



Wachira (Suing as a legal representative of the Estate of the Daniel Wachira Gibe - Deceased alias Daniel Wachira Gibe) v Wairiri (Sued as the administrator of Geoffrey Waireri Nunua) & another (Environment & Land Case 467 of 2017) [2023] KEELC 373 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 373 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 467 OF 2017

YM ANGIMA, J
JANUARY 26, 2023

BETWEEN

JOHN WAWERU WACHIRA (SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF THE DANIEL WACHIRA GIBE - DECEASED ALIAS DANIEL WACHIRA GIBE) PLAINTIFF

AND

MARY NJOKI WAIRIRI (SUED AS THE ADMINISTRATOR OF GEOFFREY WAIRERI NUNUA) 1ST DEFENDANT
PETER NDUATI NUNUA 2ND DEFENDANT

RULING

A. The 1st Defendant's Application

1. By a notice of motion dated 22.07.2022 expressed to be based upon Order 17 rule 2 of the Civil Procedure Rules, 2010, (the Rules) Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap.21), and all other enabling provisions of the law, the 1st Defendant sought dismissal of the Plaintiff's suit for want of prosecution. She also sought to be awarded costs of the application.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Defendant, Mary Njoki Wairiri on 22.07.20022. It was contended that the Plaintiff had failed to set down the suit for hearing since 2017 when it was filed. It was further contended that the Plaintiff was no longer interested in prosecuting the suit hence it would be fair and just to have it dismissed for want of prosecution.



B. The Plaintiff's Response

3. The Plaintiff filed a replying affidavit sworn by his advocate on record, David K. Gichuki on 03.10.2022 in opposition to the application. It was contended that the Plaintiff was still interested in prosecuting the suit and had taken steps by fixing it for hearing on 14.03.2019 and 07.11.2019. It was further contended that when the suit was fixed for hearing in 2020 it could not be heard due to the prevailing Covid-19 pandemic.
4. The Plaintiff also contended that the suit could not be fixed for hearing in 2021 because the Defendant's advocate then on record, Ms. Karen Wanderi passed on hence it took some time for new advocates to take over the matter. The Plaintiff's advocate contended that his efforts to ascertain if M/S Ashitiva & Co. Advocates had taken over the conduct of the suit on behalf of the Defendants were thwarted by their refusal to accept correspondence on the inquiry and that the said firm eventually filed a notice of change of advocates on 22.07.20022 together with the instant application seeking dismissal of the suit for want of prosecution.

C. Directions on Submissions

5. When the application came up for mention for directions on 05.10.2022 the parties opted to rely entirely upon the affidavit and material on record without filing any written submissions. The application was consequently filed for ruling on 26.01.2023.

D. The Issue for Determination

6. The court has considered the Defendant's notice of motion dated 22.07.2022, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination herein is whether the 1st Defendant has made out a case for dismissal of the Plaintiff's suit for want of prosecution.

E. Analysis and Determination

7. The 1st Defendant's application is essentially grounded upon Order 17 rule 2 of the Rules which stipulates 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 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.
8. The test to be applied in an application for dismissal of a suit for want of prosecution were considered by Chesoni J (as he then was) in the case of *Ivita -vs- Kyumbu* [1984] KLR 441 at page 449 as follows:

“So 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 he 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 and that justice can still be done to the parties notwithstanding 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. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in *Allen v McAlpine*, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied."

9. Similarly, in the case of *Utalii Transport Company Ltd & 3 others -vs- NIC Bank and Another* [2014] eKLR it was held, inter alia, that:

"Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases. See the case of *Allen v Alfred Mcalphine & Sons* [1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of *Agip (kenya) Limited v Highlands Tyres Limited* [2001] KLR 630 and *Sagoo v Bhari* [1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also NBI HC ELC Case No 2058 of 2007 where delay of about 1 ½ years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable."

10. It is evident from the material on record that it is not true as claimed by the 1st Defendant that the Plaintiff has never set down the suit for hearing since it was filed in 2017. The record shows that it was set down for hearing on 14.03.2019, 07.11.2019 and 27.02.2020 when it could not be heard for various reasons which were recorded. The record further shows that the suit was taken out on 19.05.2020 due to the prevailing Covid-19 situation. The suit was thereafter mentioned twice after which the ELC Judge was transferred to another station.
11. The only time when the suit was inactive was in 2021 when the advocate then on record for the Defendants died. It is noteworthy from the record that the Plaintiff's efforts to ascertain which law firm had taken over from Ms. Karen Wanderi & Co. Advocates were futile. It is only on 03.08.2022 that the firm of Ashitiva & Co. Advocates filed a notice of change of advocates together with the instant application seeking dismissal of the suit for want of prosecution.
12. Taking into account the totality of the circumstances of this case, the court is not satisfied that the Plaintiff has been guilty of inordinate and inexcusable delay. The court is satisfied that the suit was active between 2018 and 2019 and that the Plaintiff has rendered a reasonable explanation for the delay between 2020 and 2021. The court is not satisfied that the delay is such that a fair hearing cannot be had if the suit were to proceed to full hearing.
13. There is no evidence on record to demonstrate that the Defendants stand to suffer any prejudice as a result of the delay apart from a bare statement to that effect by the 1st Defendant. There is no allegation that the 1st Defendant's witnesses are no longer available or that she has lost crucial documentary evidence as a consequence of the delay. Accordingly, the court is not satisfied that the 1st Defendant



has satisfied the requirements for dismissal of the suit for want of prosecution as required by law. Consequently, the court is not inclined to allow the same but shall give the Plaintiff an opportunity to take steps to prosecute the suit expeditiously.

F. Conclusion and Disposal Order

14. The upshot of the foregoing is that the court finds no merit in the 1st Defendant's application seeking dismissal of the suit for want of prosecution. Accordingly, the court makes the following orders for disposal of the application:
- a. The 1st Defendant's notice of motion dated 22.07.2022 be and is hereby disallowed with costs in the cause.
 - b. The Plaintiff shall file and serve his case summary, issues for determination and a complete trial bundle duly bound and paginated within 14 days from the date hereof.
 - c. The Defendants shall similarly file and serve their case summary, issues for determination and trial bundle duly bound and paginated within 14 days upon the lapse of the Plaintiff's period.
 - d. In the event of the Plaintiff defaulting in compliance with order (b) above, the suit shall stand dismissed without further order.
 - e. The suit shall be mentioned on 14.03.2023 to confirm compliance and fix a hearing date.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 26TH DAY OF JANUARY, 2023.

In the presence of:

Mr. David Gichuki for the Plaintiff

Ms. Mibei holding brief for Mr. Mburu for the 1st Defendant

N/A for the 2nd Defendant

C/A - Carol

Y. M. ANGIMA

JUDGE

