



**Kiema v CM, Milimani Commercial Court & another; Wambua & another  
(Interested Parties) (Petition 293 of 2019) [2024] KEHC 10400 (KLR)  
(Constitutional and Human Rights) (26 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10400 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 293 OF 2019**

**LN MUGAMBI, J**

**AUGUST 26, 2024**

**BETWEEN**

**BENSON KIEMA ..... PETITIONER**

**AND**

**CM, MILIMANI COMMERCIAL COURT ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**DOMINIC WAMBUA ..... INTERESTED PARTY**

**PHILIP KIEMA ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. By a Notice of Motion application dated 15<sup>th</sup> February 2022 supported by an affidavit of even date, the petitioner herein seeks orders that:
  - i. This Honourable Court be pleased to set aside the orders dated 1<sup>st</sup> November 2021 dismissing this suit for want of prosecution.
  - ii. Costs of this application be in the cause.
2. The respondents and interested parties did not file any responses and submissions to this application.



### **Petitioner's Case**

3. The petitioner asserts that the Notice to Show Cause dated 14<sup>th</sup> July 2021, was not served on him or his advocate. Therefore, the allegation otherwise is said to be untrue. Furthermore, that there is no affidavit of service to this effect.
4. He additionally states that the Court on 4<sup>th</sup> November 2019 directed that the parties file their submissions which he complied with. The only pending matter at that juncture is said to have been highlighting of the submissions before the judgment date was issued. It is asserted that despite the respondents appearing in Court on various dates, they have failed to serve him with their responses and submissions.
5. He depones that following the COVID 19 pandemic, he had challenges thereafter keeping up and being informed of the hearing dates. His Advocate's attempt to contact the registry for these dates was also in vain. Consequently, he argues that the purported delay in prosecuting this suit cannot be attributed to him.
6. According to him, the respondents are not likely to suffer any prejudice if the matter proceeds. He emphasizes likewise that allowing the application will be in line with the dictates of Article 159(d) of the Constitution.

### **Petitioner's Submissions**

7. Osoro Omwoyo and Company Advocates filed submissions dated 16<sup>th</sup> March 2023. These submissions reiterated and emphasized the petitioner's averments in the affidavit dated 15<sup>th</sup> February 2022.

### **Analysis and Determination**

8. The issue that arises for determination is:

Whether this Court should allow the petitioner's application for reinstatement of the Petition
9. The legal principles upon which a constitutional petition ought to be dismissed for want of prosecution and further setting aside of such an order where a party applies are not expressly provided in the Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Court of Appeal in cases that present such a lacuna in Karl Webner Claasen v Commissioner of Lands & 4 others (2019) eKLR guided as follows:

“...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution.”
10. The Civil Procedure Rules, 2010 allows such an application under Order 12, Rule 7:

Setting aside judgment or dismissal

Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.



11. On varying an order for a dismissed suit, the Court in *Hardy Development Company Ltd v Hamisi Shee* (2021) eKLR opined as follows:

“By virtue of Order 12 Rule 7 this Court has discretion to set aside any orders upon terms that it considers just. The principles that guide the Court in its exercise of discretion are set out in the case of *Patel v East Africa Handling Services Limited* (1974) E.A where the Court stated that in setting aside judgements/orders the main concern for the Court is to do justice to the parties.

In the case of *Shah v Mbogo & another* (1967) E.A 470 the Court of Appeal for Eastern African held;

“applying the principle that the Court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”.

12. On notice to show cause which was adopted by the Court in the instant case, the *Civil Procedure Rules, 2010* under Order 17 Rule 1 & 2 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.

13. The legal principles upon which Courts make findings on dismissal of a suit for want of prosecution were summarized in *George Gatere Kibata v George Kuria Mwaura & another* (2017) eKLR as follows:

“8. The legal framework on dismissal of suit for want of prosecution is found in Order 17 Rule 2 which provides as follows: -

“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.”



My understanding of the framework contained in Order 17 Rule 2 is that a court may suo moto dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.

9. Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita v Kyumbu* (1984) KLR 441 where it is summarized as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

10. In *Mwangi S. Kimenyi v Attorney General and another*, Civil Suit Misc. No 720 of 2009, the court restated the test as follows: -

When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

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.”

