



**Mwangi v Muigai & 5 others (Environment & Land Case 2 of 2020)
[2024] KEELC 13954 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 2 OF 2020
FO NYAGAKA, J
DECEMBER 17, 2024**

BETWEEN

JOHN KAMAU MWANGI PLAINTIFF

AND

JOHN KAMAU MUIGAI 1ST DEFENDANT

GEOFFREY NYONGESA WAFULA 2ND DEFENDANT

JOSPHAT MAKANGA AYEKA 3RD DEFENDANT

JAMES KARIUKI GITONYO 4TH DEFENDANT

JOSEPH KIMANI NJOROGE 5TH DEFENDANT

DOUGLAS WANJALA WAMAMILI 6TH DEFENDANT

RULING

1. The plaintiff filed this suit on 23/01/2020. It appears, as borne by the documents on record that in the course of time the Plaintiff served the Defendants with summons to enter appearance. The Defendants filed a Defence dated 17/02/2020 on 28/02/2020. Thereafter they filed an Amended Defence on 08/12/2021. The Plaintiff did not fix the suit for hearing.
2. On 13/05/2024 the Court issued Notice to Show Cause Why the suit should not be dismissed for want of prosecution. It was fixed for hearing on 25/05/2024. The Plaintiff filed an affidavit explaining the cause for the delay. But before that his learned counsel explained that he wanted to obtain further instructions as to whether to withdraw their suit or not because the subject matter had been changed by the Defendants in the course of the pendency of the suit.
3. After mentioning the matter thrice for those instructions, the notice to show cause was fixed for hearing on 29/10/2024. By that time the Plaintiff filed the Affidavit showing cause. It was sworn on



the 05/10/2024. He deposed in it that initially the parcel of land in question measured approximately 9.8 acres or thereabout. It was comprised in land title number Trans-Nzoia/Sinyerere/145. Then the proprietor of parcel No. Trans-Nzoia/Sinyerere/190 encroached onto 8.9 acres of parcel No. 145. He then subdivided the plot No. 190 together with the 8.9 acres of parcel No. 145 into six (6) parcel Nos. Being Trans-Nzoia/Sinyerere/1274-1279. The Plaintiff complained about the subdivision. The titles were recalled and the Registry Index Map (RIM) reversed.

4. While the suit was pending, and without his knowledge that defendants colluded with the County Land Surveyor and the County Land Registrar and between 09/09/2022 and 17/04/2023 the subdivision that had been revised on 30/09/2010 was restored and the Defendants issued with title deeds. He annexed and marked as JMK 1 and 2 copies of the extracts of title. He deposed further that it became difficult for him to proceed with the suit and he needed to amend the Plaint in order to incorporate the issues that had affected the suit. He deposed that the suit should not be dismissed but the Court does allow amend the same because of it is dismissed, the Limitation of Actions law will not permit him to file another matter. He prayed to be given chance to file the relevant application in order to salvage the situation. Further, the defendants stole a match against him during the pendency of the suit. He had high blood pressure and sugar.

Analysis And Determination

5. I have considered the matter before me together with the oral submissions by learned counsel. This Court proceeds to decide the dispute using the Issue, Rule, Application and Conclusion (IRAC) method.
6. The issue for determination is whether the Plaintiff has shown cause why the suit should not be dismissed for want of prosecution.
7. The relevant law on dismissal of suits for want of prosecution where there is inaction for some time is Order 17 Rule 2 of the [Civil Procedure Rules](#). It provides in the relevant part as follows:-
 - “(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 in sub-rule 1.”
8. The provision is to the effect at that time where no step has been taken by either party in a matter for over one year the Court can issue to the parties a notice in writing to show cause why the suit should not be dismissed. The parties have the burden of showing why the court should not dismiss the matter. In my view, it is both the Plaintiff and the Defendant who bear this burden, as the Sub-Rule (1) provides that it is “either party” whose conduct of inaction for one year comes into play. The Defendant should be as much an active party as the Plaintiff. He/she is not like the flower girls in weddings who after making everything look beautiful and awesome they never get married in that wedding: they live to marry another day.
9. The burden should be discharged, and by all parties, to the satisfaction of the court. It means that the parties have to present before the court the facts which give the basis for it to exercise its discretion not to dismiss the suit for want of prosecution. The point to emphasize is that. It is not necessarily



