



REPUBLIC OF KENYA



**Musau v Musau & another (Environment & Land Case 97 of 2018)  
[2024] KEELC 7509 (KLR) (8 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7509 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 97 OF 2018  
TW MURIGI, J  
NOVEMBER 8, 2024**

**BETWEEN**

**CHRISTOPHER MUSYOKA MUSAU ..... PLAINTIFF**

**AND**

**BENEDICTER NDUNGE MUSAU ..... 1<sup>ST</sup> DEFENDANT**

**ELIZABETH KAMENE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 3<sup>rd</sup> April 2024 brought under Order 5 Rule (1), (6), (21), Order 12 Rule 7, Order 51 Rules 1 & 15 of the Civil Procedure Rules in addition to Sections 1A, 1B & 3A of the Civil Procedure Act, in which the Applicant seeks the following orders:-
  1. Spent.
  2. That the Honourable court be pleased to order stay of the orders given on 15<sup>th</sup> February 2024 dismissing the Applicant's Notice of Motion dated 5<sup>th</sup> October 2023 for want of prosecution.
  3. That the Honourable Court be pleased to set aside the orders given on 15<sup>th</sup> February 2024 dismissing the Applicant's Notice of Motion dated 5<sup>th</sup> October 2024 for want of prosecution.
  4. That the Honourable court be pleased to reinstate the Applicant's Notice of Motion dated 5<sup>th</sup> October 2023 for hearing and disposal on merits.
  5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Evans Nzalu Muli Advocate sworn on even date.



## **The Applicant's Case**

3. It is the Applicant's case that the Notice of Motion dated 5<sup>th</sup> October 2023 was dismissed on 15<sup>th</sup> February 2024 for want of prosecution. The deponent deposed that failure to attend court was occasioned by his call dropping due to fluctuations in the network. According to the deponent, the Applicant will suffer irreparable loss if the application is not reinstated for hearing as it seeks to reinstate the Plaintiff's suit. He contended that the application has been brought without inordinate delay and urged the court to allow the application as prayed.
4. Though duly served, the Respondents did not file any response to the application.

## **Analysis and Determination**

5. Having considered the application, the only issue that arises for determination is whether the Applicant is entitled to the orders sought.
6. The legal framework on dismissal of suits for want of prosecution is found in Order 17 Rule 2 of the Civil Procedure Rules which provides that;  
  
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  - (1) 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 by sub-rule 1.
7. Order 17 Rule 2(6) allows a party to make an application to reinstate a suit that has been dismissed for want of prosecution.
8. The Plaintiff commenced this suit vide a Plaint dated 04/10/2018 seeking the following orders:-
  1. That an order do issue directing the 4<sup>th</sup> Respondent to remove the caution registered against Title No. Sultan Hamud Township/93 by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on 30<sup>th</sup> November 2016 forthwith.
  2. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents be condemned to pay costs of this application.
9. The record shows that when this matter came up for hearing on 17/03/2022, both parties were absent. Consequently, the Plaintiffs suit was dismissed for want of prosecution. On 6<sup>th</sup> October 2023 the Plaintiff filed the application dated 5<sup>th</sup> October 2023 seeking the following orders:-
  1. Spent.
  2. That this Honourable court be pleased to grant leave to the firm of M/s Evans Muli & Co Advocates to come on record for the Plaintiff/Applicant in place of Mulandi Kisabit & Associates Advocates.
  3. That the Honourable Court be pleased to order stay of the orders given on 13<sup>th</sup> March 2023 dismissing the Plaintiff's suit for want of prosecution.



4. That the Honourable Court be pleased to set aside the orders given on 13<sup>th</sup> March 2023 dismissing the Plaintiff's suit for want of prosecution.
5. That the Honourable court be pleased to reinstate the Plaintiff's case for hearing and disposal on merits.
6. That upon grant of prayers herein above, the Honourable Court be pleased to re-issue Summons to Enter Appearance for a period of 12 months from the date of the order.
7. That the costs of this application be provided for.
10. The application was fixed for hearing on 13<sup>th</sup> November 2023. The date was declared a public holiday and the matter was scheduled for hearing on 15/02/2024. When the application came up for hearing on 15/02/2024, both parties were absent. Consequently, the application was dismissed for want of prosecution.
11. The test for consideration for reinstatement of a suit that has been dismissed for want of prosecution is whether the delay is prolonged and inexcusable, whether justice can still be done despite the delay and whether the Plaintiff or Defendant will be prejudiced by the reinstatement of the suit.
12. In the case of *Ivita Vs Kyumbu* [1975] eKLR, Z.R. Chesoni J. held as follows:-

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.
13. It is not in dispute that there has been inordinate delay in prosecuting this suit. The Applicant explained that failure to attend court was occasioned by fluctuations in the network. I find that the reasons given by the Applicant for failing to attend court are reasonable. It is a cardinal rule of natural justice that no one should be condemned unheard.
14. In the end I find that the application dated 3<sup>rd</sup> April 2024 is merited and the same is hereby allowed as prayed. Costs in the cause.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2024.**

In the presence of:

Parties absent.

Court assistant Alfred

