



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PETITION NO. 7 OF 2018**

**ZAINAB ABDUL LATIF VAIANI AND**

**ZAINAB ABDUL LATIF VAIANI AS TRUSTEE AND**

**LEGAL GUARDIAN OF UNEEZA ABDUL LATIF YUSUF.....PETITIONER**

**VERSUS**

**THE KENYA URBAN ROADS AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**THE MINISTRY OF ROADS.....2<sup>ND</sup> RESPONDENT**

**RULING**

The application is dated 27<sup>th</sup> April 2021 and is brought under Order 51 Rule 1 and Order 17 Rule 2(3) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya seeking the following orders;

1. This Honourable Court be pleased to dismiss the Cross-Petition dated 10<sup>th</sup> June, 2016 for want of prosecution.

2. The costs of the Cross-Petition and this Application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

It is based on the grounds that the Respondents were granted leave by the Honourable Justice Emukule on 31<sup>st</sup> May, 2016 to file a Cross-Petition following the withdrawal of the Petition. The Respondents duly filed their Cross - Petition on 10<sup>th</sup> June, 2016. Since the filing of the Cross-Petition, the Respondents have not taken any step to prosecute it. The Respondents herein have neglected, refused and or otherwise failed to take steps in prosecuting this matter more than four (4) years. The continued pendency of this suit is an abuse of the Court's process. The Respondent's indolence is prejudicial to the Petitioner. The delay is inordinate and inexcusable on the part of the Respondent. It is in the wider interest of justice that this case be brought to its finality.

This court has considered the application. The Respondents were served but failed to file any response or attend court. The Petitioner/Applicant seeks to have the Responent' cross petition dismissed for want of prosecution. Their application is based on the grounds that the respondents were granted leave by the Honourable Justice Emukule on 31<sup>st</sup> May, 2016 to file a Cross-Petition following the withdrawal of the Petition. The Respondents duly filed their Cross - Petition on 10<sup>th</sup> June, 2016. Since the filing of the Cross-Petition, the Respondents have not taken any step to prosecute it. I have perused the court record and find that on the matter was last in court on 20<sup>th</sup> March 2018. Order 17 Rule 2 of the Civil Procedure Rules provides that;

"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."

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".*

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."*

I concur with the Petitioner that Respondents herein have neglected, refused and or otherwise failed to take steps in prosecuting this matter. The application remains unchallenged. I find that the 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 2022.**

**N.A. MATHEKA**

**JUDGE**