



REPUBLIC OF KENYA



KENYA LAW
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**Banju v Registrar of Lands-Kwale County & 4 others (Environment & Land
Petition 6 of 2021) [2024] KEELC 5020 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 5020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 6 OF 2021**

AE DENA, J

FEBRUARY 1, 2024

BETWEEN

MGANDI MWATSAHU BANJU PETITIONER

AND

REGISTRAR OF LANDS-KWALE COUNTY 1ST RESPONDENT

THE LAND SURVEYOR KWALE COUNTY 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

OMAR MALEMBI MWATSAHU 5TH RESPONDENT

RULING

1. The Applicant herein seeks dismissal of the petition for want of prosecution and states that since its inception before court on 6/8/2021, the petition has never been prosecuted. The prayers sought are as follows;
 1. Spent
 2. That Petition No 6 of 2022 [formerly Mombasa ELC Petition no 37 of 2021] be dismissed for lack of prosecution.
 3. That the sum of Kshs 999,400 be held by Frontman Consultants as compensation to the 4th Respondent be released to the Applicant
 4. Costs of the application.
2. The grounds on the face of the application state that the petition was filed on 6/8/2021 and has never been prosecuted to date. That the Applicant was never served with the petition and only became



aware of it when he visited Frontman Consultants seeking his compensation. The Applicant states that Frontman Consultants are not a party in the petition and hence his compensation should not be affected in any way.

3. The application is supported by an affidavit sworn by the 4th Respondent Omar Mwalembi Banju. It is averred that vide the Kenya gazette of 7/5/2021 he was gazetted as the beneficiary for compensation scheme by the National Land Commission in relation to the construction of Mwache Multi-Purpose dam. That by an award made by the National Land Commission on 30/3/2021 he was awarded a sum of Kshs 993,400/-. The instant petition was filed on 6/8/2021 where a claim for the 5th Respondents land was made. The petition was apparently never filed upon the Applicant and to date the same has never been prosecuted.
4. The deponent states that on 25/3/2022 he received a notice of taking possession and vesting of 0.9913Ha of land in Mwavumbo Ranch/197. That the delay in prosecuting the petition has led to the 3rd Respondent declining in compensating him for the land and hence the application for compensation. It is stated that Frontman Consultants are not a party to this suit and are therefore not affected by the compensation in anyway. The court is asked to allow the application as prayed.
5. In response to the application, Gikandi Ngibuini Advocate filed a replying affidavit sworn by him on 3/11/2023. He states that counsel on record for the Applicant is a stranger to the proceedings herein as no Memorandum of Appearance has been filed.
6. It is averred that the petitioners advocate vide a letter dated 25/3/2022 made an inquiry as to the serial number assigned to this file but no response has been forthcoming. Further that in response to the Respondents advocate letter dated 29/9/2023 the Petitioners Advocate did a letter on 3/10/2023 with an inquiry as to what had transpired in court on 2/9/2023 but the same was not Responded to either. The Petitioner states that he has been eager and willing to have the petition heard and determined but his requests to be furnished with the serial number assigned to the petition in Kwale have not been responded to.
7. The court record does not bear any submissions from either parties. The court has proceeded to render its ruling over the application in the absence of the same.
8. Order 17 Rule 2(1) of the Civil Procedure Rules, which governs dismissal of suits for want of prosecution, provides as follows:

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.”

Further Order 17 Rule 2(3) of the Civil Procedure Rules, states thus:

Any party to the suit may apply for its dismissal as provided in sub-rule 1”

9. The court has considered the principles for dismissal of a suit for want of prosecution as enunciated in Argan Wekesa Okumu v Dima College Limited & 2 others [2015] eKLR as follows: -

The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff’s case for want of prosecution see the case of Ivita -v- Kyumbu (1984) KLR 441. Further to this, the decision of



whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

10. I have perused the pleadings herein as filed by both parties. It is not in dispute that the petition was instituted on 6/8/2021. The provisions of Order 17 Rule 2 are that a matter should have been pending for 12 months before the court, when either on its own motion or on the application of a party, the court makes an order for its dismissal for want of prosecution. It is evident that the 12-month period has lapsed since the suit was filed and the Applicant is within the confines of the law in seeking for dismissal of the petition.
11. However dismissal of a suit for want of prosecution is upon the discretion of the court. This is rightly so because circumstances in every case differ, in one matter the delay to prosecute a suit might have been occasioned by negligence of a party or Counsel on record and in another it might be through inevitable happenings like the loss/misplacement/misfiling of a file. In the instant petition, Counsel for the Petitioner states that the file was transferred to Kwale and efforts to trace its serial number were unsuccessful for some time.
12. Indeed, from the court record, an order for transfer of the file was made on 22/3/2022 and the petition was placed for the first time before the court in Kwale on 2/10/2023. Counsel for the Petitioner wrote a letter inquiring of the whereabouts of the file on 25/3/2022. The same was two (2) days after transfer of the file to Kwale. My assumption is that administratively at that time the files were yet to be registered at the Kwale registry with a new number. I note that there was no response from the registry and as such the Petitioner’s counsel was in dilemma. I further note that he sought for insight from the respondent’s counsel on what had transpired before court on the day that the matter was placed before this court but the said inquiry was not responded to.
13. I am convinced that efforts were made to trace the file and to have the matter litigated upon but the said efforts were fruitless leading to the events before court for determination. To dismiss the petition will serve no justice, as the same would mean that parties have not been given an avenue to ventilate their case. I am inclined towards allowing the petition to be heard on merit and on this I borrow heavily from the wordings in *Investment Limited – Versus - G4s Security Services Limited* (2015) eKLR on dismissal of suits under order 17 where court held: -

This order is permissive and allows quite significant room for exercise of discretion to sustain the suit. And I think it is so especially when one fathoms the requirements of Article 159 of the *Constitution* of Kenya and the overriding objective when demands of courts to strive often, unless for very good cause, to serve substantive justice”.

14. I have further observed from paragraph 6 of the petition that the 5th Respondent had been made aware that the suit property did not belong to him and his siblings even though they were allowed to farm on the same for the time being. At paragraph 7 it is stated that soon after the government started sensitizing the community on the Mwache Dam Project and informed the locals that there would be compensation of the same, the 5th Respondent lay claim on the suit parcel. In summary, the ownership of the suit property is contested. The 5th Defendant cannot be compensated over the same while there is a pending dispute as to ownership. Until the same is determined, the courts hands are tied as to issuing of the 3rd prayer in the application.
15. Consequently, I decline to allow the application for dismissal of the suit, and dismiss the application dated 21/6/2023 with no order as to costs.



16. Let the Petitioner comply with the necessary pre-trial requirements and set the petition down for hearing at the earliest opportune time.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED THIS 1ST DAY OF FEBRUARY 2024.

A.E DENA

JUDGE

Mr. Kinyanjui for the Petitioner

No appearance for the Respondents

Mr. Archibald Kimbada – Court Assistant