the plaintiff only who should fix the suit for prosecution. The Rule is that either party ought to take a step in the matter. Therefore, in my humble view and good faith on the part of a Defendant is only exhibited in one of two ways. One is that the defendant may take steps. And he has the obligation to take steps to fix this suit for hearing if the plaintiff does not fix it for hearing. That is a first and prudent step. The second one is that he may make an application to dismiss the suit for want of prosecution. That being so, in my view, it is not open for a defendant to do nothing and wait for the court to issue a notice for dismissal of the suit for want of prosecution after which he joyfully rides on the notice to ask for the court to dismiss the suit for one prosecution. He too is obligated to demonstrate the step he took to have the suit prosecuted.

10. In *Josphat Mabilia Akoyo v George Mabele Sifuna & John Odhiambo* [2022] eKLR, the Court held as follows:-

“Upon this background I restate the law on the setting aside of a matter dismissed for want of prosecution. In such an instance the Court is called upon to exercise discretion. The discretion is very wide. However, it should be exercised judiciously and on a case by case basis. The facts of each case and the circumstances of both the dismissal and application for setting aside should be carefully evaluated. The Court should consider the reasons advanced for failure to prosecute the case and for delay in bringing the application to set aside the order.”

11. Additionally, in *Ivita vs. Kyumbu* [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:

“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; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.

12. The contention herein is that the Plaintiff failed to fix this suit for prosecution for a long time and therefore it should be dismissed. On his part the defendant wanted the suit dismissed for want of prosecution. He argued that the changes occurred over a year before the notice to show cause was issued yet the Plaintiff did not act, it demonstrates that the plaintiff was indolent. Further, if the plaintiff was serious and prosecuting this suit, from 08/12/2021 to 15/05/2024 he took 889 days, which is over two years of failure to take any steps in the matter. Furthermore, he did not give evidence to show that he suffered from the illness of high blood pressure he alleged and paragraph 16 of the affidavit showing cause.

13. On his part, the plaintiff contended that some of the changes to the subject suit property were affected during the pendency of the suit and the defendants obtained titles to the parcels of land without his knowledge. It was therefore in the interest of justice that he be permitted to make an application for amendment of the Plaint to reflect the changes to the suit property.



14. Having looked at the circumstances of this case. The view that the explanation given by the plaintiff is satisfactory and sound. It is not denied by the defendants at that time they affected changes. It is also not denied that they did not inform the plaintiff of these changes until he discovered them on his own. It is my humble view that the defendant having intentionally and consciously changed the subject matter here in to their advantage and to the disadvantage of the Plaintiff, they cannot be permitted to benefit from the wrong, without giving the Plaintiff opportunity to seek an appropriate remedy, by dismissing the suit at this stage and giving them a blank check of riding on the wave of the court in moving the consider dismissal of suit. They have acted against the principle of lis pendens and they cannot gain unlawfully without cause. Justice ought to be balanced for all parties since, constitutionally, all parties ought to be treated equally before the law. It is therefore in the interest of justice that they need to be given a chance to prosecuted this matter. To do so can only be by giving him the chance to make an application to pray for amendments to his Plaint to reflect the changes that have occurred in the suit subject so that all issues in controversy are brought before the court. It is for that reason that this suit is spared from dismissal for want of prosecution. The plaintiff is given thirty (30) days to file an application to amend the plaint accordingly. In default the suit shall stand automatically dismissed. The matter shall be mentioned on the 30/01/2025 to confirm that the steps taken.
15. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS
17TH DAY OF DECEMBER, 2024**

**HON. DR. IUR F. NYAGAKA,
JUDGE, ELC KITALE**

In the presence of:

Kiarie Advocate for the Plaintiff

Teti Advocate for the Defendant.

