



**Dolan v Kenya Railways Corporation & another (Petition
20 of 2018) [2022] KEELC 3809 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3809 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
PETITION 20 OF 2018**

M SILA, J

JULY 27, 2022

BETWEEN

GABRIEL DOLAN PLAINTIFF

AND

KENYA RAILWAYS CORPORATION 1ST DEFENDANT

SIBED TRANSPORT CO. LTD 2ND DEFENDANT

RULING

(Application for dismissal of suit for want of prosecution; no action taken for close to two years; application allowed and suit dismissed; however, no orders as to costs as the suit was a public interest based litigation)

1. The application before me is that dated June 29, 2021. It seeks orders for the dismissal of this suit for want of prosecution. Despite being served, the petitioner has filed no response to the application.
2. I have gone through the record. This suit was commenced by way of a constitutional petition filed on November 21, 2018. The petitioner, a priest, filed the suit on behalf of the residents of Bangladesh, Kwa Punda and Birikani informal settlements, Jomvu, Mombasa. In the petition, he averred that on February 25, 2009, he requested the 1st respondent in the petition and the applicant herein, Kenya Railways Corporation, for land to build a mixed day public secondary school for the residents of Bangladesh, Kwa Punda, and Birikani informal settlements, for reason that on the land there was already a nursery school and there was a vacant portion. The request for the land was rejected through a letter dated April 6, 2009 on the grounds that the land had been sold. The residents later learnt that the land had been leased out to the 2nd respondent through a lease dated May 9, 2018. It is pleaded that the 1st respondent deliberately denied the residents the land for purposes of putting up a school. In the petition, the petitioner sought declarations of breach of the *Constitution*, citing *inter alia*, breach of the rights of the residents to adequate housing and education, and an order for surrender of the land for purposes of putting up a high school. Together with the petition, the petitioner filed an application



seeking conservatory orders to restrain the 1st respondent from giving out possession of the land. The application was opposed and a ruling on it was delivered on July 31, 2019 by Omollo J. She did not find merit in the application and proceeded to dismiss it. From the date of delivery of that ruling, on July 31, 2019, the petitioner has not taken any step to prosecute the petition.

3. The applicant herein has cited the provisions of Order 17 rule 2(1) and (3) of the *Civil Procedure Rules* as the basis for this application. They provide as follows :-
 2. Notice to show cause why suit should not be dismissed [Order 17, rule 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.
4. Although the above provision is contained in the *Civil Procedure Act*, and the *Civil Procedure Rules*, I am persuaded that it is apt to apply it to suits commenced by other procedure, including suits commenced by way of a constitutional petition.
5. It will be seen from the above that where no party takes any step in the suit for one year, the court may proceed to dismiss it. A party is also at liberty to apply for the dismissal of the suit, which is precisely what the 1st respondent has proceeded to do through this application.
6. Close to two years lapsed from 31 July 2019 when the matter was last in court to July 13, 2021 when this application was filed. I have already mentioned that no response was filed to the application. It is clear that the petitioner has lost interest in this suit and indeed appears to have lost interest once the application for conservatory orders was dismissed. There is no purpose in keeping this file on the court shelves.
7. I am persuaded that the application is merited and proceed to dismiss this suit for want of prosecution.
8. The only issue is costs. I can see that the petition was filed on behalf of the public. It was a public interest litigation. The respondents have not demonstrated that the petition was filed maliciously. In those circumstances the suit will be dismissed but with no orders as to costs.
9. Orders accordingly.

DATED AND DELIVERED THIS 27 DAY OF JULY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT MOMBASA

