



**Total Kenya Ltd & another v Ndito & 23 others & another (Environment & Land Case 302 of 2015) [2023] KEELC 18833 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 18833 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 302 OF 2015  
A KANIARU, J  
MARCH 28, 2023**

**BETWEEN**

**TOTAL KENYA LTD ..... 1<sup>ST</sup> PLAINTIFF**

**TOTAL KENYA LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DANSON G. NDITO & 23 OTHERS ..... 1<sup>ST</sup> DEFENDANT**

**DANSON G. NDITO & 23 OTHERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a motion on notice dated 2/8/22 and filed in court on 12/8/22, the applicant – Total Kenya Ltd – Is Asking The Court To Dismiss The Respondents Counter Claim Dated 9/4/2009 For Want Of Prosecution. The Respondents Are Danson G. Ndito and some 23 others. The application is expressed to be brought under order 17 rule 2 (1 & 3), and order 51 rule 2 of the [Civil Procedure Rules](#), sections 1A, 1B and 3A of the [Civil Procedure Act](#) (Cap. 21) Laws of Kenya and all enabling law. More specifically, the orders sought are as follows:
  1. That the Honourable court be pleased to dismiss the defendants/respondents counter claim dated April 9, 2009 for want of prosecution.
  2. That the costs of the suit and this application be granted to the plaintiff/applicant.
2. The application is anchored on the grounds, inter alia, that the court delivered its ruling dated 16/6/2021 and since then, one year has gone without the respondents taking any step to prosecute the matter; that delay by the defendants in prosecuting the matter is inordinate, inexcusable, and contumelious; that such delay will caused prejudice to the applicant; and that it is only fair and just to bring this litigation to an end.



3. The application came with a supporting affidavit in which the applicant deposed, inter alia, that delay in prosecuting the matter makes it difficult to access its witnesses. The affidavit also provides a narrative that gives some backgrounds and antecedents surrounding the entire suit.
4. The application was responded to vide a replying affidavit filed here on 27/10/2022 and dated 26/10/2022. According to the respondent, it is not true to say that one year has lapsed without any action on their part to move the matter forward. It was deposed that it is true that this court delivered a ruling on 16/6/2021 but the advocate moved the court on 16/6/2022 vide a letter dated 10/6/2022. By that letter, the matter was fixed for mention on 6/10/2022. When the mention date was taken, the applicant's advocates were served on 8/7/2022. The affidavit of service to show the alleged service was then filed in court on 28/7/2022.
5. It was further deposed that even before 16/6/2022, the respondent's advocate was busy trying to sort out with family members of some deceased parties how to go about substitution of those who were deceased. It was said that the case could not have proceeded without sorting out this issue.
6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 2/2/2023. It was reiterated that the respondents have never set down their suit since 16/6/2021. The applicant then pointed out the principles applicable while considering whether a suit should be dismissed for want of prosecution. It was submitted that the court has to consider whether the delay in prosecuting the matter is inordinate and if it is, whether it can be excused. Additionally, the court is required to consider the prejudice that may be caused to the applicant as a result of the delay.
7. To drive the message home, the cases of *Ecobank Ghana Limited v Triton Petroleum Co. Limited & 5 others* [2018] eKLR and *Allen v Sir Alfred Mcalpine & Sons Ltd* [1968] ALL ER 543 were cited and quoted. The court was ultimately asked to dismiss the respondents counter claim.
8. The respondent's submissions were filed on 1/12/2022. The respondent's reiterated much that is contained in their replying affidavit. They also cited and quoted the applicable statutory law, which is order 17 Rule 2(1) and (3) of *Civil Procedures Rules*. It was further submitted that the delay, if any, is not inordinate, inexcusable or contumelious.
9. I have considered the application, the response made, and the rival submissions. It appears clear to me that the applicant's was the first to file a suit against the respondents. The suit was at some point was dismissed. The respondents had filed a defence and a counter-claim to the suit. The counter-claim was left standing when the applicant's suit was dismissed. It is this counter-claim which the respondents are accused of not prosecuting, hence the request and/or application for its dismissal.
10. Before I embark on my appreciation of the facts as I see them in this matter, I find it appropriate or apt to state the applicable law. The statutory anchor for the dismissal asked for in this matter is to be found in order 17 rule 2 (1) (2) and (3) of *Civil Procedure Rules, 2010* which states thus:

“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 the expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule I



11. The courts approach to the issue of dismissal is to be found in a plethora of cases decided by our superior courts. In *Ivita v Kyumbu* [1984] 441, Z.R. Chesoni J (as he then was) made his observation as follows:

“The test to be applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

12. Further, in *Mwangi Nedangi S. Kimenyi v Attorney General & another* [2014] eKLR the court pronounced itself as follows:

“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;

- a. Whether the delay has been intentional or contumelious;
- b. Whether the delay or conduct of the plaintiff amounts to an abuse of the court;
- c. Whether the delay is inordinate and inexcusable;
- d. Whether the delay is one that gives rise to substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or likely to cause serious prejudice to defendant; and
- e. What prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather serving the interests of substantive justice on behalf of all parties.

13. In all this, the over arching consideration by the court is the desire to do justice having regard to all the prevailing circumstances obtaining in a given case. In any action to be taken, I think it is important for the court to consider whether the action is in consonance with the overriding objective in civil proceedings which obligates the courts to aim to achieve the just, expeditious, proportionate and affordable resolution of disputes.

14. Having regard to the applicable law, I now turn to the facts in this matter as I see them. The applicant’s position is that the respondents have never taken action to move the matter forward since 16/6/2021. I have read the court record. It is clear that on 16/6/2022, somebody from the respondent’s side took the mention date of 6/10/2022. And on 6/10/2022 counsel for the respondents is shown to have come to court while another counsel held brief for the applicant’s counsel.

15. There is also a letter in the court file from the respondents’ counsel addressed to the deputy Registrar of this court asking for a mention date. The letter is dated 10/6/2022 and the court received it on 16/11/2022. Further, there is a mention notice filed in court on 28/7/2022 and dated 23/6/2022 addressed to applicant’s advocate informing of the mention date of 6/10/2022. Yet another record shows an affidavit of service sworn by one Albert Murage Kagwanja dated 13/7/2022 and file done 28/7/2022 vouching for service of the mention notice dated 23/6/2022 on the applicant’s counsel.

16. All this in my view shows a reasonably active matter, with some of the action taking place after 16/6/2021, the date after which the application alleges no action has ever been taken. The respondents



have pointed out some of the things that I have already gleaned from the court record. I am therefore in general agreement with the respondents that it is not true to say that the matter has been inactive as alleged by the applicants

17. Besides, an uncontroverted position seems to emerge that some of the respondents are deceased and that counsel for the respondents' has been trying to sort out the issue of their substitution. Anybody familiar with the issue of substitution of deceased parties knows that it involves a legal process that takes time. It therefore follows that where a scenario like that arises, it would be imprudent to treat any arising delay as inordinate or inexcusable. This is so because the process of substitution takes place in a different court and it is not always possible to tell how long it might take to complete the process.
18. Faced with all this, it is obvious that I should be reluctant to hold that the merits of the applicant's application have been demonstrated. My view is that the applicant has mis-apprehended some facts and that overall, the circumstances prevailing do not warrant dismissal for want of prosecution in this matter. I therefore decline to allow the application. It is an application for dismissal and I hereby dismiss it but with no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28<sup>TH</sup> DAY OF MARCH, 2023.**

**A.K. KANIARU**

**JUDGE**

03.2023

