



Braeburn Limited v Wangari & another (As Administrators of the Estate of John Kamau) & 2 others (Civil Case 373 of 2003) [2023] KEHC 26201 (KLR) (Civ) (7 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 373 OF 2003

JN NJAGI, J

NOVEMBER 7, 2023

BETWEEN

BRAEBURN LIMITED PLAINTIFF

AND

**LUCY WANGARI & EDWIN MARTIN KAMAU (AS ADMINISTRATORS OF
THE ESTATE OF JOHN KAMAU) 1ST DEFENDANT**

GYPSUM HATCHERIES LIMITED 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

RULING

1. By a Notice of Motion application dated 1st February 2021, the Plaintiff/Applicant seeks to set aside the orders of this court given on the 25th February 2015. By the said orders, the Plaintiff's suit was dismissed for want of prosecution. The Plaintiff also prayed for the suit to be reinstated and for the costs of the application.
2. The application was brought under Order 51(1) and Order 17 of the *Civil Procedure Rules* 2010 and Section 3 and 3A of the *Civil Procedure Act* and all other enabling provisions of the law.
3. It was premised on eight grounds set out on the face of it and the supporting affidavit of Edwin C. Koech.
4. The deponent of the supporting affidavit avers that the Applicant was shocked to learn in December 2020 that the suit herein was dismissed for want of prosecution on the 25th February 2015 which dismissal the applicant and its advocates were not aware of. That the Plaintiff/Applicant's advocates on record were not served with a notice to show cause as required under Order 17 Rule 2 of the *Civil*



Procedure Rules 2010 and therefore were not aware that the suit was coming up for notice to show cause.

5. It was deposed that had the Plaintiff's advocates been notified of the date when the notice to show cause was to be heard, they would have appeared in court to resist the dismissal. That the Plaintiff has always been keen to proceed with the matter to its logical conclusion. That the case had been scheduled for hearing on several occasions but was adjourned by the court for one reason or the other. It was deposed that the court file had been missing for a long time and the court clerk of the advocates on record had not traced the same despite written reminders to the court registry as well as numerous visits to the registry.
6. It was averred that the Applicant has reasonable chance of success in the matter as appears in the pleadings. That the subject matter is land where the property in question was set aside for public utility but unlawfully converted to private property. That it is in the best interest of justice that the suit be reinstated and be allowed to proceed to its logical conclusion. That it is in the interest of justice, equity and fairness that the Plaintiff/Applicant's prayers be granted.
7. The 1st and 2nd Defendants/Respondents filed grounds of opposition to the application dated 1st February 2023 and a list of authorities filed on 2nd February 2023 in which they state that the plaintiff has not met the threshold for reinstating a dismissed suit.
8. The Court directed that the application be canvassed by way of written submissions. The parties filed their respective submissions.

Plaintiff/Applicant's Submissions

9. The Plaintiff submitted that had notice to show cause been issued to them as required by the rules then sufficient cause would have been demonstrated. The Plaintiff cited the case of Joel Pheneas Nyaga & another v Aloysius Nyaga Kanyua & another [2019] eKLR where the court held that dismissal of suit under Order XVI Rule 2(1) of the Civil Procedure Rules which is the equivalent of Order 17 Rule 2 of the Civil Procedure Rules 2010 which requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made.
10. The Plaintiff contends that dismissal of a suit without the notification of the affected party violates the constitutional right to be heard. It relied on the case of Charles Mwaniki Ireri v. ZTE Kenya Limited [2022] eKLR.
11. The Plaintiff submitted that the test to apply when dealing with applications for dismissal of suits for want of prosecution is that prolonged delay alone should not prevent the court from doing justice to all the parties. It relied on the case of Rose Makokha Mteka v Oserian Development Co. Limited [2022] eKLR. In the said case the court further stated that:

“Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”



