



REPUBLIC OF KENYA



**Wanjau v Wanyoike (Sued on Behalf of the Estate of Njoki Kibe) (Environment and Land Case 147 of 2018) [2025] KEELC 7183 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND CASE 147 OF 2018**

**JA MOGENI, J**

**OCTOBER 9, 2025**

**BETWEEN**

**PETER GATHERE WANJAU ..... PLAINTIFF**

**AND**

**THOMAS WANYOIKE (SUED ON BEHALF OF THE ESTATE OF NJOKI KIBE) ..... DEFENDANT**

**RULING**

1. Coming up before me for determination is the Notice of Motion dated 4/08/2023 brought under Section 1A, 1B & 3B of the *Civil Procedure Act*, Order 51 Rule 1, Order 12 Rule 7 of the Civil of the Civil Procedure Rules, 2010 seeking for the following orders:
  1. Spent.
  2. That this Honorable Court be pleased to set aside an Order made on 22<sup>nd</sup> March, 2021 dismissing the instant suit.
  3. That this Honorable Court be pleased to reinstate this suit and the same to proceed for submissions and final determination.
  4. THAT the costs of this Application be in the cause.
2. This Application is premised on the grounds appearing on its face together with the Supporting Affidavit of J. I. Mwangi sworn on 4/08/2023 in which he averred that he is an Advocate of the High Court specifically handling this matter on behalf of the Plaintiff. He averred that the matter came up for hearing on 4/04/2018 but the Defendants failed to enter appearance or even file a Defence or serve any within the prescribed time. As a result, the Plaintiff requested for Judgment on 30/10/2018 as per annexure 'PGW1' which is a copy of the request.



3. He further stated that the Plaintiff through his Counsel continued writing to the Defendants and served them together with Notices of Motion as evidenced as per annexure 'PGW2 (a) and (b)'. That after several visits to the Environment and Land Court Registry in Thika to take new mention dates, they were informed that the suit had been dismissed for failure of entering appearance.
4. The Applicant contends that they were not served with a Notice to Show Cause (NTSC) and/or Notice of Dismissal of suit by the Defendant to show that the matter was listed for dismissal. He further states that failure to attend Court on the date of dismissal was not deliberate as no Notice was served upon the Plaintiff by the Defendant.
5. That the Plaintiff has been desirous to have the matter concluded and that before the dismissal they were not accorded a chance to show cause as to why this suit should not be dismissed. And that in the interest of justice it was his prayer that the Court set aside the Order made on 22/03/2021 dismissing the instant suit.
6. The application is unopposed. At the same time despite the Court having directed that the parties file written submissions on 06/05/2025, at the time of writing this Ruling no submissions had been filed by either party. Given the circumstances I will determine the Motion on the basis of the Affidavit material filed by the Plaintiff/Applicant.

### **Determination**

7. The major issue I should determine is whether the delay herein has been explained such that this suit ought to be reinstated for trial. The law governing dismissal of suit for want of prosecution cannot be called upon to justify itself; it is well settled. The Court in the case of Nbi HCCC No Utalii Transport Company Limited & 3 Others V NIC Bank & Another [2014] eKLR that:-

“When the Applicant states and correctly so, that:

“It is the primary duty of the Plaintiffs to take steps to progress their case since they are the ones who dragged the Defendant to Court”.

Then exhorts that

“Over one year has lapsed without the Plaintiffs taking any step to progress their case”.

And makes a strong conclusion that

“The Plaintiffs’ inertia runs contra to the overriding objective of the Court stipulated in section 1A, 1B and 3A of the CPA.”

