwawani & another (Suing for and on behalf of the Estate of the Late Beneti Luwali Mwawani - Deceased) v Thabit ((the administrator of the late Thabit Swaleh Paolo Di Maria)) (Environment & Land Case 179 of 2018) [2024] KEELC 4864 (KLR) (18 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4864 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 179 OF 2018**

**FM NJOROGE, J**

**JUNE 18, 2024**

**BETWEEN**

**NYEVU LUWALI MWAWANI ..... 1<sup>ST</sup> PLAINTIFF**

**WILLIAM MWAWANI LUWALI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE BENETI  
LUWALI MWAWANI - DECEASED**

**AND**

**SAID THABIT ..... DEFENDANT**

**(THE ADMINISTRATOR OF THE LATE THABIT SWALEH PAOLO DI  
MARIA)**

**RULING**

1. The 2<sup>nd</sup> Defendant's Notice of Motion 4<sup>th</sup> October 2023 seeks the following orders:
  - a. That the suit against the 1<sup>st</sup> Defendant be dismissed for want of prosecution.
  - b. That the costs of this application be provided for.
2. The application is founded on the grounds set out on its face and on the annexed sworn affidavit of Lucy Wangari Mwangi and is premised on the following grounds:
  - a. That the matter was last in court on 14<sup>th</sup> April, 2022 for delivery of the ruling on account of the 2<sup>nd</sup> Defendant's Preliminary Objection dated 30<sup>th</sup> November, 2021.
  - b. That the ruling was delivered via email on 12<sup>th</sup> July, 2022.
  - c. That the Plaintiff have failed to set the matter down for hearing.



3. The 2<sup>nd</sup> defendant filed an affidavit sworn by his counsel in support of the application.
4. The present application is opposed. The 2<sup>nd</sup> plaintiff filed a replying affidavit whose gist is that the application is unmerited as:
  - a. Parties were not notified of the ruling date of the 2<sup>nd</sup> defendant's preliminary objection dated 30/11/2021;
  - b. The court never delivered the ruling as scheduled on 14/4/2022;
  - c. The record does not bear any evidence that the ruling was sent to the parties even by electronic mail;
  - d. The 2<sup>nd</sup> defendant only became aware of the delivery of the ruling on 12/7/22 when the plaintiff's advocate was served with the present application;
  - e. By reason of the foregoing the plaintiffs are innocent and the matter ought not be dismissed as urged by the defendants.
5. For a suit to be dismissed under Order 17 Rule 3 it ought to have remained static for a period of at least 1 year. Static here means that none of the parties have taken a step in the matter for at least a year.
6. The present application was filed on 13/10/24. Before that date the last occasion on which the matter came up before court was 12/7/22 when the court delivered the ruling of the same date. The record states that the ruling was sent by electronic mail. The plaintiff's complaint is that the subject ruling had been scheduled for delivery on 14/4/2022 but neither was it delivered on that scheduled date nor any notice of delivery on a future date issued by the court.
7. I have perused the court record and found no evidence of any ruling notice or correspondent forwarding the same to the parties' advocates; there is no indication, at least on the court record, that that was done, or to which electronic mail address.
8. With the hustle and bustle of everyday modern life, the assertion in this case that the plaintiffs became aware of the delivery of the ruling only after they were served with the present application may therefore be true. It can therefore be safely presumed that, however ludicrous it appears due to the length of the wait, the plaintiffs were still awaiting a ruling even by the time the application was served upon them.
9. Though this court finds that there was a lengthy period of more than one year between the date of the last action and the date of the lodging of the present application, the plaintiffs have presented extenuating facts that make it necessary in the interests of justice to retain this case among the active files in this court station for the purpose of a merit-based determination after full hearing. Consequently, I find that the application dated 4/10/2023 lacks merit and it is hereby dismissed with no orders as to costs.
10. I have noted that the parties have filed their respective trial bundles duly indexed and paginated and I therefore order that this suit shall therefore be heard on 20/11/2024 notice to the parties of which date will remain only this ruling which shall be uploaded on the CTS.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18<sup>TH</sup> DAY OF JUNE 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI.**

