



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthoga & 2 others v Mugereki (Environment & Land Case  
127 of 2015) [2023] KEELC 768 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 768 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 127 OF 2015  
JO OLOLA, J  
FEBRUARY 16, 2023  
(FORMERLY NYERI HCC NO. 130 OF 2009)**

**BETWEEN**

**RUNGARE MUTHOGA ..... 1<sup>ST</sup> PLAINTIFF  
DANIEL MAINA KARIENYE ..... 2<sup>ND</sup> PLAINTIFF  
MONICAH WANGECHI KARIENYA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**VERONICAH WANGUI MUGEREKI ..... DEFENDANT**

**RULING**

1. By this notice of motion dated January 26, 2022, Veronicah Wangui Mugereki (the defendant/applicant) prays for orders:
  1. That this honourable court may be pleased to dismiss this case for want of prosecution;
  2. That this honourable court may punish the plaintiffs/respondents for failure to obey the order dated December 17, 2018 either by way of fine or by committing the plaintiffs/respondents to a jail term for a period the honourable court may deem fit; and
  3. That the costs of this application and the main suit be awarded to the defendant/applicant herein.



2. The said application is supported by an affidavit sworn by the defendant and is premised on the grounds:
  - (a) That it is now over 1 ½ years since the last action was taken in this case;
  - (b) That the plaintiffs have ignored the order dated December 17, 2018 made in this case; and
  - (c) That this suit has been pending in court for the last 12 years.
3. The plaintiffs are opposed to the application. In a replying affidavit sworn by the 2<sup>nd</sup> plaintiff Daniel Maina Karienyia on his behalf and on behalf of the 3<sup>rd</sup> plaintiff, they aver that the application is misconceived, incompetent, bad in law and an abuse of the process of the court.
4. The plaintiffs deny that they disobeyed the court orders dated December 17, 2018 and assert that the issue is *res judicata*.
5. The plaintiffs further aver that the matter was before court on July 15, 2020 and that upon the realization that it was part-heard, the then visiting judge directed that it be stood over generally. In the intervening period, there was a lockdown due to the Covid-19 pandemic as a result whereof open court hearings were slowed down.
6. I have carefully perused and considered the defendant's application as well as the response thereto by the two surviving plaintiffs. It was apparent from the defendant's supporting affidavit that the 1<sup>st</sup> plaintiff passed away in August, 2017.
7. By this application, the defendant urges the court to punish the plaintiffs for failure to obey the orders issued herein on December 17, 2018 and to proceed to dismiss the suit for want of prosecution.
8. From a perusal of the record herein, it was apparent that by an application dated August 24, 2017 the defendant had sought orders for exhumation of the remains of the 1<sup>st</sup> plaintiff – Rungare Muthoga from the parcel of land known as LR No Aguthi/Gititu/64 (the suit property). In addition, the defendant sought for the punishment of the two surviving plaintiffs for contempt of orders issued earlier on August 23, 2017 restraining them from burying the remains of the 1<sup>st</sup> plaintiff on the suit property.
9. That application was placed before Lady Justice L N Waithaka who in a ruling delivered on the said December 17, 2018 declined to grant the order for exhumation. At paragraph 8 of the ruling, the Learned Judge determined and directed as follows:
  - “ 1. The reasons offered by the respondents for burying the deceased in the suit property being incapable of forming a basis or an excuse for disobeying the order hereto, I find and hold that the applicant has made up a case warranting the citing of the respondents for contempt of court. Accordingly, I order the respondents to, within 14 days, of delivery of this ruling show cause why they should not be punished for disobeying the court order hereto.”
10. It is the above directive that the plaintiffs show cause within 14 days why they should not be punished that the defendant by this present application accuses the plaintiffs of disobeying. As it were an order to show cause requires a party to a case to justify, explain or prove something to the court. Such justification or explanation is given at a hearing before the court.



11. From a perusal of the record herein, I was unable to find any instance wherein the plaintiffs were summoned to court for the purposes of a “show cause hearing”. After the ruling on December 17, 2018, the matter next came up before Lady Justice Mary Oundo on October 16, 2019 and the parties only sought a date for the hearing of the main suit which was part-heard and was therefore given another mention date in the absence of the judge who had partially proceeded with the matter.
12. Arising from the foregoing, I was not persuaded that the plaintiffs were in disobedience of any order of the court as to warrant their punishment as sought under prayer No 2 of the defendant’s motion.
13. As regards the prayer for dismissal of the suit for want of prosecution, order 17 rules 2(1) and (3) of the *Civil Procedure Rules* provides 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 should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
  - (2) ...
  - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”
14. In *Argan Wekesa Okumu v Dima College Limited & 2 Others (2014) eKLR*, the court observed as follows:
  - “1. The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay ...
  2. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”
15. Applying the above principles to the matter before me, I was not persuaded that the delay in prosecuting this suit was inordinate and/or that the same was inexcusable. From the material placed before me, it was clear that the parties appeared before Lady Justice Mary Oundo on July 15, 2020 when the same was stood over generally. The reasons for the decision were that the matter was part-heard before Lady Justice L N Waithaka.
16. It is common knowledge that Lady Justice Waithaka did not return to the station to deal with the part-heards and that there was no substantive Environment and Land Court judge in Nyeri until September, 2021. That being the case, I was unable to lay blame on the plaintiffs for the failure to fix the matter for hearing during that period.
17. It follows that I did not find any merit on the prayer to dismiss the suit for want of prosecution either.
18. In the circumstances herein and given the age of the matter, the plaintiffs are hereby directed to take steps to fix the suit for hearing within 3 months from the date hereof.
19. The motion dated January 26, 2022 is otherwise dismissed with the costs in the cause.



**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

In the presence of:

Mr Gikonyo Wahome for the respondent/plaintiff

No appearance for the applicant

Court Assistant - Kendi

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**J O Olola**

**JUDGE**

