



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 207 OF 2012**

EO (Minor suing through the next friend and  
father HESBON OTIENO).....1<sup>ST</sup> PLAINTIFF

DN (Minor suing through  
the next friend and mother ROSE MUTHONI CHEGE).....2<sup>ND</sup> PLAINTIFF

RUTH NJOROGE CHEGE.....3<sup>RD</sup> PLAINTIFF

NAHASON KIVUVA.....4<sup>TH</sup> PLAINTIFF

MARION WACEKE MBURU.....5<sup>TH</sup> PLAINTIFF

JOSEPH MWAI.....6<sup>TH</sup> PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY KPC LIMITED.....1<sup>ST</sup> DEFENDANT

CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT

NATIONAL ENVIRONMENTAL  
MANAGEMENT AUTHORITY.....3<sup>RD</sup> DEFENDANT

CHINA PETROLEUM PIPELINE BUREAU.....4<sup>TH</sup> DEFENDANT

-AND-

STEVE KARANI.....1<sup>ST</sup> INTERESTED PARTY

JAMES NJERU MWANIKI.....2<sup>ND</sup> INTERESTED PARTY

DEDAN WAITHAKA WAMBUI.....3<sup>RD</sup> INTERESTED PARTY

KEZIAH WANJIRU GITHINJI.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT

STEPHEN KOMU.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT

DANIEL MUNYIRI KAMAU & FRANCIS KAMAU

(Suing as legal representative of the Estate of

LUCY NYAWIRA KINYUA.....6<sup>TH</sup> INTERESTED PARTY/APPLICANT

## RULING

### INTRODUCTION

1. The 1<sup>st</sup> Defendant's Notice of Motion application dated 3<sup>rd</sup> May 2018 and filed on 10<sup>th</sup> May 2018 was brought pursuant to the provisions of Section 1A and 3A of the Civil Procedure Act, Cap 21 (Laws of Kenya), Order 17 Rule 2(3) and Order 51 Rule 1 of the Civil Procedure Rules. It sought the following orders:-

**1. THAT the Plaintiff's suit be dismissed for want of prosecution.**

**2. THAT costs of and incidental to this suit and the application be borne by the Plaintiff.**

2. Its Written Submissions were dated and filed on 26<sup>th</sup> September 2018 while those of the Plaintiffs were dated 12<sup>th</sup> October 2018 and filed on 16<sup>th</sup> October 2018.

3. The 3<sup>rd</sup> party was not opposed to the present application and hence, it did not file its Written Submissions. The Interested Parties adopted the Plaintiff's Written Submissions.

4. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

### THE 1<sup>ST</sup> DEFENDANT'S CASE

5. The 1<sup>st</sup> Defendant's present application was supported by the Affidavit of its Company Secretary, Gloria Khafafa that was sworn on 3<sup>rd</sup> May 2018.

6. It stated that after several preliminary objections, on 28<sup>th</sup> September 2015, parties were directed to comply with the Pre-Trial directions within sixty (60) days. When the matter came up in court on 17<sup>th</sup> March 2016, parties had not fully complied with the directions and the Deputy Registrar directed that they take a mention date at the Registry on a priority basis.

7. It stated that two (2) years had elapsed since the Plaintiffs set down the suit for hearing, which it said, was evidence that they were no longer keen in prosecuting the matter. It further contended that the inordinate delay was prejudicial to it.

8. It therefore urged this court to allow its application as prayed.

### THE PLAINTIFFS' CASE

9. In response to the said application, on 20<sup>th</sup> June 2018, the 6<sup>th</sup> Plaintiff herein Joseph Mwai, who was the Chairman of Sinai Victims Group herein swore the Replying Affidavit on his own behalf and on behalf of the other Plaintiffs herein. It was filed on 21<sup>st</sup> June 2019.

10. The Plaintiffs stated that the suit herein was a representative suit that involved quite a number of persons who were affected by the Sinai Fire Tragedy and that they were yet to get justice as the Defendant and the Third Party had blamed each other for the tragedy.

11. They stated that they filed their Supplementary List of Documents on 28<sup>th</sup> January 2016 and added that they had sought assistance to secure documentation from the Government but that their efforts had been frustrated.

