



Ndwiga & 7 others v Ndwiga & 4 others (Environment & Land Case 66 of 2014) [2024] KEELC 7532 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 66 OF 2014
A KANIARU, J
OCTOBER 17, 2024**

BETWEEN

DESIDERIO NJERU NDWIGA & 7 OTHERS & 7 OTHERS & 7 OTHERS PLAINTIFF

AND

JOSEPH MUNENE S NDWIGA & 4 OTHERS & 4 OTHERS & 4 OTHERS DEFENDANT

RULING

1. Before me for determination is a notice of motion dated 06.11.2023 and filed on 07.11.2023. It is expressed to be brought under Order 12 rule 7 of the Civil Procedure Rules. The applicants are the 1st to 8th plaintiffs - Desiderio Njeru Ndwiga And 7 Others - while the 1st - 5th defendants – Joseph Munene S. Ndwiga and 4 Others - are the Defendants. The prayers sought are as follows:
 1. That pending the hearing and determination of this application, the court be pleased to order arrest of the delivery of the ruling in the application dated 03.10.2022.
 2. That this honorable court be pleased to set aside orders issued on 23.03.2023 dismissing the plaintiff's suit for want of prosecution.
 3. That the honorable court be pleased to reinstate the applicant's suit to be heard and determined.
 4. That costs be in the cause.
2. The application is premised on the grounds set out on its face and on the supporting affidavit sworn by the plaintiffs' advocate, Shadrack Mugambi Njeru, on 06.11.2023. He deposed that neither him nor the plaintiffs were notified of the intended dismissal of the suit herein. That no prejudice will be suffered by the defendants if the application is allowed as they are just purchasers of the suit land. He



- asked that the suit be reinstated and a hearing date be granted. He added that the plaintiffs were born and brought up on the suit land and they have nowhere else to go if they are evicted.
3. The 4th and 5th defendants opposed the application by way of a replying affidavit sworn on 22.01.2024. They deposed that the application lacked merit and was an abuse of the court process. That it was also evident that the plaintiffs were not interested in prosecuting their suit because no action was taken to reinstate it since 23.03.2021 when it was dismissed. That the plaintiffs were notified of the intended dismissal of the suit through their advocate by being served with a notice to show cause, which the advocate acknowledged receiving by signing at the back of the copy. That the same advocate was also served with the notice to show cause through their email by the ELC court.
 4. It was further deposed that the application was made as an afterthought and that the inordinate delay to bring it was not explained. That the period in which the orders inhibiting the suit lands was to last expired a long time ago. That allowing the application will prejudice the defendants because their parcels of land continue being encumbered yet there is no suit pending in court. Further that litigation must come to an end. They denied that the plaintiffs were born and brought up on the suit lands. It was urged that the application be dismissed. A copy of the notice to show cause, email by the ELC court, as well as a copy of the orders of inhibition were annexed to the replying affidavit.
 5. The application was canvassed by way of written submissions. The plaintiffs submitted that they were unaware of the dismissal of the suit and that it was not their fault. They argued that the land in question holds immense sentimental and ancestral value for them and losing it would cause them irreparable harm as it is their only source of livelihood and shelter. They asserted that they have a strong case and are prepared to prosecute the matter. They argued that denying them a hearing would violate their constitutional right to be heard as envisioned in Article 50 of the Constitution. They cited the provisions of Order 12 Rule 7 of the Civil Procedure Rules, which allows the court to set aside a dismissal if just cause is shown.
 6. They argued further that their lawyer's failure to notice the email notifying them of the dismissal was an excusable mistake and requested the court to reinstate their case in the interest of substantive justice as required by Article 159 of the Constitution of Kenya. They pointed out that some of the defendants and the 1st plaintiff have since passed away and no orders of substitution or abatement of suit have been made. They argued that the delay in seeking reinstatement was due to the death of the 1st plaintiff who was pleading on their behalf. They also argued that the notice of dismissal was served on the plaintiffs' counsel's secretary who failed to bring it to the attention of the advocate which is regrettable. They urged the court to reinstate the suit for hearing on merit. The case of HAM V SOS (2021) Eklr was proffered in support of the submissions.
 7. It was the defendants' submissions on the other hand, that equity does not aid the indolent. That the conduct of the plaintiffs shows that they are not interested in prosecuting their suit. It was alleged that only two plaintiffs remain in occupation of the suit lands and the same continues to be unnecessarily encumbered. It was further submitted that the delay in prosecuting this matter is prolonged and the same has not been sufficiently explained. That justice will not be done to the defendants if the suit is reinstated as that will lead to a further encumbering of their titles unjustifiably and the plaintiffs will only continue being indolent. That the application lacks merit and ought to be dismissed. Several cases were proffered in support of the submissions, among them the cases of Peter Kipkurui Chemoiwo v Richard Chepsergon (2021) Eklr, Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D Popat & Others & Another (2016) Eklr, Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others (2013) Eklr.



