



Kaoyeni Community Self-Help Group & 3 others v Rama & 8 others (Land Case 78 of 2019) [2024] KEELC 6179 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6179 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 78 OF 2019
EK MAKORI, J
SEPTEMBER 26, 2024**

BETWEEN

KAOYENI COMMUNITY SELF-HELP GROUP & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS PLAINTIFF

AND

RICHARD PREMCHARD RAMA & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS DEFENDANT

RULING

1. The 1st defendant brought an application dated 12th February 2023 seeking to dismiss the current suit for want of prosecution. The first Defendant was of a firm view that this suit has been in our Court system since 2018—with no steps taken by the plaintiff, in connivance with the 2nd, 3rd, and 4th Defendants, to have it prosecuted, with the last action being on 11th March 2021.
2. After hearing parties in their averments and submissions, the Court declined to strike out the suit, but to manage the matter actively, the Court directed as follows:

“I have reviewed the application and considered the reasons for the delay. The pending application for injunctive orders, as seen from the record, has been occasioned by lawyers acting for the parties. As of 8th February 2021, the 5th Defendant had not filed submissions, and more time was sought. On 20th April 2021, Mr. Wanga for, the 5th Defendant, informed the court his client had died due to COVID-19 complications. The matter was then marked - SOG (stood over generally). The court retrieved the file for mediation on 26th October 2022. On 21st February 2023, the application for dismissal was filed.

Rereading the record shows that the delay has been much due to the lawyers representing the parties, COVID–19 restrictions, the demise of the 5th defendant due to the said disease and failure to substitute, and lack of proper active case management from the court's end.



As held in the leading decision in *Ivita v Kyumbu* [1984] KLR 441:

“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;”

The circumstances of this case are that the plaintiff is not the one to solely blame – but all the parties. The upshot of the foregoing is that the application dated 12th February 2023 is hereby dismissed with no order as to costs.

To actively manage this file, a mention date be issued forthwith to fix a hearing date.”

3. A mention date to fix a hearing was set for 26th October 2023. Counsel for the parties appeared. The matter was set for hearing on 13th February 2024. On that day, counsel for the 2nd, 3rd, and 4th Defendant sought for adjournment, arguing that there was a pending application that had not been disposed of —oblivious that the day had been set down as a hearing date. The application was opposed. The Court declined an adjournment given the ruling and directions it had provided on 28th September 2023. One witness was taken. Counsel for the Plaintiff, Mr. Ogeto, applied for adjournment because the 2nd witness had not conferred with counsel for the hearing. The application was opposed. The Court reluctantly allowed the adjournment but imposed costs on the Plaintiff payable to the 1st Defendant at Kshs. 28,000/- payable before the next hearing date.
4. The matter was fixed for hearing on 5th June 2024. Ms. Kai, for the 2nd, 3rd, and 4th Defendant, rose and addressed the Court that they had filed an application dated 25th May 2024 seeking that the 2nd, 3rd and 4th Defendant be granted leave to file defence, witness statements, and documents out of time. It was opposed. It had not been served. The Court adjourned. Parties were directed to respond. They appeared before me on 1st July 2024 and argued the application orally with Ms. Kai, stating that when instructed, she reckoned that the 2nd, 3rd, and 4th Defendants had filed no defence or statements. No prejudice would be occasioned if leave were granted to the said defendants to defend. Mr. Atiang, for the 1st Defendant, was of a contrary view; he said that the record is quite clear that the application by the Defendant was brought in bad test. The matter was ripe for dismissal, but the said Defendants, in their averments, admitted to having caused delay. He said that they were conspiring with the Plaintiff to stall the matter; the Court had declined dismissal for want of prosecution, directing the matter be heard at once. Costs had been awarded in the past which had not been paid. The defendants were in contempt of the Court’s directions and cannot be allowed to abuse the Court’s process.
5. The Plaintiff and the other defendants did not oppose the application.
6. I framed the issue for this Court’s determination as whether to grant the 2nd, 3rd, and 4th Defendants leave to file a defence, witness statements, and documents and who should bear the costs of the current application.
7. This matter was filed in 2019. Time for filing defence and appearance has long lapsed. Several Court appearances and applications have been made, and a hearing has already occurred. The second, third, and fourth Defendants have been active in the proceedings, including the hearing hereof.
8. The Court is again being asked to reverse the pendulum and order the reopening of proceedings. This can be allowed under the principles as set in *Samuel Kiti Lewa v Housing Finance of Kenya Limited & another* [2017] eKLR where Kasango J. held:

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does



not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

9. The reopening of the case here is to introduce defence statements and documents not filed since 2019. What have the 2nd, 3rd, and 4th Defendants been up to since 2019 by failing to file a defense and statements?
10. Counsel for the 2nd, 3rd, and 4th Defendants filed an affidavit stating that their failure to have counsel led to their inability to appreciate the Court process. They were ignorant of what was happening.
11. In the Court’s ruling dated 28th September 2023 on the application to have the matter dismissed for want of prosecution, the 2nd, 3rd, and 4th Defendants side with the Plaintiff:

“The Plaintiffs, through one Katana Thoya, stated that the pendency of the suit has been occasioned firstly by the COVID–19 restrictions and the death of the 5th defendant due to that pandemic necessitating the delay for want of substitution. All along, there has been communication with the parties, as shown by the attached correspondences, and the record will show that some of the parties, particularly the 5th defendant, have been seeking more time to file submission on the pending application. The 3rd, 4th, and 5th defendants concede that they have occasioned the delay and significant being the 5th defendant due to the COVID-19 scourge which took his life.”

12. It lays credence to the suggestion by Mr. Atiang for the 1st Defendant that the 2nd, 3rd, and 4th Defendants have conspired with Plaintiff to prolong this matter. The reason provided by counsel that they had no advocate to represent them is not pertinent. The application to reopen this matter and leave be granted to the 2nd, 3rd, and 4th to file defence, statements, and documents is hereby declined. It represents an abuse of the Court process. The same is dismissed with costs to the 1st Defendant.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 26TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the presence of:

Mr.Kazungu, for the Plaintiffs

Mr. Atiang for the 1st Defendant

Mr. Ojwang for the 7th, 8th and 9th Defendants

Court Clerk: Happy

In the absence of:

Ms. Kai, for the 2nd, 3rd and 4th Defendants

