



Abio & 5 others v Surveyor & 2 others (Environment & Land Case 6 of 2021) [2024] KEELC 6334 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 6 OF 2021
FM NJOROGE, J
SEPTEMBER 30, 2024**

BETWEEN

- ALFELT MUMBO ABIO 1ST PLAINTIFF**
- MOSES GUNDA MUNGA 2ND PLAINTIFF**
- ASMA MUNYIKA OUNDO 3RD PLAINTIFF**
- OYUGI EDWARD 4TH PLAINTIFF**
- KINYUNDO WANGARE ANNE 5TH PLAINTIFF**
- ELIJAH NYAINDA OGOLA 6TH PLAINTIFF**

AND

- KILIFI DISTRICT LAND SURVEYOR 1ST DEFENDANT**
- ROBINSON TSUMA MUNGA 2ND DEFENDANT**
- KILIFI DISTRICT LAND REGISTRAR 3RD DEFENDANT**

RULING

1. For determination is the application dated 21st November, 2023 brought under Order 17 Rule 2 (6) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders;
 1.Spent;
 2. This Honourable Court be pleased to order reinstatement of the suit herein;
 3. That costs be in the cause.



2. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by Alfelt Mumbo Abio on even date. He deponed that sometime in January 2021, they instructed the firm of E.M Washe & Associates to file a suit against the Defendants and they were later on informed that the partner of the law firm had been appointed as a judge in the Environment and Land Court. He also deponed that the file was handed over to another advocate to take up the matter; that upon inquiry as to the update on the matter he was informed that the advocate was sickly and admitted in hospital; that due to lack of communication from the instructed advocates, he sought legal advice from another firm of advocates who perused the file and realized that the suit herein had been dismissed for want of prosecution on 8th May, 2023. He further deponed that upon perusal of the affidavit of service they noticed that the application to dismiss the suit was served via an email address which belonged to the former law firm of the Honourable Judge which firm was not operational at the time. According to him, they are willing to prosecute the matter to its logical conclusion.
3. In response to the application, the 1st Defendant/ Respondent filed a Replying Affidavit sworn by ALFRED WANGA on the 15th January, 2024. In that affidavit the deponent stated that upon realizing that the suit had been in court for more than one year, he filed the instant application dated 25th November, 2022 seeking to have the suit dismissed for want of prosecution which they served upon the applicants' advocate together with the hearing date.
4. According to him, when the matter came up on the 24th January, 2023, there was no appearance by the Plaintiffs and as such, they sought to have the application allowed however, the court directed that the matter be mentioned on a further date to give the Plaintiffs an opportunity to respond; that on the 28th February, 2023 when the matter came up to confirm compliance by the parties, Mr. Ngoya was present for the Plaintiffs informed the court that he was seeking time to get instructions from the client on how to proceed with the matter; that further, when the matter came up on the 8th May, 2023, there was no representation from the plaintiffs/applicants; that on the 11th May, 2023 the court delivered its ruling on the matter and allowed the application. According to him, as a result of this disinterest, the Defendants moved to court seeking to have the matter dismissed for want of prosecution.
5. The 2nd and 3rd Defendants in opposition filed Grounds of Opposition dated 24th January, 2024 stating that the application was devoid of merit since the suit being sought to be reinstated was dismissed pursuant to the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules; that the applicants had failed to furnish any proof of any application made or any steps taken during the intervening one-year period prior to the dismissal of the suit.

Submissions

6. The Plaintiffs/Applicants through the firm of Muthike & Makworo Advocates filed submissions on the 5th December, 2023. In his submissions Counsel identified one issue for determination: whether the Plaintiffs/Applicants have met the threshold for grant of the orders being sought. He submitted that on 17th April, 2023 a Hearing notice was served upon the email address of washemutwana@gmail.com and there being no response the court dismissed the matter for want of prosecution on 8th May, 2023.
7. It was his submission that the firm of E.M Washe & Associates Advocates was no longer in operation on grounds that the founding partner was appointed a Judge in the Environment and Land Court and this explained why the emails were not responded to. He also submitted that the applicants have moved the court within a reasonable period of time expressing their willingness to prosecute the matter. According to him, the delay was not intentional as there was a mistaken believe that the advocate who took up the matter could update them on the progress. Counsel relied on the case of Catherine Kigasia Kivai vs Ernest Ogesi Kivai & 4 others (2021) eKLR.



8. The 1st Defendant/1st Respondent on the other hand filed their submissions on the 17th January, 2024 through the firm of Alfred Wanga & Co. Advocates. Counsel submitted that Order 5 Rule 22B of the Civil Procedure Rules allows service by email to the parties last confirmed and used email address; that an officer of the court who is duly authorized to effect service shall file an Affidavit of service attaching the electronic mail service delivery receipt confirming service. According to counsel, they have since filed an appeal and a Bill of Costs whose Ruling was delivered on 27th January, 2024 and as such the 1st defendant will be greatly prejudiced in the event the suit is reinstated. He relied on the cases of Josphat Mabiala Akoyo v George Mabele Sifuna & John Odhiambo (2022) eKLR referred to the case of Omwoyo vs African Highlands & Produce Co. Ltd (2002) 1 KLR. He also relied on the case of Ivita vs Kyumbu (1984) KLR 441 where the court laid down principles for issuance of an order of dismissal of suit for want of prosecution.

Analysis And Determination.

9. I have considered the application dated 21st November, 2023, the responses thereto and the submissions by counsels. In my opinion, the only issue for determination is whether the plaintiffs/applicants have satisfied this court to move it to reinstate the suit. The dismissal was made pursuant to the provisions of Order 17 Rule 2 CPR, which provides that:

- “2. 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.”

10. The power to dismiss a suit for want of prosecution is at the discretion of the court. In Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat & 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 v 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.”

11. I have also considered the history of this suit noting that the suit was filed on the 29th January, 2021. The record is however silent on what transpired up until the application 28th November, 2022 when the application to dismiss for want of prosecution was filed. It is evident that the matter came up several times; on 24th January, 2023 when the matter came up for hearing of that application, there was no appearance by the Plaintiffs and as such, the Defendant/Respondent sought to have the application allowed however, the court directed that the matter be mentioned on a further date to give the Plaintiffs an opportunity to respond. On the 28th February, 2023 when the matter came up to confirm compliance by the parties, Mr. Ngoya was present for the Plaintiffs informed the court that he was seeking time to get instructions from the clients on how to proceed with the matter.
12. When the matter came up on 8th May, 2023, there was no representation from the Plaintiffs/applicants and on the 11th May, 2023 the court delivered its ruling on the matter and allowed the application to dismiss the suit for want of prosecution.
13. I have also considered the reasons advanced by the Plaintiff/ applicant seeking to have the suit reinstated. The same resolves around the issue of representation by counsel and it is my opinion that upon an assessment of the circumstances of this case a reasonable justification has been given for the proposed reinstatement. Mishaps do happen as has been described in the present case. Besides, I have also wholistically considered the facts of the case and in view of the provisions of Article 159(2) (d) and for the sake a view of rendering substantive justice in this dispute, it is this court’s view that it is only just and expedient for the Plaintiff’s suit to be reinstated for it to be heard on merit.
14. In the light of the foregoing I allow the application dated 21st November, 2023 as prayed in prayer no 2 and 3 thereof. This suit shall be mentioned on 31/10/2024 for issuance of further directions.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 30TH DAY OF SEPTEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

