



**Bandari v County Government of Kilifi & 4 others (Environment & Land  
Petition 22 of 2022) [2023] KEELC 16374 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16374 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 22 OF 2022  
NA MATHEKA, J  
MARCH 22, 2023**

**BETWEEN**

**MELVIN CHIRO BANDARI ..... PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF KILIFI ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF LANDS ..... 2<sup>ND</sup> RESPONDENT**

**MTWAPA MAIN BEACH MANAGEMENT UNION (BMU) .. 3<sup>RD</sup> RESPONDENT**

**HON. SAMMY NDAGO MCA ..... 4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The application is dated November 16, 2022 and brought under Section 3A and 63 (c) of the [Civil Procedure Act](#) Order 51 of the [Civil Procedure Rule](#) seeking the following orders;
  1. That this Honourable Court be pleased to certify this application as urgent and be heard *Ex-parte* in the first instance.
  1. That this Honourable Court be pleased to set aside the orders dismissing this suit for want of prosecution.
  2. That this Honourable Court. be pleased to reinstate this suit.
  3. That the costs of this application be in the cause.
2. The application is based on the following grounds and annexed affidavit of Paul Walter Magolo. That the Petitioner/Applicant filed this suit herein on the September 25, 2020 against the Respondents. That on the October 5, 2022, this matter was coming up for mention when it was dismissed for



want of prosecution before the court could hear and make a determination as to the rights of parties herein. That the Applicant is keen and/or desirous to have this matter heard and determined. That the Applicant stands to suffer substantial loss and damage, unless the orders and proceedings dismissing this suit for want of prosecution are set aside. That the Respondent will not be prejudiced if the orders sought are granted as they will have the opportunity to prosecute their position. That it is therefore within the interest of justice and equity that the orders sought are granted.

3. The Respondent opposed the application and stated that the application is misconceived, frivolous, vexatious and an abuse of the court process. That the application has merely been brought as an afterthought and offends order 17 rule 2 (3) of the *Civil Procedure Rules*. That the Applicant has not been desirous to pursue the matter to its finality. That after the dismissal it took the Applicant over one month to file the current application. That the inordinate delay by the applicant has not been satisfactorily explained. That equity aids the vigilant and not the indolent.
4. This court has considered the application and the submissions therein. In the case of *Mwangi S Kimenyi v Attorney General and Another*, Civil Suit Misc No 720 of 2009, the court restated the test as follows:-
  1. 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.
  2. 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."
5. In the case of *Ivita v Kyumbu* [1984] KLR 441 the court held as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can Justice be done despite such delay”.
6. I have perused the court record and find that the Petitioner/Applicant filed and this suit herein on the September 25, 2020 against the Respondents. That on the October 5, 2022, this matter was coming up for filing of submissions and it was dismissed for want of prosecution as the final adjournment was given on July 21, 2022. The Respondent stated that the Applicant has not been desirous to pursue the matter to its finality. Be that as it may I find that this application was filed on November 17, 2022, slightly one month after the said dismissal. This delay is reasonable and not inordinate. The Petitioner’s advocate sated that it was due to a blackout in their building hence was not available when the matter was called out. I find the excuse acceptable as the matter was coming up for filing of submissions. For these reasons I find this application is merited and I grant it as prayed.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MARCH 2023.**



**N.A. MATHEKA**  
**JUDGE**

