



**Kinyanjui v Municipal Council of Nakuru & 2 others (Environment & Land
Case 53 of 2013) [2023] KEELC 805 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 53 OF 2013
LA OMOLLO, J
FEBRUARY 16, 2023**

BETWEEN

JOHNSON MBURU KINYANJUI PLAINTIFF

AND

MUNICIPAL COUNCIL OF NAKURU 1ST DEFENDANT

NATIONAL HOUSING CORPORATION 2ND DEFENDANT

MARY WANJIKU 3RD DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 12th July, 2022. The said application is said to be brought under Article 159 of the Constitution, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3A, 63E and 80 of the Civil Procedure Act.
2. The application is filed under Certificate of Urgency and seeks the following orders:
 1. That this honorable court be pleased
 2. to set aside the orders made on the 6th day of July, 2022 dismissing the Plaintiff's suit and all other consequential orders thereto.
 3. That this honorable court be pleased to reinstate the Plaintiff's suit dated 21st July 2010.
 4. That the cost of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit sworn by the Plaintiff/Applicant Johnson Mburu Kinyanjui.



Factual Background.

4. The Plaintiff/Applicant commenced this suit vide the Plaint dated 21st July, 2010 wherein he seeks the following orders:
 - a. A cancellation of the title deed in relation to land previously known as Racetrack Plot No. B 511 within Nakuru Municipality and now known as Nakuru Municipality Block 1/996 and an order directing the Land Registrar Nakuru to issue a fresh title in relation to Nakuru Municipality Block 1/996 in the names of the Plaintiff herein.
 - b. An order directing that the 1st and 2nd Defendants to amend their records accordingly by deleting the name of the 3rd Defendant and restoring the name of the Plaintiff.
 - c. A permanent injunction restricting the Defendants by themselves, their agents, servants and/or employees from transforming, disposing off and/or alienating Land Parcel No. B 511 Racetrack within Nakuru Municipality.
 - d. Costs of this suit.
5. The 2nd Defendant/Respondent entered appearance and filed its Statement of Defence and Counterclaim on 28th August, 2010 where it seeks that the Plaintiff/Applicant's suit against it be dismissed with costs.
6. The 3rd Defendant/Respondent filed her Statement of Defence on 31st August, 2010 and also seeks that the Plaintiff/Applicant's suit be dismissed with costs.
7. The 1st Defendant/Respondent filed its Statement of Defence on 7th September, 2010 and sought dismissal of the Plaintiff's suit with costs.
8. Subsequently, a notice to show cause why the suit should not be dismissed under Order 17 Rule 2 of the Civil Procedure Rules 2010 dated 23rd May, 2022 was served on all parties herein. The notice informed parties to appear in court on 6th July, 2022 for the hearing.
9. Prior to the issuance of the notice to show cause, the court record shows that this suit was last in court on 9th May, 2019.
10. On 6th July, 2022, the court being satisfied that had been effected upon all the parties dismissed the suit for want of prosecution. After this dismissal, the Plaintiff/Applicant filed the present application.
11. The application first came up for hearing on 13th July, 2022 and the court directed that it be served on the Defendants/Respondents.
12. The application was set for hearing on 27th September, 2022. On the said date, directions were issued that the application be heard by way of written submissions.
13. The matter was again mentioned on 18th October, 2022 when it was confirmed that all the parties had filed their submissions and the matter was reserved for ruling.

The Plaintiff/Applicant's Contention.

14. The Plaintiff/Applicant contends that he filed a suit against the Defendants/Respondents herein vide a Plaint dated 21st July, 2010 over a dispute in respect to land parcel No. Nakuru Municipality Block 1/996 previously known as Racetrack Plot No. B 511.



