



**Major (RTD) John Ayabei Seii v Cabinet Secretary, Ministry of
Defence & another (Petition 142 of 2018) [2023] KEHC 808 (KLR)
(Constitutional and Human Rights) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 808 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 142 OF 2018
HI ONG'UDI, J
FEBRUARY 16, 2023**

BETWEEN

MAJOR (RTD) JOHN AYABEI SEII PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF DEFENCE 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. This ruling is in respect of the notice to show cause issued by the court *suo muto vide* the dismissal notices dated April 13, 2021 and May 19, 2021.
2. In reply the petitioner through his then counsel, Lucy Muthoni Kambuni of the firm of L M Kambuni and Associates Advocates filed an affidavit dated January 17, 2022. She deponed that the petitioner had not prosecuted the petition this far owing to the following grounds:
 - i. The petitioner had been appointed to the Building Bridges Initiative (BBI) taskforce by the president and was for long periods of time traversing the country which made it difficult for him to attend court.
 - ii. On the day when the petitioner was able to attend court, on May 6, 2019, Counsel Benson Njuguna who had been assigned the matter lost his infant son and the baby's mother in a road accident along Kiambu road.
 - iii. The temporary closure of the court premises due to covid 19 made it difficult for the petitioner to procure a hearing date.



- iv. The petitioner responded to the first dismissal notice expressing his desire to have the matter heard on merit *vide* its letter May 26, 2021.
 - v. Counsel logged in for the scheduled hearing of the notice to show cause however the court was not sitting.
 - vi. If it were not for the pending notice to show cause by the court counsel could have taken an early hearing date.
3. On this premise, counsel deponed that the delay had not been deliberate and sought to have the petition heard and determined. She added that the respondents would not suffer any prejudice if the petition was heard on merit.
 4. The firm of Lilan and Koech Associates LLP on behalf of the petitioner filed written submissions and a list of authorities dated July 18, 2022. Counsel indicated that the only issue for determination was whether the petitioner had shown cause why the petition should not be dismissed. She confirmed that order 17 rule 2 of the [Civil Procedure Rules, 2010](#) allows the dismissal of suits. Relying on the Court of Appeal case of [Salkas Contractors Limited v Kenya Petroleum Refineries Limited](#) (2004) eKLR, she noted that a court can dismiss a suit on the ground that there was inordinate delay, the delay is inexcusable and the defendants are likely to be seriously prejudiced.
 5. Additional reliance to emphasize these grounds was placed on the cases of [Mwangi S. Kimenyi v Attorney General & another](#) (2014) eKLR, [Cecilia Wanja Waweru v Jackson Wainana Muiruri & another](#) (2014) eKLR, [Daudi Mutua v Crown Industries Limited](#) (2022) eKLR and [Skyview Properties Limited & amp; another v Kennedy Amos Njoroge & amp; 3 others](#) (2017) eKLR. Finally counsel submitted that where the delay is explained the court should exercise its discretion towards preserving the suit in the interest of justice, which should be the case herein.
 6. The respondents filed written submissions and a list of authorities dated January 16, 2023 through special state counsel, V W Mung'ata, in support of the notice to show cause. Counsel submitted that the petitioner had failed to prosecute the matter for over two years and had not taken any step to ensure the expeditious hearing of the same. He stressed that the petitioner was guilty of laches and the inaction rendered the suit ripe for dismissal by dint of order 17 rule 2(1) of the [Civil Procedure Rules](#).
 7. In support reliance was placed on the case of [Allan v Sir Alfred Mc Alphine & Sons Limited](#) (1968) 1 ALL ER 543 that set out the burden of proof, and what a defendant must prove for a suit to be dismissed. The court stated that the grounds were; first that it would not be difficult to recognize inordinate delay, secondly that unless a credible excuse was made out the natural inference would be that it is inexcusable and finally that the longer the delay the greater the likelihood of prejudice at trial.
 8. Counsel explained that the matter had been filed in 2018 and since October 21, 2019 no action had been taken to fix a hearing date. He reminded the court that prior to this the petitioner had sought successive adjournments. He cited the case of [Mukhisa Biscuit Company Limited v West End Distributor](#) (1969) EA 699 where the court held that it is the duty of the plaintiff to bring the suit to early trial and he cannot absolve himself of his primary duty. Similar reliance was placed on the cases of [Kettle man v Hansel Properties Limited](#) (1988) 1 ALL ER 38 and [Cecilia Wanjiku Njoroge v NEMA & another](#) (2013) eKLR.
 9. Counsel further pointed out that the petitioner in failing in his duty had caused unnecessary anxiety and expense to the respondents for the 5 years the suit had existed. He submitted that the respondents were also entitled to the right under article 50 of the [Constitution](#) and sections 1A (1) and 1B(1)(e) of the [Civil Procedure Act](#) to expeditiously dispose of any claims against it.



Analysis and Determination

10. I have considered the pleadings, the record and the submissions by the parties and in addition the documents and authorities cited. The only issue raised for determination is:

“Whether the petitioner has shown cause why the petition should not be dismissed.”

