



Maingi (Suing on Her Behalf and on Behalf of All and Representing for the Benefit of All Residents of Thange, Moki, Mbulutini, Mwanza, Nazavoni And Ngomano Villages in Kibwezi West Constituency, Makueni County and All Citizens Affected Downstream the Thange River and Athi River) v Kenya Pipeline Company & another (Environment & Land Petition 4 of 2019) [2025] KEELC 3929 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3929 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 4 OF 2019**

EO OBAGA, J

MAY 22, 2025

BETWEEN

ALICE MUTHIKI MAINGI (SUING ON HER BEHALF AND ON BEHALF OF ALL AND REPRESENTING FOR THE BENEFIT OF ALL RESIDENTS OF THANGE, MOKI, MBULUTINI, MWANZA, NAZAVONI AND NGOMANO VILLAGES IN KIBWEZI WEST CONSTITUENCY, MAKUENI COUNTY AND ALL CITIZENS AFFECTED DOWNSTREAM THE THANGE RIVER AND ATHI RIVER) PETITIONER

AND

KENYA PIPELINE COMPANY 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND RESPONDENT

RULING

Introduction

1. This is a ruling in respect of a Notice of Motion dated 4th January, 2024 in which the Petitioner/Applicant seeks the following orders:
 1. That this honourable court be pleased to set aside its orders and/or vacate its order issued on the 17th March, 2022 dismissing the petition for want of prosecution and the same be reinstated for hearing and final determination on the merits.
 2. That the cost of this application be in cause.



Background

2. On 25th November, 2015, the Petitioner who was suing on her own behalf and on behalf of all residents of Thange, Moki, Mbulutini, Mwanza, Nzavoni and Ngomani villages in Kibwezi East Constituency, Makueni County and all citizens affected downstream the Thange River and the Athi River filed a constitutional petition against the Respondents in which she sought the following reliefs:
 - a. An order compelling the 2nd Respondent to issue an Environmental Restoration order against the 1st Respondent to restore the degraded environment as far as practicable to its immediate condition prior to the damage, that is, the 1st Respondent do undertake a clean-up of River Thange, the water wells, aquifers and soils of the affected area in accordance with international Standards under the supervision of the 2nd Respondent, the United Nations Environment Programme (UNEP) and such other independent environment assessment expert on a polluter-pays principle.
 - b. A declaration that upon an environmental impact assessment audit, if it is found that the land affected is no longer habitable, arable, cultivable and/or productive, the 1st Respondent be ordered to relocate the affected residents to new properties and/or compensate them.
 - c. An order directing that all affected residents do undergo a through medical check-up at the best hospital at the 1st Respondent's expense (inclusive of the costs of the attendant medication that may be prescribed)
 - d. An order compelling the 2nd Respondent to charge the 1st Respondent with offenses pursuant to Sections 141, 142 (1)(a),(b),(c), (2) and (3) and Section 145 (1) of the Environmental Management Co-ordination Act No. 8, 1999.
 - e. Compensation for the victims of the pollution and for their beneficial loss of their farmlands, wells, aquifers and the river waters pursuant to Article 23 (3) (e) and 70 (2) (c) of *the Constitution* and Section 3 (3) (e) of the Environmental Management Coordination *Act, No. 8 of 1999*.
 - f. Punitive and aggravated damages against the 1st and 2nd Respondents.
 - g. Costs of the petition
 - h. Such other order(s) as this honourable court shall deem just.
3. The petition was filed as a result of a burst underground pipeline belonging to the 1st Respondent which occurred in May, 2015 spewing oil into the farmlands into the immediate vicinity and on to the Thange River and other neighbouring villages downstream.
4. The petition which was filed by the firm of S. Gichuki Waigwa & Associates Advocates did not name the other affected petitioners other than the petitioner. On 11th January, 2024 a notice of change of advocates was filed by the firm of Musembi Ndolo & Co. Advocates taking over the conduct of this matter from M/s S. Gichuki Waigwa & Associates Advocates. It is on the same day that the present application was filed.

Applicant's contention

5. The Applicant contends that she filed this petition on behalf of all residents of Thange River basin of Makueni County. She engaged the services of Musembi Ndolo & Company Advocates who perused the court file on 19th September, 2023 and discovered that this Petition was dismissed on 17th



March, 2022 for want of prosecution. She states that her former advocates M/s S. Gichuki Waigwa & Associates Advocates were neither aware nor served with any dismissal notice.