15. The Plaintiff/Applicant also contends that the matter came up for mention to confirm compliance on 10th October, 2016 and it was fixed for hearing.
16. The Plaintiff/Applicant further contends that when the matter came up for hearing on 9th May, 2019, his advocates applied for adjournment which was allowed and he was directed to pay the 1st and 2nd Defendants/Respondents costs of kshs. 5,000/= each and court adjournment fees of KShs. 2,000/=. He was further directed to take a new hearing date at the registry.
17. It is his contention that no action has been taken on the matter for over three years which necessitated the court to list the matter for dismissal for want of prosecution.
18. The Plaintiff/Applicant contends that upon service of the Notice to Show Cause dated 23rd May, 2022 upon his advocates on record and the counsel for the Defendants/Respondents, none of them appeared in court for the date scheduled for dismissal and so the court proceeded to dismiss the suit.
19. The Plaintiff/Applicant also contends that his advocate on record failed to represent him in court as instructed which led to the dismissal of the suit.
20. The Plaintiff/Applicant further contends that he has an arguable case with high chances of success and is thus entitled to have the suit reinstated for purposes of determining the rights and liabilities of each party.
21. The Plaintiff/Applicant contends that he stands to suffer irreparable harm if the suit is not heard on merit due to the nature of the claim or subject matter.
22. He further contends that a party should not suffer because a mistake has been made. It is his contention that broad equity approach dictates that unless for fraud or intentional overreach, there is no error or default that cannot be put right.
23. The Plaintiff/Applicant contends that his application has been brought in good faith and without delay and that the Defendants/Respondents will not suffer any prejudice if the suit is reinstated.
24. The Plaintiff/Applicant further contends that it is in the interest of justice that the suit be reinstated so that it can be heard and determined on merit.
25. He ends his deposition by stating that once the suit is reinstated, he undertakes to immediately set the suit down for directions.

1st Defendant/respondent's Response.

26. In response to the application the 1st Defendant/Respondent filed a Replying Affidavit sworn on 14th September, 2022 by Maureen Litunda the County Government of Nakuru's Legal Officer; the successor of the 1st Defendant/Respondent herein.
27. She deposes that the Plaintiff/Applicant's application has been brought in bad faith and is meant to obstruct the course of justice and deny the Defendants/Respondents the right to enjoy the fruits of their lawful ruling dismissing the suit for want of prosecution.
28. She also deposes that the matter was instituted vide a Plaint dated 21 July, 2010 and that neither the Plaintiff/Applicant nor his advocates have denied that they were served with the Notice to Show cause and were therefore aware that it was coming up on 6th July, 2022.
29. She further deposes that despite being aware of the same, they both failed to appear before the Court to explain the reason for the long period of inaction in this matter.



30. It is her deposition that the last time the matter came up in Court was on 9th May, 2019 when the same was adjourned at the behest of the Plaintiff/Applicant and he was ordered to pay costs of Kshs. 5,000/= to the 1st and 2nd Defendants/Respondents Advocates and also pay Court Adjournment fees at a sum of Kshs. 2,000/= but to date the said costs are yet to be paid.
31. She deposes that the Plaintiff/Applicant has not placed any evidence before the court to demonstrate that since 9th May, 2019 they have been making attempts to fix dates in vain considering that dates are usually requested for in writing.
32. She also deposes that since then no action has ever been taken with regard to this file as their advocates on record have never received any notice to that effect and further that it has been over three years since the matter was last in court prior to the Notice to Show Cause.
33. She further deposes that the explanation which was tendered by the Plaintiff/Applicant in seeking to set aside the order of dismissal for want of prosecution is not satisfactory and that they humbly urge the court to disallow the Plaintiff/Applicant's application with costs to the 1st Defendant/Respondent.
34. It is her deposition that it was the duty of the Plaintiff/Applicant and his advocates to follow up on his matter as a demonstration of interest but in this case, they waited for this Honourable court to issue a Notice to Show Cause and dismissal before following up with the instant application in a belated attempt to set the orders of dismissal aside.
35. She further deposes that the Plaintiff/Applicant has not been keen in having this matter concluded expeditiously and that he had a duty to follow up on the matter with his advocates, which he failed to do adding that litigation has to come to an end.
36. She also deposes that the 1st Defendant/Respondent stands to suffer great prejudice if the matter is reinstated since it had already been concluded.
37. She ends her deposition by stating that the Plaintiff/Applicant is not entitled to the Orders sought by virtue of Order 12 Rule 6 of the Civil Procedure Rules as read with Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya. This is because the cause of action arose in 2005 and therefore a period in excess of 17 years has lapsed and the Plaintiff/Applicant is therefore not entitled to any of the orders sought.

2nd Defendant/Respondent's Response.