1st & 2nd Defendants'/Respondents' Submissions

12. According to the Respondents the pertinent issues for determination are:
 - (1) Whether or not this Court has jurisdiction to hear and determine the Plaintiff's notice of motion dated 1st February 2021.
 - (2) Whether or not the application has met the legal threshold for reinstating dismissed suits under Order 17 of the *Civil Procedure Rules* 2010.
 - (3) Whether or not there was inordinate delay in filing the present application.
13. On the first issue, the Respondents contend that this court as currently constituted lacks jurisdiction to hear and determine the matter. It is the respondents' case that the subject matter of the dismissed suit is parcel of land L.R No. 28/11 and the plaint dated 22nd April 2003 includes declaration on ownership, cancellation of title and or restraining the Defendants from any further dealing with the said parcel of land.
14. The Respondents submitted that by virtue of Article 162(2) (b) of *the Constitution* of Kenya 2010 and Section 13(2) of the *Environment and Land Court Act*, the jurisdiction of this matter lies with the Environment and Land Court, which is created pursuant to Article 165 of *the Constitution*.
15. The Respondents argued that the High Court as presently constituted was divested of jurisdiction to hear and determine land matters and that the present motion does not seek to review the Order of 25th February 2015 but instead seeks to have the matter reinstated.
16. They further submitted that the Plaintiff ought to have taken necessary legal steps either with the Chief Justice or the Chief Registrar to have the suit transferred to the appropriate court of competent jurisdiction within the 4 years period, which was available to them. They relied on section 30 of the Environment and *Land Act*, 2011.
17. The Respondents submitted that the court of appeal has settled the law that once it is found that the court lacks jurisdiction to hear and determine a matter, the court, ipso facto, has no power to transfer the same matter to a court of competent jurisdiction. They cited the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016]* eKLR.
18. On the issue of whether the notice of motion has met the legal threshold for reinstating the dismissed suit, the respondents contend that the dismissed suit was inactive for over three years between 2011, when the suit was last cause listed and 2015 when the suit was dismissed for want of prosecution.
19. The respondents further submitted that as per Order 17 Rule 2(1) of the *Civil Procedure Rules*, the service of a Notice to show cause why suit should not be dismissed is not a mandatory requirement. They further opine that the applicant cannot rely on that argument to fault the Court for dismissing the suit and excuse itself from prosecuting the suit. They relied on the case of *Kestem Company Ltd v Ndala Shop Limited & 2 others [2018]* eKLR.
20. In submitting on the factors to be taken into account for purposes of reinstating a suit they cited the case of *Ivita V Kyumba [1984]* KLR 441 where it was held that:

“So 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 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 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 and that justice can still be done to the parties notwithstanding 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.”

21. The Respondents argue that they will be greatly and seriously prejudiced should the Honourable court grant orders sought in the application since there is likelihood of loss of memory, difficulty in tracing witness and retrieval of documents / evidence given the age of the matter. They contend that they will be greatly prejudiced by being put on the defence 8 years after the suit was dismissed and 20 years after the suit was filed.
22. The Respondents argue that the right to fair hearing and access to justice as enshrined in Article 50 and 48 of *the Constitution* of Kenya 2010 are not exclusive to the Plaintiff/Applicant and cuts both ways. They cited the case of *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another [2016]* eKLR where the Court held that:

“Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.”

23. On the issue of whether there was inordinate delay in filing the present notice of motion, the Respondents submitted that the motion was filed on the 17th May 2021 six years after the suit was dismissed and the Applicant has not tendered any plausible or justifiable reason the inordinate and unreasonable delay. They cited the case of *Mary Chelimo v Mutinda Ngari [2014]* eKLR where the court stated that:

“In the present case, it is clear that the applicant had been indolent after filing this suit to warrant its dismissal and thereafter in bringing this application without unreasonable delay. After the suit was dismissed, the applicant did nothing for three years and only filed this application on 15th March 2012 for reinstatement of the suit. I am not prepared to overlook the indiscretion of the applicant in failing first to prosecute her case and secondly upon dismissal, to file her application for reinstatement within a reasonable time. The applicant's conduct in this matter precludes me from exercising my discretion in her favour.”

24. In submitting that justice delayed is justice denied, the Respondents cited the case of *Tirth Construction Limited v Orion Hotels Limited [2020]* eKLR.

Analysis and Determination

25. I have carefully considered the Application as presented and the written submissions made by counsels for both parties. In my view, the twin issues for determination are whether this court has jurisdiction



and whether the Plaintiff/Applicant has made out a case to warrant grant of orders sought for reinstatement of this suit.

