



**Some & 4 others v Attorney General & others & 6 others (Anti-Corruption and Economic Crime Petition 07 of 2021) [2023] KEHC 26975 (KLR) (Anti-Corruption and Economic Crimes) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIME PETITION 07 OF 2021  
EN MAINA, J  
DECEMBER 20, 2023**

**BETWEEN**

**DAVID BARNO SOME ..... 1<sup>ST</sup> PETITIONER  
ESTHER CHEBET SOME ..... 2<sup>ND</sup> PETITIONER  
DASAHE INVESTMENTS LTD ..... 3<sup>RD</sup> PETITIONER  
KEIBUKWO INVESTMENT LTD ..... 4<sup>TH</sup> PETITIONER  
OLOMOTTI ESTATE LTD ..... 5<sup>TH</sup> PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL & OTHERS ..... 1<sup>ST</sup> RESPONDENT  
THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> RESPONDENT  
THE DIRECTOR OF PUBLIC PROSECUTIONS ..... 4<sup>TH</sup> RESPONDENT  
THE CHIEF MAGISTRATE ANTI-CORRUPTION & ECONOMIC CRIMES  
COURT (TRIAL MAGISTRATE IN CASE NO 33 OF 2018) ... 5<sup>TH</sup> RESPONDENT  
THE KENYA RAILWAY CORPORATION ..... 6<sup>TH</sup> RESPONDENT  
ETHICS & ANTI-CORRUPTION COMMISSION ..... 7<sup>TH</sup> RESPONDENT**



## RULING

1. In the Notice of Motion dated 28<sup>th</sup> September, 2023 the 6<sup>th</sup> Respondent/Applicant seeks an order for the dismissal of this petition with costs for want of prosecution.
2. The gist of the application is that by the time of bringing the application it was over one year since the matter was last in court for a ruling which was delivered on 31<sup>st</sup> May 2022; that the petitioners had not made any efforts to list the matter for hearing; that the continued pendency of the petition in absence of prosecution is unfair and unjust to other parties and more so the 6<sup>th</sup> Respondent and that it is in the interest of justice that litigation must come to an end.
3. The application is supported by the affidavit of Fidel Muisyo, Advocate, sworn on 28<sup>th</sup> September, 2023 in which he reiterates the grounds for the application.
4. The Petitioners/Respondents did not file any response to the application but upon giving directions that the application would be canvassed through written submissions and directing that those directions be served upon Counsel for the Petitioners/Respondents as they were not in court, Counsel for the Petitioners/Respondents filed written submissions.
5. I have carefully considered the application; the grounds on its face thereof and in the supporting affidavit; the rival written submissions; the cases cited by learned Counsel for the parties and the law.
6. Prior to the filing of this application this matter was last in court on 31<sup>st</sup> May 2022 when a ruling on two applications, one dated 21<sup>st</sup> October, 2020 which sought conservatory orders and the other dated 4<sup>th</sup> March 2021 which sought leave to amend the Petition were delivered. The file seems to have been taken back to the registry with no action being taken until 24/10/2023 when the Hon. Deputy Registrar placed it before me for directions in respect to the present application.
7. Whether or not to dismiss a suit for want of prosecution is in the discretion of the court. Order 17 Rule 2 (1) and (3) of the [Civil Procedure Rules](#) under which this application is expressed to be made states:-

“2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]

- (1) in any suit 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) .....
- (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

8. The principles which a court should consider when deciding whether or not to grant the application are now well settled. In the case of [Ecobank Ghana Limited v Triton Petroleum Co. Limited & 5 others](#) [2018]e KLR the Court of Appeal paraphrased it as follows:-

“21. ....it is well settled that in considering whether to dismiss a suit for want of prosecution the courts will consider the following guiding principles; whether the delay is inordinate, and if it is, whether the delay can be excused and lastly,



whether either party is likely to be prejudiced as a result of the delay or that a fair trial is not possible as a result of the delay.” (underline mine).

9. In this case, the explanation given by the Petitioners/Respondents for failing to take steps to advance the petition is that they were actively embroiled in the hearing of Nairobi Chief Magistrates Anti-Corruption Case No. 33 of 2018 Republic v Prof Abdalla Swazuri Mohammed & Others wherein they (Petitioners) are accused persons. They contend that, in any event, the last action in the matter having been on 31<sup>st</sup> May 2022, time in respect to this application, ought to be reckoned from 31<sup>st</sup> May 2023; that the delay is excusable and that that as the 6<sup>th</sup> Respondent/Applicant has not demonstrated what prejudice she stands to suffer as a result of the delay then this application has no merit and it ought to be dismissed and the Petition be heard on the merits.
10. The argument that the delay in prosecuting this Petition cannot be said to be inordinate given that it has been only a year since the last action was taken and because this application was brought only four months into the delay cannot hold. Order 17 Rule 2 of the Civil Procedure Rules ought not to be interpreted to mean that it is acceptable for a party to file a matter in court and park it there for one year without a step taken. Sections 1A and 1B of the Civil Procedure Act were introduced so as to oblige parties and their Counsel to take keen interest in the matters they bring to court and to ensure that they progress those matters expeditiously. This Petition is no exception.
11. Be that as it may the Petitioners/Respondents have explained that they got too engrossed in the criminal cases filed against them that they forgot about this Petition. I am inclined to treat that as a plausible explanation in light of the fact that the Registry also neglected the Petition by allowing it to lie there for a year without a date. Had the Registry brought to the attention of the Deputy Registrar or the Judge that the Petition did not have a date then the scenario would have been different. It is common knowledge that, in this age and era, the responsibility to manage cases which includes giving dates, lies with the court as opposed to previously when that was left to the parties and their Counsel. The court Registry is therefore as much to blame for the delay as are the Petitioners/Respondents and for that reason this court is inclined to rule in favour of the Petitioners/Respondents. This is more especially because the 6<sup>th</sup> Respondent has not demonstrated to the satisfaction of this court the prejudice she is likely to suffer were the petition to be heard on its merits.
12. In the premises the prayer to dismiss the petition for want of prosecution is declined and in its place this court directs that the Respondents in the Petition shall now have 14 days from today to file and serve their responses whereupon the Petitioners shall have 14 days to file a supplementary affidavit if need be. The Petition shall thereafter be mentioned on 1<sup>st</sup> February 2024 for directions on the manner of disposal of the Petition.
13. While costs follow the event the order that best commends itself to me in this case is that each party shall bear their own costs.

Orders according.

**SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF DECEMBER, 2023.**

**E.N. Maina**

**JUDGE**

20/12/2023

