



REPUBLIC OF KENYA



**Musa v Seif (Environment & Land Case 312 of 2014)
[2024] KEELC 6109 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 312 OF 2014
NA MATHEKA, J
SEPTEMBER 24, 2024**

BETWEEN

JUMA MUSA PLAINTIFF

AND

BIASHA OMAR SEIF DEFENDANT

RULING

1. The application is dated 14th June 2024 and is brought under Section 1A, 1B, and 3A of the Civil Procedure Act Cap 21 laws of Kenya, Order 12 Rule 7 of the Civil Procedure Rules, Article 48 and 159(2)(d) of the Constitution of Kenya 2010 seeking orders that;
 1. This Honorable Court be pleased to certify this application as urgent and ought to be heard on merit basis.
 2. This Honorable Court be pleased to set aside its orders of 25th April, 2024 dismissing the suit for want of prosecution and do reinstate the same.
 3. Costs of this application be in the cause.
2. It is based on the grounds that the Defendant's Advocates were not aware of the Notice to show cause issued by this Court on 14th February 2024 and the subsequent mention dates of 15th April 2024 and 25th April 2024 which were not served upon the Advocates as require by law. The matter revolves on land ownership of which the Plaintiff is alleged to have been registered through fraud. That they had lost communication with the Defendant as she had relocated out of town and they had limited instructions to act in Court. The Defendant is now back in town and wishes to prosecute its case to its logic conclusion and has given adequate instructions to her Advocates on record to do so. The judicial principals backed up by Article 48, 50(1) and 159(2) (d) of the Constitution of Kenya 2010 puts this Honorable Court into a fair test to the setting aside its orders of dismissal of the suit for want of prosecution and reinstate the suit and set it for hearing on a priority basis otherwise the Defendant



shall suffer irreparable loss and damages. This application has been made timeously after discovering that the suit has been dismissed for want of prosecution. The application is made in good faith and not meant to abuse the Courts time and resources.

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 v 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 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."

6. In *Argan Wekesa Okumu v 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 -v-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 v 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. In the present case, that court has perused the court record and finds that the matter was previously last in court in 2021. The Defendant's Advocates states that they were not aware of the Notice to show Cause issued by this Court on 14th February 2024 and the subsequent mention dates of 15th April 2024 and 25th April 2024 which were not served upon the Advocates as require by law. From the records it is clear that the court gave the date of 14th February 2024 and it is on record that counsels for both parties were served via email. Be that as it may I see no evidence that the Defendant's Advocate was served on the 25th April 2024 when the matter was dismissed for nonattendance. The defence has a counter claim hence he is keen on the matter being reinstated. This is a very old case of 2014 however, land matters are sensitive and the court will give the litigants one last chance to prosecute their cases. I find that this application is merited and is granted on condition the applicant fixes a hearing date within the next 30 days. There will be no order as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