38. In response to the application, the 2nd Defendant/Respondent filed a Replying Affidavit sworn on 26th September, 2022 by Kisilah Daniel Gor, its counsel on record.
39. He deposes that the Plaintiff/Applicant instituted the present suit via the Plaint dated 21st July, 2010 and consequently served the same upon the Defendants/Respondents herein with summons to enter appearance dated the 2nd July, 2010.
40. He also deposes that the 2nd Defendant/Respondent through its advocate M/S Sheth and Wathigo advocates entered appearance and on the 25th day of August, 2010 and filed a statement of defence.
41. He further deposes that the matter came up for Mention on 10th October, 2016 when parties were directed to conclude discovery and fix a hearing date at the registry which they proceeded to do on behalf of the 2nd Defendant/Respondent.



42. It is his deposition that the matter was then fixed for hearing on 23rd October, 2018 where they attended but the same was adjourned to 9th May, 2019 on request of the Plaintiff/Applicant's advocate who alluded to being indisposed but without sufficient evidence being adduced to demonstrate the same.
43. He deposes that further on 9th May, 2019, the matter came up for hearing but was again stood over generally as the Plaintiff/Applicant's advocate was allegedly held up before another court on a lengthy criminal trial, proof of which was not provided, nonetheless the court directed parties to take another hearing date at the registry.
44. He also deposes that following the conduct of the Plaintiff/Applicant, the court issued a Notice to Show Cause why the matter should not be dismissed for want of prosecution dated 23rd May, 2022 and a mention date was set for 6th July, 2022.
45. He further deposes that on 6th July, 202, the matter came up for mention and was dismissed for want of prosecution for reasons that the Plaintiff/Applicant had not prosecuted the case for three years.
46. It is his deposition that the notice to show cause as the title suggests accorded the Plaintiff/Applicant the occasion to justify why the suit should not have been dismissed in spite of his lack of interest and when afforded the opportunity, the Plaintiff/Applicant did not file any affidavit or appear to make representations to justify the sustenance of this stale suit.
47. He deposes that in true testament to the Plaintiff/Applicant's blatant abuse of the court and it processes the resultant kneejerk reaction from the Plaintiff/Applicant resulted in the application dated the 12th July, 2022 where he seeks to reinstate the suit in an attempt to further prejudice the 2nd Defendant/Respondent but without accounting for past lethargy and failure to utilize the Notice to Show Cause alluded to earlier.
48. He also deposes that it would be an abuse of court process and totally prejudicial to the Defendants/ Respondents to set aside the orders made on the 6th July, 2022 dismissing the Plaintiff/Applicant's suit herein notwithstanding that the same was occasioned by the Plaintiff/Applicant's own conduct of non-attendance.
49. He ends his deposition by stating that it would also be a total negation of the purpose of Notice to Show cause to reinstate the suit and a waste of precious judicial time and resources.

3rd Defendant/Respondent's Response.

50. The 3rd Defendant/Respondent filed her Replying Affidavit sworn 14th October, 2022 and filed on the same day.
51. She deposes that she has read the affidavits in response to the Plaintiff/Applicant's application by the 1st and 2nd Defendants/Respondents and wholly adopts their contents.
52. She also deposes that the application is defective and not capable of cure as it is in violation of the provisions of the law.
53. She ends her deposition by urging the court to disallow the application.

The Plaintiff/Applicant's Response to the Defendants/Respondents Replying Affidavits.

54. In response to the Defendants/Respondents Replying Affidavits the Plaintiff/Applicant filed a Supplementary Affidavit sworn on 23rd September, 2022.



