



**Maina v Kimari (Environment & Land Case 44 of 2020)
[2023] KEELC 16725 (KLR) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16725 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 44 OF 2020
JG KEMEI, J
MARCH 29, 2023
IN THE MATTER OF SECTIONS 37 AND 38 OF THE LIMITATION OF
ACTIONS ACT (CAP 22 LAWS OF KENYA)
AND
IN THE MATTER OF LAND TITLE NO. RUIRU/MUGUTHA
BLOCK 1/T.5315**

BETWEEN

LUCY NYAMBURA MAINA PLAINTIFF

AND

EUDIAS WACHERA KIMARI DEFENDANT

RULING

1. The defendant filed the instant Motion dated 5/10/2021 primarily seeking an order for dismissal of the plaintiff's suit for want of prosecution with costs.
2. The Application is based on the grounds that the plaintiff has not taken any action to prosecute her suit and is supported by the affidavit of even date of James Mwaura Ndung'u, the defendant's Counsel.
3. He averred that the plaintiff filed her originating summons on 3/7/2020 which the Defendant responded to vide her replying affidavit sworn on 5/8/2020 and filed on 24/8/2020. That since then the plaintiff has not taken any other step to prosecute her case hence the Application.
4. The Application is contested. The plaintiff swore her replying affidavit on 22/7/2022 and avowed that the Application is incompetent because pleadings have not closed according to Order 2 Rule 13 of [Civil Procedure Rules](#); the defendant has never served the plaintiff with her replying affidavit herein and that even the instant motion was not served upon her. That she has all along been willing to prosecute



her case save for the hindrance of service upon the defendant and the Application does not meet the requisite threshold to grant the orders sought.

5. The Application was canvassed by way of written submissions pursuant to this court's directions taken on 13/10/2022 and 5/12/2022. At the time of writing this Ruling, only the plaintiff had personally filed her submissions dated 13/12/2022.
6. The plaintiff submitted that she filed her suit at the height of the Covid 19 pandemic and it was her belief that the defendant has never responded to her pleadings despite serving her through her husband. Relying on Order 2 Rule 13 *Civil Procedure Rules*, she contended that the close of pleadings is pending and therefore the Orders sought in the motion are premature. She further beseeched the court to grant her an opportunity to prosecute her case in light of article 159 *Constitution of Kenya* and the Oxygen Principles under sections 1A and 1B of the *Civil Procedure Act*.
7. The main issue for determination is whether the Application is merited.
8. The legal provisions for dismissal of a suit for want of prosecution are anchored under Order 17 Rule 2 of the *Civil Procedure Rules* that;

- “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.”

9. The above provision is explicit that the court can move to dismiss a suit for want of prosecution suo moto or upon Application by a party. From the record before court, on 3/7/2020 the plaintiff filed her originating summons dated 1/7/2020. A month later, the defendant filed her Memorandum of Appearance and replying affidavit in objection to the originating summons.
10. The plaintiff argues that her failure to prosecute the matter is due to failure to receive any response to her originating summons and further that pleadings are yet to close. On the first limb, going by the Plaintiff's argument, there are legal provisions under Order 10 *Civil Procedure Rules* on how a Plaintiff ought to move the court if her pleadings are not responded to, if at all. So that failure to respond (which is not the case herein anyway) is not a bar to the plaintiff to prosecute her case. I say this as it is not the case herein because the address in the plaintiff's originating summons is indicated as;

“Lucy Nyambura Maina



Dropping Zone, Thika
Sawa House, 1st Floor, Rm 13
Kwame Nkurumah Road,
Box 20
Kiambu
Tel 0721249107/0735601841
Email: keithwaweru@gmail.com
lucynyamburamaina@gmail.com”

11. The above address is the same one contained in the defendant’s responses.
12. The other averment put forward by the plaintiff is that pleadings are yet to close also fall on quick sand because close of pleadings is not a prerequisite under Order 17 Rule 2 Civil Procedure Rules above.
13. In her submissions, the plaintiff alluded to the heightened Covid 19 pandemic at the time of filing suit which pandemic indeed is a matter of judicial notice. However, the pandemic in itself did not stop judicial hearings as the same were conducted on virtual platforms and in the recent past, courts have opened doors to physical hearings.
14. The totality of the foregoing is that the plaintiff has not proffered a plausible explanation for the inordinate delay in prosecuting her case. Even if there was such explanation, the provisions of Order 17 Rule 2(5) above that a suit stands dismissed after two years where no step has been undertaken automatically apply to this suit. The said provision was introduced to the Civil Procedure Rules via amendment as contained in Legal Notice No. 22 of 2020 dated 26/2/2020. It is now three years and one month since the said amendment was introduced and over two years and 8 months since the instant Originating Summons were filed.
15. Accordingly, the instant suit stands dismissed by operation of law.
16. Each party to bear their own costs.
17. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF MARCH, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Applicant – Absent but served

Ms. Kiarie HB Ndungu Mwaura for Respondent

Court Assistant – Lilian