12. It was their contention that they were ready to be heard if given a date and asserted that the present application was unwarranted.

13. They therefore asked this court to dismiss the present application with costs.

### LEGAL ANALYSIS

14. The 1<sup>st</sup> Defendant herein submitted that Order 17 Rule 2 of the Civil Procedure Rule entitles a party to apply for the dismissal of a suit for want of prosecution in the event that no step had been taken by either party for one (1) year.

15. It also placed reliance on the case of **Allan vs Sir Alfred McAlphine & Sons Ltd [1968] 1 ALL ER 543** which was cited in **Salkar Contractors Ltd vs Kenya Petroleum Refineries Ltd [2004] eKLR** where Salmon J set out the threshold to be met by an applicant in an application brought under Order 17 (sic). Procedure Rules.

16. It was held that an applicant must show:-

1. That there was inordinate delay;
2. That the inordinate delay was inexcusable;
3. That he was likely to be seriously prejudiced by the delay.

17. It was categorical that the Plaintiffs had not given any explanation for the inordinate delay in prosecuting the matter from 17<sup>th</sup> March 2016 to the time of filing the present application in 2018. It also stated that they had not demonstrated that they had sought to obtain documents and further, that the 3<sup>rd</sup> Party was not a co-Plaintiff and hence it had no obligation to prosecute case on their behalf.

18. It was also its further submission that nothing would have been easier than for the Interested Parties whose cases had been consolidated with the case herein to have prosecuted their individual cases if they had felt that the Plaintiffs herein had been slow in prosecuting the case herein.

19. It was emphatic that the present case arose in 2011 which was more than seven (7) years ago and that the delay was greatly inconveniencing them due to witness unavailability and potential inaccuracy of the testimony due to passage of time.

20. In this regard, they referred this court to the case of **Mobile Kitale Services vs Mobil Oil Kenya Ltd & Another[2004] eKLR** where Warsame J (as he then was) cited the case of **Nilan vs Patel [1969] EA page 341** where it was held that:-

**“...It is the duty of the Plaintiff’s advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died. . . documents may have been mislaid, lost, destroyed and the memory tends to fade.”**

21. On their part, the Plaintiffs also relied on the case of **Allan vs Sir Alfred McAlphine & Sons Ltd** (Supra) that was also cited in the case of **Naftali Onyango vs National Bank of Kenya [2005] eKLR** where the threshold of what an applicant must meet before his application seeking dismissal of a suit for want of prosecution could be allowed was set out.

22. They further relied on the case of **Ivita vs Kyumbu [1975] eKLR** where it was held that:-

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

23. It was their prayer that the suit herein should not be dismissed but contended that instead, this court should order that the same be set down for hearing at the earliest available time.

24. A perusal of the court file showed that on 28<sup>th</sup> September 2018, Mbogholi Msagha J stayed several suits pending hearing and determination of the suit herein, which was selected as a test case on liability of all suits arising out of a fire that broke out in Sinai Slums on 12<sup>th</sup> September 2012. He directed that parties comply with Pre-trial procedurals within sixty (60) days from 28<sup>th</sup> September 2015. The matter was to be mentioned on 30<sup>th</sup> November 2015 to confirm compliance.

25. On 30<sup>th</sup> November 2015, counsel for the Plaintiffs informed the said learned judge that they had complied but that the other parties had not done so. He therefore directed the parties to appear before the Deputy Registrar for purposes of confirming compliance.

26. Parties appeared before the Deputy Registrar on 28<sup>th</sup> January 2016 and on 17<sup>th</sup> March 2019. On 28<sup>th</sup> January 2016, the Plaintiffs’ counsel informed her that they had since filed a Supplementary List of Documents but that service had not been effected upon the Interested Parties. The said advocates did not appear to have attended court on 17<sup>th</sup> March 2016 when the 1<sup>st</sup> Defendant and 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Interested Parties sought for more time to comply with the Pre-Trial directions.

27. Notably, no other action was taken by the Plaintiffs until 25<sup>th</sup> June 2018 when the present application was listed for hearing.