6. The Applicant further states that the dismissal notice which was issued by court omitted to include the firm of M/s. S. Gichuki Waigwa & Associates Advocates. She states that she is desirous of proceeding with her petition and that she should have been granted an opportunity to be heard before her petition could be dismissed.

1st Respondent's Contention

7. The Applicant's application was opposed by the 1st Respondent through a replying affidavit sworn on 30th September, 2024. The 1st Respondent states that this court is functus officio having rendered its decision on 17th March, 2022 and that the only option for the Applicant was to either seek a review of the decision or appeal against the decision.
8. The 1st Respondent contends that the former advocates of the Applicant have not sworn an affidavit to deny the fact that they were not served with the dismissal notice. The 1st Respondent further states that the Applicant is not being candid when she states that she only discovered the dismissal upon change of advocates. Litigation belongs to a litigant and that there is no explanation why the petition was not prosecuted and why it took two years to file an application for vacating the order dismissing the petition.

2nd Respondent's contention

9. The 2nd Respondent opposed the Applicant's application through a replying affidavit sworn on 24th April, 2024. The 2nd Respondent states that the Petitioner was not keen with her petition. She filed an application to vacate the dismissal order after two years.
10. The 2nd Respondent further states that this petition is similar to petition number 9 of 2019 which was filed by one Muindi Kimeu who was a member of Thange River Taskforce. The dismissed petition seeks the same reliefs for same people and that if it were to be reinstated, it will amount to waste of judicial time. The 2nd Respondent avers that this petition was solely filed to take advantage of the ignorant majority for the benefit of one individual.
11. In a replying affidavit sworn on 30th June, 2024 the Applicant responds to the replying affidavit by the 2nd Respondent and states that she is aware that Petition numbers 8, 9 and 12 all of 2019 as well as Petition No. 15 of 2017 and the dismissed petition are raising similar issues but that in Constitutional Petitions, a Petitioner has a right to bring a petition urging violation of his/her Constitutional rights. She states that she is aware that Petition 9 of 2019 is pending judgment and that she may not be necessarily bound by the outcome of that judgment.
12. The Applicant states that the parties in the Petitions mentioned are different and they are seeking different reliefs. She blames her erstwhile advocate for not informing her of the progress of the petition. She states that she is illiterate and did not know that her former advocates were not going to deal with her petition to the end. She further states that the delay in prosecuting the petition was because the 2nd Respondent had not provided certain reports which the court had directed and further that the dismissal was premature as no directions had been taken as per the Mutunga rules.



Submissions of parties

13. The parties were directed to dispose of the application by way of written submissions. The Applicant filed her submissions dated 30th June, 2024. The 1st Respondent filed submissions dated 13th December, 2024. The 2nd Respondent filed submissions dated 16th May, 2024.

Applicant's submissions

14. The Applicant submitted that as there was no service of the notice of dismissal upon her former advocates. What ensued on 17th March, 2022 was an irregular judgment which ought to be set aside *ex debito justitiae*. She relied on the case of *James Kanyita Nderitu & Another –vs- Marios Philota Ghikas & Another (2016) eKLR* where it was stated as follows:

“In an irregular default judgment, on the other hand, judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set side as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

1st Respondent's Submissions

15. The 1st Respondent submitted that courts are under obligation to ensure that cases are disposed of expeditiously. One such way is by issuing notice of dismissal. The 1st Respondent relied on the case of *Josephat Oginda Sasia –vs- Wycliffe Wabwile Kiiya (2022) eKLR* where it was held as follows:

“But as has been held time and again before, all the court needs to do when a party does not take steps to prosecute his matter is for it to “give notice” of the intent to dismiss the matter. Such notice can be by way of publishing the intent through the cause lists, websites or even court notice boards.”

16. The 1st Respondent further submitted that the Applicant did not exhibit diligence in monitoring the progress of her case. She should not blame her former lawyers as it was her duty to follow up on her case.

2nd Respondent's Submissions

17. The 2nd Respondent submitted that the delay of over 2 years to bring an application to reinstate a dismissed case is inordinate. The 1st Respondent relied on the case of *Mwangi S. Kimenyi –vs- Attorney General & Another (2014) eKLR* where Justice Gikonyo J stated as follows:

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case, the subject matter of the case, the nature of the case, the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus



test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore inexcusable. Caution is, however, advised for courts not to take the word “inordinate” in its dictionary meaning, but to apply it in the sense of excessive as compared to normality.

Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.”