55. He deposes that the litigation is on a dispute over the ownership of Land Parcel no. LR Nakuru Municipality /Block 1/996 formerly Nakuru Racetrack/ Plot "B" 511.
56. He also deposes that a temporary injunction was issued on 22nd September, 2004 in Nakuru CMCC 1976 of 2004. That there is a Certificate of Lease issued on 31st May, 2005 to Mary Wanjiku I/ d 11154585 P.O Box 2328 Nakuru over land parcel No. LR Nakuru Municipality /Block 1/996 formerly Nakuru Racetrack/ Plot 511 which is the suit property in Nakuru CMCC 1976 of 2006.
57. He further deposes that judgment was delivered on 19th June, 2006 in Nakuru CMCC 1976 of 2006 and the decree issued on 3rd July, 2006.
58. It is his deposition that on 11th November, 2009 an order was issued in Nakuru CMCC 1976 of 2006 directing Mary Wanjiku to deposit Kshs. 70,000 within 28-days of 11th November 2009 and in default her Chamber Summons Application stood dismissed with costs to the respondent.
59. He deposes that there is the decree for costs amounting to Kshs 130,795 pursuant to the Judgment given on 19th June, 2006 in Nakuru CMCC 1976 of 2006.
60. He also deposes that there is an Arrears Demand Notice dated on 07th September, 2004 signed by N.K. Birech, Officer-in Charge calling for payment of Kshs 22,379.60 principal loan which is the amount in arrears in respect of the Infrastructure Loans Clearance Certificate on the suit property maintained at National Housing issued to Mary Wanjiku and addressed to The Town Clerk Nakuru Municipal Council P.O. Box 124 Nakuru in management of the suit property in Nakuru CMCC 1976 of 2006.
61. He further deposes that there is an Infrastructure Loans Clearance Certificate dated 11th February, 2005 in respect of the Infrastructure Loan maintained at National Housing issued to Mary Wanjiku and addressed to The Town Clerk Nakuru Municipal Council P.O. Box 124 Nakuru in management of the suit property in Nakuru CMCC 1976 of 2006.
62. It is his deposition that there is the letter dated 18th August 2006 from Municipal Council of Nakuru signed by S.K. Laboso detailing the cash payments of Advance payment against the Principal amount of Kshs 27,394.45 by Johnson Mburu Kinyanjui to Joseph Mwaura as transfer transactions over the suit property LR Nakuru Racetrack No. 511B which is the suit property in Nakuru CMCC 1976 of 2006.
63. He deposes that there is the Infrastructure Loan Demand Notice issued on 18th August, 2006 by National Housing issued to Johnson M. Kinyanjui for payment of Kshs 13,177.00 Accumulated arrears, Kshs 18,325.00 principal Loan balance totalling to Kshs 31,523 (Kshs 13,177.00 plus Kshs 18,325.00) as at 31st August, 2006 in the management of the suit property Race Track Plot 511B the suit property in Nakuru CMCC 1976 of 2006.
64. He also deposes that there is the Infrastructure Loan Clearance issued on 21st August, 2006 by National Housing Corporation to Municipal Council of Nakuru in respect of Property Rates over the suit property Nakuru Racetrack 511B "re Owner DR/MR/MRS/MISS: Johnson M. Kinyanjui" the suit property in Nakuru CMCC 1976 of 2006.
65. He further deposes that there is the Demand Notice issued by County Government of Nakuru, Nakuru East Sub County Code 3321000 Land Rates Revenue Code 5301 amount Kshs 3,400 with details of where to remit Name: 010 County Government of The Rating Act (CAP 267) dated 08th July, 2014 Rates amount for Kshs 3,757 for Plot 1/996 against Mary Wanjiku showing Annual Rates amount at Kshs 3,400 and Penalty amount of Kshs. 3757.



