



**Sakwa v Epu (Environment & Land Case 33 of 2010)
[2024] KEELC 13923 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13923 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 33 OF 2010
EC CHERONO, J
DECEMBER 17, 2024**

BETWEEN

MARTIN SAKWA PLAINTIFF

AND

MAURICE EPU DEFENDANT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 13/09/2024. The said application is expressed to be brought under Article 159 of the *Constitution of Kenya*, Section 1A, 1B, and 3A, 63 and 18(a), (b) and (i) of the *Civil Procedure Act*; Order 12 Rule 7 of the *Civil Procedure Rules*, 2010 seeking the following Orders:
 - a. That this application be certified urgent and heard ex-parte in the first instance.
 - b. That the firm of H.P. Wamalwa & Co Advocates be put on record for the Plaintiff/Applicant.
 - c. That the court do order that the suit be reinstated and the same be determined.
 - d. That consequently the suit be transferred to a sub-ordinate with jurisdiction for determination, in this case the Senior Principal Magistrate's Court, Kimilili.
 - e. That the costs of this application be provided for.
2. The application is based on the grounds on its face supported by the affidavit of Martin Sakwa, the Applicant hereinsworn on the 10th July, 2024.
3. It is the Applicant's case that he instructed the firm of Wafula & Co Advocates in the year 2010 to represent him in this matter. That an interlocutory judgment was entered against the Respondents on 10/06/2010 and later dismissed for want of prosecution on 20/07/2011. He stated that he did not follow up on the progress of the case as he was assured that the same had been taken care of. That



he later found out that the suit had been dismissed. He stated that the Respondents have illegally and fraudulently sub-divided LR No. Kimilili/Kimilili/550 into plot nos. 4023,4024 and 4037. That LR Kimilili/Kimilili/4037 is registered in his name and has been erroneously included in Bungoma Succession Cause No.39 of 2015.

4. The Respondent not file any response despite directions given that the Applicant serves the application and the Respondent to file his response together with written submissions.
5. The current application seeks to reinstate the suit and for leave to allow the firm of H.P. Wamalwa & Co Advocates to be placed on record. The Applicant states that his previous counsel on record failed to prosecute the case while he entrusted him with the said responsibility leading to its dismissal for want of prosecution. He now avers that the Respondents herein have included the said land in succession proceedings and he is being disadvantaged as a result.
6. From the court record, this suit was dismissed on 20/07/2011 for want of prosecution. The dismissal was pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, which provides that:

Rule 2.

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 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.
 4. The court may dismiss the suit for non-compliance with any direction given under this Order.
7. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In NileshPremchandMulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR, the court stated as follows:

“ 11. 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 .”

8. From the record and the averments of the Applicant, it is clear that the suit was dismissed after a year of no action. The applicant blames his counsel on record at the time i.e Wafula & Co Advocates for failure to prosecute the suit. However, this court is not persuaded by this position. This is a matter that was dismissed in the year 2011 and the current application has been filed 13 years later. The explanation that the counsel on record was expected to take care of prosecution of the suit is not only perplexing but misguided. Cases belong to parties and it behooves them to take steps to prosecute their own cases and not their advocate. This is a clear demonstration that the Applicant has been indolent since he



filed this suit. In the case of *Limited v Susan Wanjiru Muritu Milimani* HCCC No.397/2002 it was stated as follows;

“it is trite that the case belongs to a litigant and not her advocate. A litigant has a duty to pursue his or her case.....”

9. Further, the averments in the supporting affidavit have not been supported by any documentary evidence and as such, they are unsubstantiated. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the *Evidence Act* (Chapter 80 of the Law of Kenya), which provides:

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”

10. In the circumstance, I find the application devoid of merit. Consequently, the Applicant’s application for reinstatement of this suit dated 13/09/2024 is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF DECEMBER, 2024

HON.E.C CHERONO

ELC JUDGE

In the presence of

1. Mr. H.P Wamalwa for the Plaintiff/Applicant
2. Defendant/Respondent-absent
3. Bett C/A