14. Likewise, the Court in *Naftali Opondo Onyango v National Bank of Kenya* (2005) eKLR, while quoting a Court of Appeal decision on the principles to be considered in an application for dismissal



for want of prosecution in *Allan v Sir Alfred McAlphine and Sons Ltd* (1968) 1 ALL E.R. 543 noted that:

“The Defendant must show:

- i. That there has been inordinate delay... What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.
- ii) That this inordinate delay is inexcusable. As a rule until a credible excuse is made out the natural inference would be that it is inexcusable.
- iii) That the Defendants are likely to be seriously prejudiced by the delay. This may prejudice at the trial of issues between themselves and the Plaintiff or between each other or between themselves and third parties. In addition to any inference that may properly be drawn from the delay itself, prejudice can sometimes be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial.”

15. Equally, it is worthy to be reminded that the decision to dismiss a suit for want of prosecution is based on the Court’s discretion after consideration of the facts of the case. This was appreciated in *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another* (2016) eKLR where the Court held as follows:

- “ 11. 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. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:

“The test 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 plaintiff’s 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.”

16. The Petition dated 24/7/2019 was filed in Court on even date together with a certificate of urgency, a notice of motion and a supporting affidavit Benson Kiema sworn on the same date. On 25/7/2019, the matter went before Justice Makau who certified the application urgent and directed service and parties to go back to Court on 31/7/2019. On 31/7/2019; the Court among others granted prayer 2 of the application and fixed the matter for 4/11/2019 to confirm compliance. On 4/11/2019; the Respondents and interested parties were each granted 21 days to file their responses after which the Petitioner was to have 14 days to put in his submissions. The Respondents and interested parties were



to equally have 14 days from date of service to file submissions in reply. The matter was fixed for 3/3/2020. Come 3<sup>rd</sup> March, 2020; the 2<sup>nd</sup> Respondent sought and was granted adjournment 14 days to file a response while Mr. Osoro was granted leave to file a supplementary affidavit.

17. The matter was fixed for 6/5/2020. None of the parties appeared including the Petitioner. The same case applies on the next date which was 29/6/2020. On 13/10/2020; only the 2<sup>nd</sup> Respondent and 1<sup>st</sup> intended Interested Party were represented. The Petitioner and the 2<sup>nd</sup> Interested Party were a no show. The matter was fixed for 27/1/2021 again, the Petitioner did not attend. Only the 2<sup>nd</sup> Respondent was represented. On 14/7/2021, again only the 2<sup>nd</sup> Respondent was represented. The Court noted that the last time the Petitioner was before Court was 3/3/2020 and directed that a Notice to Show Cause be issued for the matter to be mentioned on 1/11/2021.
18. On 1/11/2021; the Petitioner did not show up, indeed, no other party showed up apart from the 2<sup>nd</sup> Respondent. The Court (Makau J) observed that the last date the Petitioner had been in Court was 3/3/2020. That was a period of almost one and half years without ever making any Court appearance. It thus found that the Petitioner had lost interest and dismissed the matter for want of prosecution based on the Notice to Show Cause dated 14/7/2021.
19. It is after the dismissal that the instant application for reinstatement was filed in which the Petitioner gave the reasons already adverted to. I have carefully considered the reasons advanced by the Petitioner/ Applicant which among others include that the Petitioner was not served with the hearing notices 29/10/2020; 13/10/2020; 18/10/2020, 27/1/2020, 14/1/2021 and 1/11/2021. I do not think this reason is plausible. It was the Petitioner who filed this Petition under certificate of urgency seeking affirmative relief yet for one and half years he sat on his laurels without initiating any activity in this case. He expected the parties that he had sued would be the ones to take the lead and serve him with hearing notices. This in my view is demonstrative on willful apathy of one's own suit. The Petitioner cannot thus pretend after dismissal that he was unaware of what was going on in the matter. There was a complete lack of personal initiative. There were no personal challenges or circumstances like illness proved that were beyond his control. Article 159 (1) (b) requires that in exercising judicial authority, Courts shall ensure justice is not delayed. Through the petitioner's conduct which has been reviewed, the Petitioner failed to assist the Court to meet this constitutional objective. I am not satisfied that the Petitioner has provided cogent reasons to persuade this Court to reinstate this Petition given the immense disinterest depicted and which actually drove this Court to dismiss the Petition.
20. The application is thus declined and consequently dismissed. The file is hereby ordered closed.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF AUGUST, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

