



**Moganda v Mukangu & another (Environment & Land Case
E023 of 2021) [2023] KEELC 944 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 944 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E023 OF 2021**

JG KEMEI, J

FEBRUARY 16, 2023

BETWEEN

EDWIN MANDERE MOGANDA PLAINTIFF

AND

ZIPPORAH WANJA MUKANGU 1ST DEFENDANT

ESTHER MATARIA MOKANGU 2ND DEFENDANT

RULING

1. The applicant filed this application on the 24/6/2022 under section 1A, 1B, 3 & 3A of the [Civil Procedure Act](#), Order 12 rule 3, Order 17 rule 2 of the [Civil Procedure Rules](#) and all other enabling provisions of the law seeking the following orders;
 - a. That the court be pleased to issue an order that the entire suit be dismissed for want of prosecution
 - b. That the orders issued by Hon Lady Justice Gacheru on the 28/5/2021 be set aside.
 - c. That the plaintiff be hence forth restrained from entering or causing any disturbance or trespass over the suit property known as Kahawa Sukari Plot 2185 in Ruiru Sub County.
 - d. That costs of the application be in the cause.
2. The application is supported by the grounds annexed thereto and the supporting affidavit of the Esther Mataria Mokangu, the 1st applicant who deponed on her own and on behalf of the 2nd applicant. She avowed that the plaintiff failed to attend court severally and or prosecute his claim despite notice and a draft consent by the parties dated the 7/2/2022 seeking to have the suit marked withdrawn has not been attended to leading to his Advocate withdrawing his representation for want of instructions to proceed with the suit; the plaintiff has intimated his intention not to proceed with the suit; continued



- maintenance of the unprosecuted suit has visited the applicants with piling costs and is a waste to judicial time; the plaintiffs case is non-starter, ab initio;
3. The application is not opposed despite evidence of service of the same upon the respondent. See the affidavit of service sworn on the 12/7/2022 on record.
 4. The application was argued orally in court on the 17/10/2022 in the absence of the respondent though served. The applicants rehashed the grounds of the application and urged the court to so grant it. That the Respondent had indicated his wish to withdraw the suit whereupon his Counsel drafted a consent which consent he has refused and or neglected to execute leading to his Counsel withdrawing from representing him. See the consent dated the 26/4/2022. That his clients one of whom is a senior citizen is in occupation of the suit land which is registered in the name of the 1st applicant, have consistently attended court, hence incurring huge costs in a suit that has no *prima facie* case. Counsel for the Applicants urged the court to dismiss the suit as the respondent has exhibited no interest in prosecuting the same.
 5. This court is under a Constitutional edict set out in article 159(2) (b) and (d) which state as follows:-

“Justice shall not be delayed.”

“Justice shall be administered without undue regard to procedural technicalities.”
 6. To achieve the constitutional principles set out above, in its operations, courts are guided by the overriding objectives which include the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the [Civil Procedure Act](#). The court’s aim in exercising its statutory powers is to give effect to the overriding objectives. The administration of justice is a three-legged stool. Save for the court, a party and his Advocate are under a duty to assist the court to further the overriding objectives and to participate in the processes of the court and to comply with the directions and orders of the court.
 7. The duty of the court has been codified in section 1B of the [Civil Procedure Act](#) as follows:-

“(1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:

 - (a) The just determination of the proceedings.
 - (b) The efficient disposal of the business of the Court.
 - (c) The efficient use of the available judicial and administrative resources.
 - (d) The timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties; and
 - (e) The use of suitable technology.”
 8. It is therefore evident that a party who wishes to approach the court for the determination of a dispute once a suit is filed has a duty to ensure that the suit is prosecuted expeditiously and within the set time lines given by the law. If no action is taken the law allows the court, subject to notice to the party to dismiss the suit or his opponent may approach the court and seek orders to have the suit dismissed for want of prosecution.
 9. Order 17 rule 2 of the [Civil Procedure Rules](#) provides as follows:-



- a. 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.
 - b. 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.
 - c. Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - d. The court may dismiss the suit for non-compliance with any direction given under this Order.
 - e. A suit stands dismissed after two years where no step has been undertaken.
 - f. A party may apply to court after dismissal of a suit under this Order.
10. In the case of *Ivita v kyumbu* [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:
- “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 it 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, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”
10. The power to dismiss a case for want of prosecution is a discretionary remedy. The circumstances of each case must be considered. Though courts exist to determine disputes, it is an old adage that justice delayed is justice denied. If a party files a suit and neglects to prosecute it, it cannot be the place of the court to exercise mercy or empathy in favour of an indolent litigant.
11. In this case the suit was filed on the 24/2/2021. One might be forgiven in saying that the delay in prosecuting this case is not inordinate. The applicant has invited the court to look into the conduct of the plaintiff in determining the application. At the inception, the court on application granted interim orders in favour of the plaintiff on the 28/5/2021. Thereafter the plaintiff’s steam in prosecuting the case seems to have evaporated. According to the record the plaintiff was absent on the 14/9/2021. On the 16/11/2021, the plaintiff Counsel then informed the Court as follows;
- “I received a call from my client indicating that he intends to withdraw the suit entirely. We can take a mention to record a consent with respect to the withdrawal of the suit.”
10. On the 8/2/2022 the plaintiff’s Counsel sought leave to cease acting on grounds of want of instructions. The leave was granted on the 26/4/2021. On the 24/5/2021, 13/7/2022 and 17/1/2022, the plaintiff was absent despite service. I have seen a whatsapp communication on record of the 25/5/2022 admittedly from the plaintiff stating that he is not interested with the case and that he wishes to withdraw. Unchallenged evidence was led by the applicants that the plaintiff refused to sign the consent to withdraw despite the same having emanated from him. This triggered the plaintiff’s



Counsel's desire to cease acting. There is certainly no evidence on record to demonstrate that the said consent to withdraw the suit has been adopted as an order of this court.

11. In addition, the plaintiff has not taken steps to prosecute the suit for a period of over one year and going by the provisions of Order 17 Rule 2 (1) and (3) of the *Civil Procedure Rules*, this is a case that is ripe for dismissal for want of prosecution.
12. The totality of the above analysis is that the plaintiff has showed tendencies of lack of interest in prosecuting his own suit. The court notes that the application is not opposed despite service.
13. In the upshot the application is allowed in terms of prayer No (a) and (b) effectively dismissing the suit for want of prosecution.
14. I make no orders as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but served

Kimathi for 1st and 2nd Defendants

Court Assistants – Esther / Kevin