Whether this court has jurisdiction to entertain the current application

26. It is not in dispute that the subject matter of the plaint filed on 22nd April 2003 involved land Parcel number LR No 28/11 and the Plaintiff sought declaration on ownership, cancellation of title and an order restraining the Defendants from further dealing with the said piece of land.
27. The Respondents argued that since this court lacks jurisdiction to issue orders as sought in the plaint dated 22nd April 2003 it could not therefore entertain the instant Notice of Motion since the two are conjoined at the hip.
28. The Respondents submitted that by virtue of Article 162 (2)(b) of *the Constitution* of Kenya and Section 13(2) of the *Environment and Land Court Act* of 2011 the jurisdiction to hear and determine this current application lies with the Environment and Land Court and not this court.
29. The Respondents further argued that the Plaintiff should have taken the necessary steps to have the suit transferred to the appropriate court of competent jurisdiction as per section 30 of the *Environment and Land Court Act* 2011.
30. Article 162 of *the Constitution* provides thus:
 162. System of courts
 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a) employment and labour relations; and
 - b) the environment and the use and occupation of, and title to, land.
 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
 4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.
31. Similarly, Section 13 (1) and (2) of the *Environment and Land Court Act* confers upon the court jurisdiction to adjudicate all disputes relating to land. It provides thus:
 13. Jurisdiction of the Court
 - 1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - 2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes-



- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b) relating to land administration and management;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e) any other dispute relating to environment and land
32. In light of the broad jurisdictional framework set out in Article 162 of *the Constitution* and the elaboration spelt out under Section 13 of the *Environment and Land Court Act*, I do agree with the Respondents that the issues in dispute in the initial plaint falls within the jurisdiction of the *Environment and Land Court Act*. However, it is important to take cognizant of the fact that the suit was instituted before the promulgation of *the Constitution* 2010 hence before the establishment of the *Environment and Land Court Act*.
33. The *Environment and Land Court Act* provided for what should happen to matters that were pending before courts through the transitional provision at Section 30 which is drawn as follows:
30. Transitional provisions
- (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.
 - (2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.
34. Pursuant to the provisions of section 30, the Chief Justice issued directions vide Gazette Notice No. 5178 dated 25/7/2014 of which paragraphs 4 and 5 thereof provides that:
- 4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.
 - 5. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge.
35. The hearing of the case under consideration had not commenced before the High Court when it was dismissed for want of prosecution on 25th February 2015. Since the hearing had by then not commenced before the High Court, the High Court, in my view, did not have jurisdiction to deal with the matter. The court that had jurisdiction to deal with the matter at the time was the ELC and therefore the case ought to have been transferred to the ELC.
36. It is therefore my finding that I do not have jurisdiction to determine the application before the court for setting aside the order for dismissal of the suit for want of prosecution. If the court did not have the initial jurisdiction to dismiss the matter for want of prosecution, it cannot, in my view have the



jurisdiction to reinstate the matter. Two wrongs do not make a right. In any case it would be pointless to reinstate the suit for hearing when the court does not have jurisdiction to proceed with the matter.

37. In *Republic v Karisa Chengo & 2 others [2017]* eKLR, the Supreme Court stated that

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

See also the decision of the same court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others*, [2012] eKLR.

38. In the Owners of the Motor Vessel “Lilian S. vs. Caltex Oil (Kenya) Ltd [supra]. Nyarangi, J.A. (as he then was) expressed himself thereon on the subject as follows:

“Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

39. In view of my holding that I have no jurisdiction to deal with the matter, I do not consider it proper to delve into the merits of the application. The issues being sought in the application can only be considered, in my view, by the court with jurisdiction or the Court of Appeal. I deem it proper to down my tools and make no step in regard to the matter. The application dated 1st February 2021 is therefore dismissed with costs to the Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF NOVEMBER 2023

J. N. NJAGI

JUDGE

In the presence of:

Miss Munene HB for Mr. Koech for Plaintiff/Applicant

Miss Bett HB for Mr. Njuguna for 1st and 2nd Defendants/Respondents

30 days Right of Appeal

