



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Weru v Gakuya (Environment & Land Case 143 of 2016)
[2023] KEELC 2 (KLR) (11 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 2 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 143 OF 2016**

JG KEMEI, J

JANUARY 11, 2023

BETWEEN

JAMES MACHARIA WERU PLAINTIFF

AND

ERASTUS KARANJA GAKUYA DEFENDANT

RULING

1. The Defendant/Applicant filed the instant Motion dated October 25, 2022 seeking Orders that;
 - a. The suit be dismissed for want of prosecution.
 - b. Costs of this Application and of the entire suit be awarded to the Defendant/Applicant.
2. The Application is based on the grounds thereat and Supporting Affidavit of Moses Njuru the Applicant's Counsel. He deponed that the suit was last in Court on 31/8/2020 when the Plaintiff/Respondent was directed to pay Court costs, Applicant's costs and witness expenses before fixing the matter for hearing. That the said costs were not paid and the case has never been fixed for hearing and there is no plausible reason for the said inaction hence the Application.
3. The Application is opposed through the Respondent's Counsel Meja Mutuma who filed his Grounds of Opposition dated 9/12/2021 and Replying Affidavit of even date. He conceded that the matter has been in abeyance for a long time majorly because of his illness that hampered prosecuting his client's case. That he informed his client of his predicament but forgot to inform the Applicant and that having regained his health, he is ready to prosecute the suit.
4. The Respondent filed a Further Affidavit dated 25/5/2022. He averred that besides his illness, he indeed took steps to have a survey conducted as ordered by the Court on 21/6/2019 to no avail as shown by the letters dated 8/7/2022 and 26/9/2019 annexed as MM1 and MM2 respectively. That however the Ministry of Lands and Planning & survey of Kenya acceded to the Respondents request



for a survey and the same was done and a report issued on 5/10/2019 and later the District Surveyor's report dated December 18, 2019 and filed in Court on December 19, 2019 with the participation of the Applicant's counsel. That the delay to prosecute the matter is also attributed to the post-accident trauma suffered by counsel following a road accident as evidenced by copy of plaint filed against him; MM-3.

5. On 18/5/2022 directions were taken to canvass the Application by way of written submissions.
6. The firm of Njuru & Co Advocates filed submissions dated 16/6/2022 on behalf of the Applicant. It was submitted that the instant suit was filed on 16/2/2016 and the Respondent is not keen on prosecuting it, two years after the Court directions issued on 31/8/2020. That the averments by Advocate Mutuma on his illness are not supported by way of evidence and the annexures filed before Court relate to matters that happened way back in 2018 before the Respondent lost interest in his case in 2020. That the Respondent failed to explain the inordinate delay in prosecuting his case and instead left his Counsel to depone the Affidavits contrary to the reasoning in the case of *Omari Shee Kisabafu v Kwale International Sugar Ltd* [2020] eKLR that matters filed in Court belong to the named parties and not their Advocates. The Court was urged not to exercise its discretionary powers in favour of the Respondent who has been indolent and whose conduct offends Article 159(2) *Constitution of Kenya* as far as expeditious disposal of suits is concerned.
7. The Respondent filed his submissions dated 27/6/2022 through the firm of Mutuma Meja & Co Advocates. The gist of his submissions was that he has been keen on prosecuting his case and in particular on conducting the survey on the suit land resulting in the survey report dated 5/10/2019. That the Respondent's counsel suffered psychological trauma following the aftermath of an accident he was involved in as shown by MM-3. Urging the Court to dismiss the Application, reliance was placed on the case of *Invesco Assurance Co Ltd Vs Oyange Barrack* [2018] eKLR that dismissal of suit for want of prosecution under Order 17 is a matter of Court's discretion.
8. The germane issue for determination is whether the Application is merited.
9. The Application is expressed under Order 17 Rule 2(3) *Civil Procedure Rules* which states;

“2. Notice to show cause why suit should not be dismissed [Order 17, 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 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 non-compliance with any direction given under this Order.
- (5) A suit stands dismissed after two years where no step has been undertaken. (6) A party may apply to Court after dismissal of a suit under this Order.”



10. The Applicant contends that the Respondent has lost interest in prosecuting his case which was last in Court on 31/8/2020. The Applicant is of the contrary view and maintains that he is still interested to prosecute the case on its merits. In his Replying Affidavit, Learned Counsel Meja Mutuma detailed his efforts to have the suit property surveyed in compliance with the orders of this Court and report filed to that end. He also averred to suffering post-accident psychological trauma after being involved in a road accident. However, there was no evidence of active steps to prosecute the case after 31/8/2020 when the matter was slated for hearing during the service week. The Court record bears witness that the hearing failed to take place on account of Plaintiff's counsel illness (which was not supported by any evidence) but the Court was gracious to grant the adjournment subject to the Plaintiff paying Court Adjournment Fees, Defendant's counsel costs and one witness expenses for the day. No iota of compliance with the said orders has been exhibited before this Court or even an expression of intention to pay the said costs.
11. As rightly submitted by the rival parties, the Court's power to dismiss suit is discretionary and such discretion must be exercised judiciously. The efforts alluded to by the Plaintiff's counsel to set the matter down for hearing relate to the period before August 2020. While acknowledging Counsel's involvement in the road accident as pleaded, there is no medical evidence post August 2020 that has been tabled before this Court.
12. On his part, the Applicant pleaded prejudice due to prolonged time taken since the filing of the suit. However, no cogent evidence was annexed to that end. The test for dismissing a matter for want of prosecution was highlighted by the Court of Appeal in Moses Muriira Maingi & 2 Others Vs Maingi Kamuru & Another Civil Appeal No 151 of 2010 that:-

“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 the 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 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.”
13. Earlier on the same Court in DT Dobie & Co (K) Ltd Vs Joseph Mbaria Muchina CA 37 of 1978 stated that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”
14. Purely in the interest of justice and to accord the Plaintiff a fair hearing and being alive to the provisions of Article 48 Constitution of Kenya as regards the right to access to justice for all, the Application dated October 25, 2021 be declined.
15. The Plaintiff be and is hereby granted the last chance conditional upon him complying with the orders of 31/8/2020 within 7 days; pays the Defendant throw away costs of Kshs 5,000/- within 14 days and sets down the matter for hearing within 60 days. Failure to comply with any of the above, the suit stands dismissed on the 61st day of this ruling.



16. The costs of the application shall be in favour of the applicant.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF JANUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff / Respondent - Absent

Njuru for Defendant

Court Assistant – Phyllis / Kevin

