



Pangos Limited v Kenya Wildlife Service (Environment & Land Case 455 of 2011) [2023] KEELC 205 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 205 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 455 OF 2011
NA MATHEKA, J
JANUARY 26, 2023**

BETWEEN

PANGOS LIMITED PLAINTIFF

AND

KENYA WILDLIFE SERVICE DEFENDANT

RULING

1. The application is dated August 8, 2022 and is brought under article 50 of the Constitution, section IA, 1B, 3 & 3A of the Civil Procedure Act, order 51 of the Civil Procedure Rules seeking the following orders;
 - (1) The Application be certified as urgent.
 - (2) The Orders of October 30, 2018 be set aside and the suit be ordered to proceed on merits.
 - (3) The costs of the application be provided.
2. It is based on the grounds that no notice was served on the Plaintiff/Applicant to attend Court on October 30, 2018. The dismissal without notice violates the right to fair trial and breaches the principles of natural justice.
3. The Respondent stated that this suit was filed on August 17, 2011 vide a Complaint dated August 15, 2011 accompanied by a verifying affidavit sworn by Alessandro Torriani a resident of Funzi Island and of PO Box 838 Mombasa who described himself as a director of the Plaintiff Company. Attached and marked 'BM 1' are true copies of the Complaint and a Verifying Affidavit of the Plaintiff Company Director Mr Alessandro. That the Defendant filed its statement of Defence on September 20, 2011 whereafter the Pleadings closed 14 days after. That the Plaintiff failed to take any step to set down this case for hearing whatsoever and howsoever until the filing of this application dated August 8, 2022 on August 24, 2022 a period of over 11 years. There are no Pre-trial questionnaires or List of Issues filed.



4. That the Plaintiff's conduct in this case smacks of gross indolence amounting to an abuse of the Court process. The Plaintiff has not bothered to explain what they did to progress their case from 2011 to 2018 when the Suit was dismissed, and why it took them another 4 years after the suit was dismissed to file this application. That the Plaintiff Company appears to be blaming the firm of Waweru Gatonye & Co Advocates for failing to correspond with him without exhibiting any letters/email or even their representative's attendance at the said Lawyer's office to check on the progress of their case now that its director Mr Torriani was a resident of Funzi Island within Kwale County. That indeed the Plaintiff's conduct is/was meant to delay the cause of justice herein and is not excusable. That the Plaintiff's Director is also a director in Pwani Holdings Resort Ltd, Serious Holdings Ltd and Bantu Investments Ltd which Companies also filed similar suits against KWS in Mombasa ELC No 456 of 2011, ELC No 457 of 2011 and ELC No 239 of 2011 respectively. Attached herewith and marked 'IBM 2' are true copies of Plaints filed in the above Suits. That in all the above mentioned Suits all filed suit in 2011 the Plaintiff Companies failed to take any steps to have their cases heard and determined leading to dismissal orders being sued by the Court. Attached and marked 'BM 3' are copies of the said dismissal orders. That it cannot be by coincidence that in all these 4 matters the Plaintiff Companies director - Alessandro Torriani failed to take even a passing interest in following up on their progress in Court once filed in 2011. Cases belong to litigants and not their lawyers.

5. This court has considered the application and the submissions therein. I have perused the court record and find that on September 17, 2018 the Court issued a notice to show cause (NTSC) to the parties why this suit should not be dismissed for want of prosecution. The Notice to Show Cause (NTSC) came up on October 30, 2018 and the suit was dismissed as both parties were absent. This application to set aside those orders was filed on August 24, 2022 and the Plaintiff's Notice of Motion application is dated August 8, 2022 this is over 4 years from the time the dismissal order of 2nd November 2018 was made to file this application. In the case of *Ivita v Kyumbu* [1984] KLR 441 the court held as follows:

The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay”.

6. In the case of *Mwangi S Kimenyi v Attorney General & another*, Civil Suit Misc No 720 of 2009, the court restated the test as follows:-

"1 When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;

- 1) whether the delay has been intentional and contumelious;
- 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court;
- 3) whether the delay is inordinate and inexcusable;
- 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
- 5) what prejudice will the dismissal cause to the Plaintiff.



By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

7. In the case of *Utalii Transport Company Ltd & 3 others v NIC Bank & another* (2014) eKLR, the court held that it is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In *Ivita v Kyumbu* (1984) KLR 441, Chesoni, J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the Plaintiff and the Defendant. In *Essanji & another v Solanki* (1968) EA 218 it was observed:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights."

8. In the present case one would ask whether this error or blunder by the advocate on the delay be visited upon the client. The courts have adopted an equitable approach in addressing this issue. In the case of *Philip Chemwolo & another v Augustine Kubede* (1982-1988) KAR 103, the stated that;

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

9. In *Belinda Murai & 9 others v Amos Wainaina* (1979) eKLR, the court stated that;

"The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

10. 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 the Defendant will be prejudiced by reinstatement of the suit. In the instant case it appears that there was some miscommunication between the Applicant and their former advocate hence the change of advocates. From perusal of the court records there is no evidence of service to the previous advocates and it would be possible the notice was not served. Land matters are emotive and I find the excuse for the delay plausible and justice should be done despite the delay. I find this application has merit and I grant it as prayed. Costs to be in the cause.

11. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JANUARY, 2023.

NA MATHEKA

JUDGE