18. The 2nd Respondent also submitted that the dismissed petition is sub-judice as there is another petition being petition No. 9 of 2019 which is pending judgment. This petition is similar to the one pending judgment. Reliance was placed on the case of *Kinatwa Co-operative Savings & Credit Society Limited –vs- Kinatwa Prestige Ltd (2021) eKLR* where it was held as follows:

“The rationale behind sub-judice rule is to prevent situation of having conflicting orders emerging from two or more different courts over the same subject matter. That situation has obtained in this instance because court issued injunctive orders on 22nd April, 2021 unbeknown to it that a different court had issued a conflicting order vide Nairobi Chief Magistrate’s Court Civil Case Number E816 of 2020, *Kinatwa Prestige Limited Versus Kinatwa Coop Savings and Credit Society Limited & National Transport & Safety Authority & Another*. That is exactly the mischief Section 6 of the *Civil Procedure Act* is supposed to cure by providing for a stay of suit or proceedings. In the case of *David Ndii & Others versus Attorney General & Others 2021 EKLR*, a bench of five judges inter alia stated;

“The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will.....”.

Analysis and Determination

19. I have carefully considered the Applicant’s application as well as the opposition to the same by the Respondents. I have also considered the submissions by the parties. The only issue for determination in this application is whether the Applicant deserves the court’s discretion to set aside the orders of 17th March, 2022. As has been stated hereinabove, this petition was filed on 25th November, 2015.
20. The court record shows that the last time the matter was before court was on 3rd December, 2019. All the advocates for the parties were present when by consent, they took a mention date for 20th December, 2019. There was nothing done by either the Applicant or the Respondents to progress the petition. A notice to show cause was issued by court on 3rd February, 2022 which was set for hearing on 17th March, 2022. During the hearing, it is only the counsel for 1st Respondent who was present. He informed the court that all parties had been served. The court then proceeded to dismiss the petition for want of prosecution.
21. The Applicant denies that she or her advocates were served. She claims that her erstwhile advocates informed her that they were not served. There was no affidavit from the firm of S. Gichuki Waigwa & Associates Advocates denying that they were served. There was no need to serve the Petitioner as she had an advocate on record. This being the case and given the fact that the counsel for the 1st Respondent informed the court that all parties had been served, I find that what resulted in the orders given on 17th March, 2022 amounted to a regular judgment which could only be set aside if sufficient cause is shown.



22. In the instant case, the last time the parties advocates were active in court was on 3rd December, 2019. The dismissal occurred on 17th March, 2022. The present application was made almost two years later and after four years since the last court appearance. The reason given by the Applicant is that her advocate did not inform her of the progress of the case. Litigation belongs to the litigants and not their advocates. It was the duty of the Applicant to keep monitoring her case.
23. The period taken from the last court appearance and the time the suit was dismissed and the time for making this application was inordinate and inexcusable. The petition herein is brought by one Petitioner on behalf of herself and on behalf of others who are not named. There are other petitions which have been filed arising out of the same cause of action. The Applicant admits that fact and goes on to state that there is Petition No. 9 of 2019, pending judgment. The others are Petition Numbers 8 and 12 of 2019 as well as Petition Number 15 of 2017.
24. The reliefs sought in these petitions are the same. It will therefore not serve any useful purpose to reinstate this petition which will only consume the court's time for no good reason. I am aware that petition number 8, 9 and 12 all of 2019 were consolidated and are pending for judgment before a three judge bench. For good order, all the petitions arising from the oil incident affecting the residents of Thange village and its environs and which occurred at the same period ought to have been addressed by the same bench. This case arose out of the oil incident of May, 2019 as the cases in the consolidated petition. The Applicant's present lawyer Musembi Ndolo & Co. Advocates are also involved in the three Judge bench matter.
25. Though I cannot see any affidavit of service of the notice to show cause, I am convinced that there was service and that explains why the counsel for 1st Respondent was present on 17th March, 2022. The matter must have been listed on the cause list and appeared in the Kenya Law Reports website which is accessible to all advocates. Publication in the cause list and website is one mode of service as was held in the case of Josephat Oginda Sasia (Supra).

Disposition

26. From the above analysis, it is clear that the Applicant does not deserve the court's discretion. Her application is devoid of merit. The same is dismissed with no order as to costs as the dismissed petition was one of public importance.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2025.

In the presence of:

Mr. Ndolo for Applicant.

Mr. Mugun for 1st Respondent

Court assistant – Steve Musyoki