66. He deposes that there is a payment receipt number MPESA F147GV855 on 10th July 2014 at 3.13pm for amount Kshs 3,757 paid and remitted by Mwamba Kinyanjui in respect of Property Rates over the suit property Nakuru Racetrack 511B now Nakuru Municipality /Block 1/996 the suit property in Nakuru CMCC 1976 of 2006.
67. It is his deposition that there is the Demand Notice LA Name:010-county Government of The Rating act (CAP 267) issued to Mary Wanjiku in respect of Suit Property Blk 1 Plot no 996 for payment of Kshs 21,348 indicating the penalty amount as Kshs. 7748.
68. He deposes that there is the Bankers Cheque number 918625 issued on 08th November, 2012 by Barclays Bank of Kenya Nairobi drawn to the Municipal Council of Nakuru dated on 08th November, 2012 on remittance of Kshs 21,500; Cash money deposit record for Kshs. 21,250 made at Barclays Bank Nakuru East Brach in support of the cheque number 918625 in respect of Property Rates over the suit property Nakuru Racetrack 511B now Nakuru Municipality /Block 1/996 the suit property in Nakuru CMCC 1976 of 2006.
69. He also deposes that there is the County Government of Nakuru Property Rates Demand Notice (Rating Act cap 267) number T3715 code 576 Municipal Council of Nakuru issued to Mary for Kshs54,000.
70. He further deposes that he has paid and remitted the cash liabilities to National Housing Corporation and The County Government of Nakuru in respect of the suit property LR Nakuru Municipality/ Block 1/996 former Nakuru Racetrack Block 511B which the Defendants/Respondents have colluded and conspired to deceitfully, fraudulently, illegally and unlawfully alienate to Mary Wanjiku, the 3rd Defendant/ Respondent, who has never remitted any liabilities to the 2nd Defendant/Respondent nor any liabilities on the Rates to the 1st Defendant/Respondent.
71. It is his deposition that he has paid and remitted the cash amount totalling to Kshs 20,163 to JA Simiyu his former Advocate on record in June, 2022 remitted thus to wit: 18.01. Kshs 5,100 on 06.06.2022 at 13.41:02 Pm; 18.02. Kshs 5,067 on 08.06.2022 at 18.38:43 PM; 18.03. Kshs5,000 on 13.06.2022 at 13.03:49 PM; Totalling to Kshs 20,167 remitted through MPESA on Cell Phone number 0703 21 45 37 indicating the name of the recipient as Jimmy Simiyu.
72. He deposes that his former Advocates never informed him that there was a Notice to Show Cause why the suit should not be dismissed for want of prosecution issued on 23rd May, 2022 by Deputy Registrar.
73. He also deposes that he has been in uninterrupted occupation and possession of the suit property for the past thirty-seven years since the year 1985.
74. He further deposes that he stands to suffer irreparable loss and damage unless his application is allowed.
75. He ends his deposition by stating that he has all along been available and ready to attend court and so he seeks that the suit be revived so that it can be determined on merit.
76. Regrettably, the depositions contained in the supplementary affidavit is an attempt by the Plaintiff/Applicant to prosecute his claim rather than respond to issues raised by the Respondents on why the orders dismissing this suit for want of prosecution should not be set aside.

Issues for Determination.

77. The Plaintiff/Applicant filed his submissions on 3rd October, 2022, the 1st Defendant/Respondent filed its submissions on 14th October, 2022, the 2nd Defendant/Respondent filed its submissions on 17th October, 2022 while the 3rd Defendant/Respondent filed hers on 14th October, 2022.



78. The Plaintiff/Applicant in his submissions reiterates the contents of his supporting and supplementary affidavits and sets out the contents of the Replying Affidavits filed by the Defendants/Respondents. He identifies the following issues for determination:
- a. Did the Plaintiff fix the case for hearing within the three years?
 - b. Was there inordinate delay, if yes what is the remedy?
 - c. Would a mistake of an advocate be visited on an innocent client?
 - d. What is the test in granting the relief sought?
 - e. Are the Respondents going to suffer any prejudice?
 - f. Will the Plaintiff/Applicant suffer irreparable loss if the orders sought are not granted?
79. On the 1st issue, the Plaintiff/Applicant submits that his advocates on record made an effort to fix the matter for hearing on 16th May, 2019 and 3rd June, 2019.
80. He also submits that his advocates on record did not bring the matter to his attention and neither did they notify him of their absence in court.
81. The Plaintiff/Applicant relies on the cases of Philip & Another Vs Augustine Kubende 1982-88 KLR 103, CMC Holdings Ltd Vs James Mumo Nzioka [2004] KLR 173 and Winnie Wambui Kibinge & 2 Others Vs Match Electricals Limited Civil Case No. 222 of 2010 in support of his arguments.
82. On the second issue, the Plaintiff admits that there was inordinate delay in setting the matter down for hearing and relies on Order 12 Rule 7, the case of Wanjiku Kamau Vs Tabitha Kamau & 3 Others [2014] eKLR and submits that the court has the discretion to set aside orders where suits have been dismissed and order for their reinstatement.
83. On the third issue, the Plaintiff/Applicant submits that the mistake of an advocate cannot be visited on an innocent client and relies on the cases of Lee G Muthoga vs Habib Zurich Finance (K) Limited & another Civil Application No. Nairobi 236 of 2009, Wachira Karani Vs Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR in support of his arguments.
84. On the fourth issue he cites among other decisions the cases of Ivita Vs Kyumbu [1984] KLR 441, Onyango Oloo Vs Attorney General [1986-1989] EA 456 and submits that he deserves an opportunity to be heard on merit.
85. On the fifth issue, the Plaintiff/Applicant submits that the Defendants/Respondents will not suffer any prejudice if the orders sought are granted and concludes his submissions by seeking that his application be allowed as prayed.
86. The 1st Defendant/Respondent submits on whether the Plaintiff/Applicant's suit should be reinstated. It submits that the suit was dismissed on 6th July, 2022 for want of prosecution and relies on Order 17 Rule 2(3) of the Civil Procedure Rules which it states gives the court powers to dismiss a suit for want of prosecution.
87. The 1st Defendant/Respondent submits that the suit was instituted through a Plaint dated 21st July, 2010 and that it has never taken off for hearing since it was filed and it therefore seeks that the Plaintiff/Applicant's application be dismissed with costs.