8. I have considered the Application, the response filed to it, as well as the parties submissions. The suit herein was filed by the plaintiffs on 16.07.2010 by way of an originating summons. They were seeking orders that they had acquired title to land parcel no Gatari/Nembure/2566 later subdivided into Gatari/Nembure/11453 – 11457 by way of adverse possession. They also sought a declaration that the suit lands were being held in trust on their behalf by the 1st defendant. The suit was active in court until 06.06.2016 when an application was made to substitute one of the plaintiffs who was deceased. It appears that since then no further action was taken. The matter was then slated for notice to show cause why it should not be dismissed on 23.03.2021 and since the plaintiff's did not make an appearance to show cause, the suit was dismissed. It appears that the defendants made an application dated 03.10.2022 to lift orders of inhibition placed on the suit lands which is what prompted the plaintiff's to file the instant application.
9. The plaintiffs are asking this court to arrest the ruling of the defendant's said application dated 03.10.2022 seeking to lift the orders of inhibition. They are also asking for their suit to be reinstated and the court orders dismissing their suit be set aside. In order to determine whether the court ought to arrest the ruling of the defendant's application, this court must be satisfied that the suit is one fit to be reinstated. Under Order 12 Rule 7 of the Civil Procedure Rules, the court has the discretion to set aside a dismissal order and reinstate a suit where sufficient cause is shown. The principles guiding the court's discretion in reinstating a dismissed suit are well established. The court must consider:
 - i. Whether the delay in prosecuting the matter is prolonged and inexcusable.
 - ii. Whether justice can still be done despite the delay.
 - iii. Whether the reinstatement will prejudice the opposing party.
10. In this case, the suit was dismissed for want of prosecution on 23.03.2021 and the present application to reinstate the suit was filed on 06.11.2023, nearly two and a half years later. The plaintiffs' have attributed the delay to the oversight of their advocate, who failed to notice the email notifying them of the dismissal. They further argue that the death of the 1st plaintiff, who was actively involved in prosecuting the suit, contributed to the delay.
11. While the plaintiffs' have offered some explanation for the delay, I find that the period of over two years before filing the application is prolonged and to some extent, inexcusable. The plaintiffs' counsel was duly served with a notice to show cause, and even though the dismissal notice may not have come to his attention, counsel is expected to diligently follow up on their clients' case, especially when no action has been taken for years. Parties are also required to diligently prosecute their cases to ensure justice is served without unnecessary delay. It also the courts duty to ensure that justice is served to both parties without undue delay.
12. To this end, I find that the plaintiffs' failure to prosecute their case for over two years and the absence of a convincing explanation for this delay lends credence to the fact that the plaintiffs have been indolent. It would be unjust to the defendants, who have been unable to enjoy their property rights fully due to the existence of orders of inhibition, to allow the reinstatement of the suit. I also note that the plaintiffs did not address the issue of the orders of inhibition which appear to have lapsed or at least demonstrate that the orders were extended. This further weakens their case for reinstatement. I am therefore not satisfied that this suit should be reinstated.



13. In making my decision, I find useful guidance in the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D Papat & Others [2016] eKLR proffered by the defendants where it was observed:

“The court is aware that the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the judgment seat of justice. Nonetheless the court is bound to do justice to both parties without undue delay, which delay occasions injustice to the either party to the dispute and in this case, delay defeats equity. The plaintiff filed suit, failed to get injunctive orders to preserve the status quo and went to slumber. He has not been vigilant or at all to have his suit heard and determined. The court shall therefore not hesitate to have the suit dismissed because the continued delay no doubt infringes on the defendants’ rights and legitimate expectations that disputes against them should be resolved expeditiously.” The plaintiffs herein neglected prosecution of their case for far too long. It is now too late in the day to seek reinstatement.

14. Accordingly, the plaintiffs’ application dated 06.11.2023 is hereby dismissed with costs to the defendants.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF OCTOBER, 2024.

In the presence of Okwaro for defendants and Mugambi Njeru for plaintiffs.

Court Assistant – Leadys

A. KANIARU

JUDGE – ELC, EMBU

