



REPUBLIC OF KENYA



**Gichohi & another v Muia & 6 others (Environment & Land Case 198 of 2015) [2023] KEELC 402 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 402 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 198 OF 2015  
A NYUKURI, J  
JANUARY 25, 2023**

**BETWEEN**

**JAMES KARIUKI GICHOHI ..... 1<sup>ST</sup> PLAINTIFF**

**GRACE WAMBUI KARIUKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NAOMI MITI MUIA ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIP MUSEMBI MUIA ..... 2<sup>ND</sup> DEFENDANT**

**CHARITY MUTHONI MACHANGA ..... 3<sup>RD</sup> DEFENDANT**

**BENJAMIN IRUNGU MWANGI ..... 4<sup>TH</sup> DEFENDANT**

**JOSEPH MUCHIRI KANGANGI ..... 5<sup>TH</sup> DEFENDANT**

**MUUNGANO SELF HELP GROUP ..... 6<sup>TH</sup> DEFENDANT**

**LAZARUS N. MUIA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. Before court is a notice of motion dated August 9, 2021 filed by the defendants seeking the following orders;
  - a. That the Honourable Court be pleased to order that the suit herein be dismissed for want of prosecution for over one year.
  - b. That the Honourable Court in any event issue orders that the suit against the 1<sup>st</sup> Defendant who died in April 2016 and the one against the 7<sup>th</sup> Defendant who died in April 2020 abated for want of substitution within one year of death.



- c. That the cautions or any other encumbrances placed by the plaintiffs/respondents or on their behalf on LR Donyo Sabuk/Komarock Block 1/20113 be removed forthwith.
  - d. That costs of this application and of the entire suit be borne by the plaintiffs/respondents.
2. The application is anchored on the supporting affidavit of Benjamin Irungu Mwangi, the 4<sup>th</sup> Defendant. The Defendants' case was that this matter was last in court in March 2020 and that the Plaintiffs have not made any effort to list it for hearing. Further that the 1<sup>st</sup> and 7<sup>th</sup> Respondents are dead and no substitution application has been made, as the 1<sup>st</sup> Defendant died on 4<sup>th</sup> April 2021 and the 7<sup>th</sup> Defendant died on April 4, 2020, which deaths the Plaintiffs are aware of.
3. The Applicants also stated that the 6<sup>th</sup> Defendant was suffering as the suit property was cautioned by the Plaintiffs.
4. The Application was opposed. James Kariuki Gichohi, the 1<sup>st</sup> Plaintiff filed a replying affidavit sworn on October 4, 2021 in opposition to the application. The Plaintiff/Respondents' case is that this matter has been fixed for hearing severally but due to the death of the 1<sup>st</sup> and 7<sup>th</sup> Defendants, the Plaintiffs have been unable to proceed due to difficulties in obtaining the relevant information to cite the Defendants' family members. They further stated that the 7<sup>th</sup> Defendant had prepared to proceed with the case but died during the Covid-19 pandemic.
5. The Respondents further stated that they had now obtained the relevant information and had prepared an application in the lower court citing the deceased Defendants' relatives to file succession cause. That the 7<sup>th</sup> Defendant had been prepared to testify to confirm that the Plaintiff paid for the disputed land. That the case is meritorious and ought to be heard as the delay was due to the Covid-19 pandemic restrictions.
6. The application was canvassed by written submissions. On record, are the Defendants/Applicants submissions filed on November 16, 2021 and the Respondents submissions filed on April 21, 2021, both of which the court has considered.

### **Analysis and Determination**

7. I have carefully considered the application, the response, the parties' submissions and the record. The issues for consideration are;
  - a. Whether the suit should be dismissed for want of prosecution.
  - b. Whether the suit as against the 1<sup>st</sup> and 7<sup>th</sup> Defendants should be marked as having abated.
  - c. Whether the caution placed on the suit property should be removed.
8. Order 17 rule 2 of the [Civil Procedure Rules](#) provides for the power of the court to dismiss a suit for want of prosecution as follows;
  - (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 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.