11. The legal principles upon which courts make findings on dismissal of a suit are now fully settled. These principles were summarized in the case of *George Gatere Kibata v George Kuria Mwaura & another* [2017]eKLR as follows:

“8. The legal framework on dismissal of suit for want of prosecution is found in order 17 rule 2 which provides as follows: - “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.”

My understanding of the framework contained in order 17 rule 2 is that a court may *suo moto* dismiss a suit for want of prosecution. Within the same framework, the court may dismiss a suit on the same ground on the application of either party to the suit.....

.....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.”

12. Furthermore, it is worthy to note that the decision to dismiss a suit for want of prosecution is based on the court’s discretion after consideration of the facts of the case. This was appreciated in the case of



in *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M D Popat and others & another* [2016] eKLR where it was held that:

“ 11. Nonetheless, article 159 of the *Constitution* and order 17 rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of *Ivita v Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff’s excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

13. The law is therefore clear on what ought to be considered in such instances. A perusal of the court proceedings and file discloses that the petition was filed on April 13, 2018 and the respondents’ filed their replying affidavit on June 22, 2018. The court set the matter for hearing on December 4, 2018 for the parties to proceed by way of *viva voce* evidence. On the material day, the petitioner sought for an adjournment, because he was in Kilifi on official duty in the matter of the Building Bridges Initiative (BBI). The hearing was accordingly rescheduled to May 6, 2019 by consent of the parties. The petitioner was again not present and counsel holding brief for his counsel sought for an adjournment. The matter was subsequently adjourned to July 17, 2019.
14. On July 17, 2019, the parties and their advocates did not appear on claims that the matter was wrongly listed for the next day. By consent of the parties the matter was fixed for hearing on October 21, 2019. There is nothing on record to show what transpired on the said date. The record does not also reflect any pursuit of a new hearing date since then. The court issued the first dismissal notice dated April 13, 2021 with a mention for May 18, 2021. The same was not responded to and no parties appeared prompting the issuance of the second dismissal notice.
15. Counsel in her affidavit in response to the notice to show cause and while challenging the dismissal for want of prosecution noted that the reasons for the delay were the petitioner’s appointment to the Building Bridges Initiative (BBI), the loss of the child and its mother of the counsel who was assigned to the case and closure of the courts due to covid 19.
16. I have taken the time to outline the history of the matter for all parties to appreciate the circumstances of this case. To begin with the petitioner made known on December 4, 2018 that he would not be able to attend the hearing due to the BBI. This has remained the constant and consistent reason for not taking action in the matter despite being represented by legal counsel. The BBI was not a permanent assignment!
17. It is prudent to point out that the reason given for counsel Benson Njuguna’s absence although unfortunate, is not tenable. It is appreciated that the law firm has other advocates who could have



- proceeded with the matter at the time, and no reason was given to show why the other counsel would not proceed with it.
18. Counsel further stated that due to the temporary closure of the courts due to covid 19 it was difficult to procure a hearing date. It is worthy to note that the court proceeded virtually during the said period. In this context, the petitioner did not demonstrate an attempt to procure an audience with the court albeit virtually as an action in his matter. There is no evidence of any requests made to the court for securing a hearing date.
 19. It is noted also in fact that the petitioner and his counsel only responded or instigated action in the matter after the court issued the two dismissal notices. This was after a period of more than two years of inaction by the petitioner in the matter. At this point I question the petitioner's desire to prosecute the matter expeditiously. This is keeping in mind the prejudice the other parties have to go through as they wait for the petitioner to finally prosecute the matter expeditiously to its definitive end.
 20. Owing to all this, it is clear to me that in a matter that commenced in April 2018 which has taken a long time to take off, its responsibility lies squarely in the petitioner's hands. The delay as can be discerned from the court record stems from the indolence of the petitioner which in this case is inexcusable as it is not justified appropriately. This is because of the laid back approach by the petitioner in prosecuting the matter which is offensive to the constitutional principle of adjudicating justice without delay.
 21. In such matters as seen in the case of *George Gatere Kibata (supra)* the court is not assisting the indolent, but is serving the interest of justice and, substantive justice on behalf of all the parties. It is for this reason that I come to the conclusion that this court should not exercise its discretion in favour of the petitioner.
 22. On further perusal of the pleadings I do note that the substratum of this petition is the termination of the petitioner's services in the then Kenya Armed Forces which is now Kenya Defence Forces. Its an action between an Employer & Employee and should have therefore been filed in the Employment & Labour Relations Court, (ELRC). As at the time this petition was being filed the ELRC was already in operation. The said court addresses constitutional issues related to employer/employee relationships.
 23. For the above reasons I do not see any good reason to have the pendency of this petition sustained in this court. It is hereby struck out with costs to the respondents.
 24. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 16TH DAY OF FEBRUARY 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. ONG'UDI

JUDGE OF THE HIGH COURT