88. The 2nd Defendant/Respondent submits on whether the Plaintiff/Applicant's application is merited. It is the 2nd Defendant/Respondent submits that the Plaintiff/Applicant concedes that no action has been taken in the matter for a period of over three years.
89. The 2nd Defendant/Respondent further relies on the cases of Julius Kibiwott Tuwei Vs Reuben Argut & 7 Others [2022] eKLR, Wachira Karani Vs Bildad Wachira [2016] eKLR and submits that the Plaintiff/Applicant blames his advocates on record and yet he was aware that from the year 2013 that the matter was not being properly addressed but did not take any action to remedy the same.
90. The 2nd Defendant/Respondent concludes its submissions by seeking that the application be dismissed with costs.
91. The 3rd Defendant/Respondent in her submissions identifies the following issues for determination:
- a. Whether the Plaintiff/Applicant's application is capable of cure?
 - b. Whether the delay and/or reason for dismissal of the suit was justified.
92. On the first issue, she relies on Order 9 Rule 9 (a) and (b) and Rule 10 of the Civil Procedure Rules 2010 and submits that the Plaintiff/Applicant's application is defective and should be struck out because he filed a Notice to Act in person after the suit had been struck out.
93. On the second issue, the 3rd Defendant/Respondent submits that the dismissal of the suit was justified as the Plaintiff/Applicant's counsel was served with the Notice to Show cause but failed to attend court.
94. She concludes her submissions by seeking that the Plaintiff/Applicant's application lacks merit and should be dismissed.

Analysis and Determination.

95. I have considered the application, the affidavit in support of the application, the Replying Affidavits and the Supplementary Affidavit and the submissions filed by parties herein.
96. It my view that the issues that arise for determination are as follows:
- a. Whether the court should set aside the orders made on 6th July 2022 dismissing the Plaintiff/Applicant's suit and reinstate it for hearing and determination on merit.
 - b. Who should bear the costs of this application.

A. Whether the court should set aside the orders made on 6th July, 2022 dismissing the Plaintiff/Applicant's suit and reinstate it for hearing and determination on merit.

97. Order 17 Rule 2 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) 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.
98. The present suit was instituted on 27th July, 2010. The matter was last in court on 9th May, 2019 when it came up for hearing but the Plaintiff/Applicant's counsel was not ready to proceed.
99. It has also emerged that orders as to payment of costs and court adjournment fees issued by this court on 9th May, 2019 against the Plaintiff/Applicant have also not been complied with.
100. It is also important to note that no action was taken by the parties herein to set the suit down for hearing since 9th May, 2019.
101. When the notice to show cause came up for hearing on 6th July, 2022, one of the parties were present in court and upon the court being satisfied that all the parties had been served, proceeded to dismiss the suit for want of prosecution.
102. The Plaintiff/Applicant admits that by the time the suit was dismissed for want of prosecution, he had not taken any action in the matter for a period of over three years.
103. The Plaintiff/Applicant has gone to great lengths in blaming his counsel of record for failing to inform him of the issuance of the Notice to Show Cause why the suit should not be dismissed.
104. The Learned Judge in *Josphat Oginda Sasia Vs Wycliffe Wabwile Kiiya* [2022] eKLR cited with approval the decision in *Edney Adaka Ismail Vs Equity Bank Limited* [2014] eKLR wherein it was held as follows;

“It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter...”