- (4) The court may dismiss the suit for no compliance with any direction given under this order.
  - (5) A suit stands dismissed after two years when no step has been undertaken.
  - (6) A party may apply to court after dismissal of a suit under this order.
9. Principles governing dismissal of suit for want of prosecution are well settled. The test is if the delay is prolonged and inexcusable and if justice can be done despite the delay. The *Constitution of Kenya* underscores the right to be heard on merit as a basis of substantive justice and the court should strive to hear the parties on merit, unless the ends of justice demand otherwise.
  10. In the case of *Mwangi S Kimenyi v Attorney General & another*, Civil Suit Misc No 720 of 2009, the court held as follows;
 

“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 defendant, the plaintiff 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.”
  11. I have perused the record and I note that on November 14, 2019, this matter was listed for March 26, 2020. Nothing happened between that date and August 17, 2021 when the Defendants fixed this matter for the hearing of the application herein. Between March 26, 2020 and 17<sup>th</sup> August 2021 there was a period of 17 months. The Plaintiff says the disruption of the Corona Virus pandemic was the reason for the delay for fixing the matter for hearing and that when the 1<sup>st</sup> and the 7<sup>th</sup> Defendants passed on, they needed information to cite the relatives to take out letters of administration.
  12. It is common knowledge that the first case of Covid-19 was first reported in Kenya on March 12, 2020, with the effect that court operations and the daily lives of Kenyans were disrupted in a manner not experienced before, no wonder the record has no entries for the hearing date on March 26, 2020. The pandemic continued into a substantive part of 2021, and therefore it would be unfair to blame the Plaintiffs for failure to fix a hearing date in the year 2020. The application for dismissal was filed in August 2021. That was barely a year after the restrictions and disruptions that accompanied the Covid-19 pandemic. I do not think that the delay between 2020 and 2021 in the face of the Covid-19 pandemic can be termed as inordinate. In any event, the explanation given by the Plaintiffs is a matter of public knowledge and the same is excusable.
  13. On whether the suit against the 1<sup>st</sup> and 7<sup>th</sup> defendants had abated, I note that the Defendants stated that the 1<sup>st</sup> Defendant died on 4<sup>th</sup> April 2021 while the 7<sup>th</sup> Defendant died on April 4, 2020. No death certificates were attached to the application to verify these allegations. Under order 24 rule 4(3) of the



Civil Procedure Rules, a suit can only abate where the death of a party occurred 12 months before an application for substitution is filed. I note from the annexures filed by the Plaintiffs/Respondents that the 1<sup>st</sup> Defendant died on April 22, 2016 while the 7<sup>th</sup> Defendant died on May 2, 2020. This fact is not disputed by the Applicants. It is therefore clear that the suits as against the 1<sup>st</sup> and 7<sup>th</sup> Defendants have indeed abated. However, the Plaintiff is at liberty to apply for extension of time and substitution of the deceased Defendants as the cause of action survived the death of the Defendants.

14. On whether a caution on the suit property should be removed, no evidence was attached to the application to show that there is a caution placed on the suit property by the Plaintiffs. In any event, the claim for removal of the caution on the suit property is a substantive prayer by the Defendants in their counter-claim and therefore the same cannot be determined on an application at this preliminary stage, without hearing the parties on merit; as granting the order would amount to condemning the Respondents unheard.
15. In the end, I order that the suit as against the 1<sup>st</sup> and 7<sup>th</sup> Defendants be and is hereby marked as abated. The plaintiff is at liberty to apply. The costs of the application shall be in the cause.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25<sup>TH</sup> DAY OF JANUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

**Mr. Gachiengo for the Defendants**

**Mr. Gulenywa for the Plaintiffs**

**Ms Josephine – Court Assistant**