28. After carefully going through the record, this court agreed with the 1<sup>st</sup> Defendant that there was absolutely no or good reason that had been advanced by the Plaintiffs why they had not taken any action since 17<sup>th</sup> March 2016 as by that time, they had indicated that they had already complied with the court’s directions on Pre-Trial. The responsibility lay with them to fix a hearing date irrespective of whether or not the other parties had complied with the same. It was not for them to wait until the other parties complied.

29. Going further, this court did not see any documentation to prove that they had been unable to obtain documents from Government offices. They appeared to have sat on their laurels and could not be waited on until they got their documentation.

30. Indeed, a case belongs to a plaintiff. It is his responsibility to progress his matter to ensure that the same is concluded expeditiously as is contemplated in Section 1A, 1B and 3A of the Civil Procedure Rules and Article 159 (2) (c) of the Constitution of Kenya. A plaintiff cannot move at the pace of a defendant. Indeed, a defendant is not obligated to file any witness statements or file any list and bundle of documents. In other words, a defendant can opt not to call any evidence. The onus therefore lies with a plaintiff to comply with courts’ directions in respect of progressing a matter for hearing.

31. A plaintiff who takes advantage of the failure of a defendant to comply with a court order and sits on his laurels does himself great disservice and risks his matter being dismissed for failure to prosecute his case.

32. This is what happened in this case. The Plaintiffs purported to equate themselves to the omission of the 1<sup>st</sup> Defendant not to file their documentation much to their detriment. This court therefore determined that there had been inordinate delay on the Plaintiffs part in prosecuting their matter.

33. It must be appreciated that the incident herein occurred in 2011. It is now eight (8) years since the said occurrence. As was rightly pointed out by the 1<sup>st</sup> Defendant, there were high chances of their witnesses leaving their employ and witnesses forgetting what exactly transpired eight (8) years ago as memories fade with time.

34. This court thus agreed with the 1<sup>st</sup> Defendant that the delay had great potential to prejudice them. The Sword of Damocles has continued to hang over their heads for over eight (8) years without knowing when the case against them will come to an end.

35. Bearing in mind that the Plaintiffs had indicated that they had filed their Supplementary List of Documents and were ready to proceed with the hearing, it was not clear why they had not fixed a hearing date. The court did not need to direct that a hearing be taken. It was their case and their advocates were obligated by law to prosecute their case with utmost dispatch as provided for in Section 1A (1) of the Civil Procedure Acts that stipulates:-

**“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”**

36. Section 1A (3) of the Civil Procedure Act further provides that:-

**“A party to civil proceedings or an advocate for such a party is under a duty**

**to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”**

37. Having said so, proceedings in other suits were stayed pending the hearing and determination of the test suit herein. Dismissal of the same would leave all the other cases in limbo and thus prejudice many people who were not at fault for the lack of prosecution of the case herein.

38. This court took judicial notice that the 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Interested Parties filed a Notice of Motion application dated 26<sup>th</sup> March 2019 on 28<sup>th</sup> March 2019 seeking the setting aside and/or vacating of the orders of Mbogholi Msagha J that were issued on 28<sup>th</sup> September 2015. They appear to have been awoken from their slumber by the 1<sup>st</sup> Defendant. However, they should be given an opportunity to prosecute their application.

39. Accordingly, having considered the parties' Written Submissions and the case law that they each relied upon, this court found and held that although the delay by the Plaintiffs in prosecuting this case had been inordinate, inexcusable and it had the potential of prejudicing the 1<sup>st</sup> Defendant, it was in the interests of justice that the Plaintiffs be given another chance to prosecute their case.

#### **DISPOSITION**

40. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> Defendant's Notice of Motion application dated 3<sup>rd</sup> May 2018 and filed on 10<sup>th</sup> May 2018 was not allowed. Costs shall be in the cause.

41. The Plaintiffs are hereby directed to take steps to prosecute the case herein without any further delay failing which the Defendants and/or 3<sup>rd</sup> party will be at liberty to seek appropriate orders from the court to safeguard their interests.

42. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of July 2019**

**J. KAMAU**

**JUDGE**