105. The Plaintiff, does not state what active steps he has taken since the year 2019 to ensure that his suit is heard. This is a confirmation of indolence on the part of the Plaintiff and his counsel.
106. The Court of Appeal in *Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR considered the duty that advocates owe to the court:

“From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side.(emphasis is mine). (See. *Halsbury's Laws of England*, 4th Edn, Vol 44 at p 100-101) and also *Re Jones* [1870], 6 Ch. App 497 in which Lord Hatherley communicated the court's expectations this way:

‘... I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned...’



107. In *Ivita Vs. Kyumbu* [1984] eKLR 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...”

108. Before making a determination to dismiss the suit for want of prosecution, the plaintiff was given an opportunity to respond to the notice but failed to do so. Three years is the time that this matter has been in abeyance since last in court. 13 years is the time that this suit has been in court and not been heard. There is no doubt that a three-year delay is prolonged. The rules provide for dismissal when no steps have been taken by parties in over one year. Justice delayed is justice denied and justice is not only for the party who institutes a suit but for all the parties in it.

109. Even when a party approaches the court for setting aside of an order of dismissal of a suit for want of prosecution, it should not be forgotten that there is an opposing party whose interests must also be taken into account. All the defendants have put a strong case against the reinstatement of this suit citing lack of sufficient cause or reason given by the Plaintiff/Applicant.

110. In *Josphat Oginda Sasia Vs Wycliffe Wabwile Kiiya* [2022] eKLR, the learned judge held as follows;

On the other hand, courts should not be used as fora to breed injustice to parties who have been diligent to proceed with their matters but have been met by inexcusable indolence by the adverse parties. It is a rule of law and equity that justice delayed is justice denied however pure it may look. Thus, where a suit is dismissed for want of prosecution, the onus is on the party applying to reverse the order to explain sufficiently to Court as to why his application merits the exercise of the Court’s discretion.

111. The power of the court to set aside orders of dismissing a suit for want of prosecution is discretionary. For the court to exercise its discretion in favour of the applicant, he or she must satisfy the court that there is sufficient reason.

112. Similarly, in *Thathini Development Company Limited Vs Mombasa Water & Sewerage Company & another* [2022] eKLR held as follows:

The discretion of court to set aside an order for dismissal ought to be exercised judiciously. A suit is dismissed for a want of prosecution, means that the parties therein failed to aid court in meeting its Overriding objective. The party seeking to reverse this order must explain sufficiently to court as to why his application is merited and persuade court to exercise its discretion.

113. The depositions by the plaintiff/Applicant do not sufficiently explain the delay in prosecuting this suit for a period of over three years or what steps he took during the three years to follow up with his counsel on instructions that he had given.

The Plaintiff/Applicant solely blames his advocates for failing to inform him of the issuance of the Notice to Show Cause.

114. I find that reinstatement of this suit shall neither aiding the ends of justice nor aid the court in meeting its overriding objectives.



115. All evidence points to inertia on the part of the Plaintiff and this runs contrary to the overriding objectives of this court as set out in the Civil Procedure Act at Section 1A , 1B and 3A and also the overriding objective of the Environment and Land Court as set out in Section 3(1) of the Environment and Land Court Act i.e “just, expeditious, proportionate and accessible resolution of disputes governed by it.”

The constitutional of Kenya, 2010 at Article 159 2(b) provides that courts shall be guided by several principles, one of which is that justice shall not be delayed.

B. Which party shall bear the cost of the preliminary objection?

116. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap.21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

117. This suit was commenced in the year 2010 and has not been prosecuted due to inertia on the part of the Plaintiff/Applicant and his counsel. Prior to the issuance of the Notice to show cause it had not been set down for hearing for 3 years. Taking into account the law and the facts, it is evident that the delay is inordinate and inexcusable.

118. Consequently, I find that the application dated 12th July, 2022 is without merit and is hereby dismissed with costs to the Defendants.

119. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16TH DAY OF FEBRUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Plaintiff/Applicant.

Mr. Orege for the 1st Defendant/Respondent.

No appearance for the 2nd Defendant/Respondent.

No appearance for the 3rd Defendant/Respondent.