8. The first intuitive feeling one gets is that the offending proceeding should quickly be removed out of the way of the innocent party. But, the law prohibits a Court of law from such impulsive inclination, and requires it to make further enquiries into the matter under the guide of defined legal principles on the subject of dismissal of cases for want of prosecution; a view which is undergirded by the fact that dismissal of a suit without hearing the merits is draconian act which drives the Plaintiff from the Judgment-seat. It is, therefore, a matter of discretion by the Court. See the opinions of Danckwerts, LJ in *Nagle V Fielden* [1966] 2 QBD 633 at p 648, and Lord Diplock in *Birket V James* [1978] A.C. 297. A great number of cases in the Court of Appeal have adopted that approach but I do not wish to multiply them. Accordingly, I will discern the principles which the law has developed to guide the exercise of discretion by Court in an application for dismissal of suit for want of prosecution. These principles are:
  - i. Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;



- ii. Whether the delay is intentional, contumelious and, therefore, inexcusable;
  - iii. Whether the delay is an abuse of the Court process;
  - iv. Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
  - v. What prejudice will the dismissal occasion to the Plaintiff?
  - vi. Whether the Plaintiff has offered a reasonable explanation for the delay;
  - vii. Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court?
9. I will also refer to the Ibrahim Athman Said -vs- Ibrahim Abdulla & Anor (2014) eKLR where the Court held that parties should be afforded an opportunity to show cause and that if it is shown that the affected party did not get an opportunity to show cause such an order will be set aside at the instance of the affected party. In that suit, the Court went ahead to set aside the order dismissing the suit.
  10. Order 17 Rule 2 of the Civil Procedure Rules, 2010 empowers the Court to reinstate a suit if the Plaintiff show that the steps had been taken with a view to prosecuting the suit. In the application before the Court the Plaintiff showed that he had requested for Judgment when it emerged that the Defendant had failed to enter appearance or file a Defence or serve any in the prescribed time and he annexed a copy of the request as 'PGW1'.
  11. At the same time he annexed documents written to the Defendants and Notices from the Environment and Land Court Registry to demonstrate the actions takes which are marked as 'PGW2'. This indeed confirms that averment that the Plaintiff had indeed taken steps to prosecute this suit. He pleaded with the Court to reinstate the suit and hear this matter on merit.
  12. As already stated above the Defendant did not oppose the application and therefore, there was no rebuttal of the Plaintiff's Counsel's application.
  13. 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; among others. 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. See the case of Allen V Alfred Mcalphine & Sons [1968] 1 All ER 543: where a delay of fourteen (14) years was considered inordinate and inexcusable. But see also the cases of Agip (Kenya) Limited V Highlands Tyres Limited [2001] KLR 630 and Sagoo V Bhari [1990] KLR 459, where delay of eight (8) months and five (5) months, respectively was considered not to be inordinate. And also Nbi HC ELC Case No. 2058 of 2007 where delay of about 1½ years was considered not to be inordinate. At this point, I think I should examine the circumstances of this case and the amount of delay involved to determine whether it is inordinate and inexcusable?
  14. The Plaintiff/Applicant has explained through his Counsel that this matter came up for hearing on 4/04/2018 but the Defendant failed to enter appearance nor file any Defence. That despite effort from the Plaintiff to have the Defendants defend the suit this was not possible. After several visits to the



- Registry seeking to have new mention dates they were informed that the suit had been dismissed for failure of entering appearance.
15. The Plaintiff has stated that they were not served with any Notice to Show Cause (NTSC). There is a school of thought that a party is deemed notified of the hearing of their matter once it is listed in the Court's cause list online or hard copies. That therefore it is not the business of the Court to serve the NTSC.
  16. I hold a slightly different opinion because the litigant must be given a chance to prosecute their case, the point of consideration is how much time should that take and what is the impact on dispensation of justice for both the Plaintiff and the Defendant who has been dragged to Court by the Plaintiff?
  17. Now regarding service of the NTSC, from a glimpse of the record, it is apparent that the Applicant was not served. The Court on 14/12/2020 directed that the NTSC should be served through the Court Registry. I have perused the file diligently but there is no indication that the NTSC was served at all. If this be the case then it follows that the Plaintiff was not aware that his matter was ever listed for dismissal at all.
  18. That said, and while the Applicant was entitled to be heard on the merits of his case, the right cannot be stretched to the detriment of the parties he dragged to Court. It is now five years since the suit was filed. The words of the Court of Appeal in *Rajesh Rughani v Fifty Investments Limited & Another* [2016]eKLR though primarily addressing an application for the dismissal of a case for want of prosecution, equally speak to the present situation.
  19. The Court of Appeal stated that: -

