



**Simkan Investments Limited v Toza & 3 others (Environment & Land  
Case 348 of 2009) [2023] KEELC 19002 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19002 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 348 OF 2009  
NA MATHEKA, J  
JULY 26, 2023**

**BETWEEN**

**SIMKAN INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**ALI SALIM TOZA ..... 1<sup>ST</sup> DEFENDANT**

**JUMA SALIM TOZA ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

- 1 The application is dated January 24, 2023 and is brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), order 12, rules 6 and 7 of the [Civil Procedure Rules, 2010](#) seeking the following orders;
  1. This suit be transferred to the Environment and Land Court at Kwale for consideration of the 1<sup>st</sup> and 2<sup>nd</sup> defendants' notice of motion dated January 24, 2023 and for directions on further proceedings.
  2. The dismissal order dated November 9, 2015 be set aside and the suit be reinstated for hearing.
  3. Costs of the application be provided for.
- 2 It is based on the grounds that this suit was filed at the High Court of Kenya at Mombasa in 2009 before the establishment of the Environment and Land Court. The subject matter of the suit is a parcel of land known as LR No 14897 CR 19582 which is situated in Tiwi Beach area within Kwale District (suit property). There is an Environment and Land Court which sits at Kwale. This is the court with the territorial jurisdiction to hear and determine any dispute relating to the land. The suit was dismissed on November 9, 2015 for nonattendance by the parties. The 1<sup>st</sup> and 2<sup>nd</sup> defendants have always been



desirous of having this dispute settled and have actively pursued the matter over the years. Between 2014 and 2019, the National Land Commission (the NLC) was seized of the dispute and resolved it in favour of the and 2<sup>nd</sup> Defendants. The NLC recommended that the title held by the plaintiff be revoked and the suit land revert back to the 1<sup>st</sup> and 2<sup>nd</sup> defendant. In 2017, the 2<sup>nd</sup> defendant suffered a stroke and up to now he is yet to recover fully. Between 2017 and 2020, the 1<sup>st</sup> defendant could not actively pursue this court case in light of his brother's sickness. In January 2021, the 1<sup>st</sup> Defendant got involved in a road accident which necessitated him to undergo surgery in October 2021. Up to late 2022, the 1<sup>st</sup> defendant was not well enough to actively pursue this court case. From 2017 to late 2022, the Toza family channelled all their resources, both material, emotional, financial and otherwise, towards the health and wellbeing of the 1<sup>st</sup> and 2<sup>nd</sup> defendants and therefore had no means to engage an advocate to pursue this case on their behalf. The 1<sup>st</sup> and 2<sup>nd</sup> defendants regained their health substantially in late 2022 and that's when they decided to approach their advocates now on record for assistance. The dispute concerning the suit property is still unresolved by this court and if left unresolved it will lead to a great historical injustice and may lead to a breach of the peace.

3 This court has considered the application and the submissions therein. In the case of *Mwangi S Kimenyi vs 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."

4 In the case of *Ivita vs 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".

5 I have perused the court record and find that on the November 9, 2011 the matter came up in court and there was no appearance from the parties and the court dismissed the suit. This application was filed in court in February 2023. This is over ten years after the dismissal. I find that the applicant is guilty of laches. The 1<sup>st</sup> and 2<sup>nd</sup> defendants stated that they have always been desirous of having this dispute settled and have actively pursued the matter over the years. Between 2014 and 2019, the National Land Commission (the NLC) was seized of the dispute and resolved it in favour of the and 2<sup>nd</sup> defendants. In 2017, the 2<sup>nd</sup> defendant suffered a stroke- and the 1<sup>st</sup> defendant could not actively pursue this court case in light of his brother's sickness. In January 2021, the 1<sup>st</sup> defendant got involved in a road accident



which necessitated him to undergo surgery in October 2021. Up to late 2022, the 1<sup>st</sup> defendant was not well enough to actively pursue this court case. Be that as it may, it is on record that there was Counsel on record for the applicants who should have been following up on the matter. I find that the reasons given for their absence inexcusable and this application was brought after prolonged delay. I find this application is unmerited and I dismiss it with no orders as to costs.

6 It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JULY 2023.**

**N.A. MATHEKA**

**JUDGE**