“The test for dismissal of a suit for want of prosecution is stated in the case of *Ivita -v- Kyumbu* (1984) KLR 441). The test was expressed as follows: The test is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite such delay. Justice is to both the Plaintiff and the Defendant so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents and or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time; the Defendant must satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced; he must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff.”
  20. As observed in *Ivita's* case above, extended delay impacts adversely on the possibility of a fair trial being eventually held as documents and witnesses may become unavailable, while memories of such witnesses may fade over time. Notwithstanding the delay herein, considering the advanced stage of proceedings it appears feasible that the trial can be concluded without further undue delay, and orders can be made to curtail such eventuality. The onus of progressing the suit to conclusion rests with the Applicant.
  21. I admit that a party should always take steps to progress his case to logical conclusion. That is a requirement of justice and the overriding objective in assisting the Court to attain expeditious and just disposal of cases which follows after the long-standing adage; justice delayed is justice denied. So, where the Plaintiff commits acts of inordinate delay in prosecuting his case, he occasions injustice on the Defendants. But Courts of law are Courts of justice to all the parties. And as I stated earlier, dismissal of a case is a draconian judicial act which drives the Plaintiff away from the seat of Judgment. It should be done sparingly and in cases where dismissal is the feasible and just thing to do. Therefore, Courts should strive to sustain suits rather than dismiss them especially where justice would still be done and fair trial had despite the delay. Any explanation for the delay which is given should be properly evaluated by the Court to see whether it is reasonable. That notwithstanding, a Court of law should not hesitate



to dismiss a suit for want of prosecution where it strongly feels the sustenance of the suit will only breed extreme prejudice to the Defendant. But in ascertaining prejudice to the Defendant it must also weigh the prejudice the dismissal will cause to the Plaintiff. The balance thereof need not be symmetrical, but the impulsion should come from the dictates of justice and where need be, the suit should be sustained.

22. The dismissal of a suit for want of prosecution is meant to prevent an abuse of the Court process. One of the questions to consider is whether there was inordinate delay on the part of the Plaintiff in setting this matter down for hearing. It is my opinion that while there is no precise measure of what amounts to inordinate delay, the test is whether there is such a delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases.
23. In the case of Agip (Kenya) Limited –vs.-Highlands Tyres Limited [2001] KLR 630 the Court held that a delay of eight (8) months was not inordinate. The Plaintiffs’ Counsel submitted that this suit was ready for the main hearing on 4/04/2018 but the Defendant failed to enter appearance or even file a Defence or serve any within the prescribed time.
24. Whereas the Plaintiff requested for Judgment on 30/10/2018 this was not granted and for good reasons since this is a land matter. It was only later that they learnt that the suit had been dismissed. This suit was last before the Court on 22/03/2021 when it was dismissed. The Originating Summons is dated 30/04/2018 therefore the suit was inactive for two years and 11 months before the Court dismissed it. Was the delay inordinate and inexcusable? I find that the delay in fixing this suit for hearing was excusable, there being a demonstration of an effort to set the suit down for hearing and also seeking an interlocutory Judgment.
25. The other issue which I wish to still address is the issue of service of the Notice to Show Cause upon the Plaintiff’s Counsel. As stated, I have perused the Court file and noted that there was no service of the Notice to show cause why this suit should be dismissed upon the Plaintiff. I therefore arrive at the finding that the Plaintiff was not served with the Notice to Show Cause.
26. For the above reasons, I hereby allow this Application in terms of prayer No. 2 and further direct as follows:-
  - a. The Plaintiffs shall file and serve all the necessary papers and pleadings, including witness statements and documents they intend to rely upon in this case within fourteen (14) days from today’s date.
  - b. The Defendant shall file and serve all the necessary papers and pleadings including witness statements and documents in support of their case within fourteen (14) days of receipt of the Plaintiff’s documents.
  - c. In default of (b) above by the Defendant the suit shall be listed for formal proof without the necessity of an application in that behalf.
  - d. The matter suit shall be mentioned on 17/11/2025 for further directions.
  - e. The costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 9<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....



**MOGENI J**

**JUDGE**

In the presence of:-

Mr. Irungu Mwangi for the Plaintiff

Defendant – Absent

Melita – Court Assistant

