Tallam v Judicial Service Commission (Employment and Labour Relations Petition E010 of 2023) [2026] KEELRC 256 (KLR) (23 January 2026) (Ruling)

Neutral citation: [2026] KEELRC 256 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS PETITION E010 OF 2023

AN MWAURE, J

JANUARY 23, 2026

BETWEEN

LILIAN JELIMO TALLAM ..... PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

RULING

1. The Respondent/Applicant filed a Notice of Motion dated 24th July 2025 seeking the following orders that:
    1. This Honourable Court be pleased to dismiss the Petition for want of prosecution
    2. The costs of this Application be borne by the Respondent.
2. The application is brought under Rules 43(1) and (3) of the Employment and Labour Relations Court (Procedure) Rules 2016; sections 3 and 12 of the *Employment and Labour Relations Court Act*.

Respondent/Applicant's supporting affidavit

3. The application is accompanied by the supporting affidavit of Winfridah Mokaya, the Respondent's Secretary and Chief Registrar of the Judiciary, sworn on the same date as the application.
4. The Respondent/Applicant avers that the Petition was filed on 14th July 2023 and it sought a declaration that the Respondent's dismissal without terminal dues was wrongful, unlawful, and unfair.
5. The Respondent/Applicant avers that it opposed the same through a Replying Affidavit dated 5th October 2023, asserting that the dismissal was lawful, procedurally fair, and based on gross misconduct, with terminal dues duly paid.

6. However, by 24th July 2025, the Respondent/Applicant avers that the Petitioner/Respondent had taken no steps to prosecute the matter, leaving the suit dormant for over two years.

7. The Respondent/Applicant avers that this delay warrants dismissal for want of prosecution, as the pending Petition prejudices it by creating unnecessary legal and administrative costs, contrary to the justice system's objective of expeditious disposal of cases.

8. The Respondent/Applicant urged this Honourable Court to allow the application as prayed.

Petitioner/Respondent's replying affidavit

9. In opposition to the application, the Petitioner/Respondent filed a replying affidavit dated 29th October 2025, sworn by Fred M. Ratemo, the Petitioner/Respondent's advocate.

10. The Petitioner/Respondent avers that at delays in prosecuting the matter were caused by challenges with the court's transition to the e-filing system, including difficulties in mapping the case to the firm's account despite repeated follow-ups at the registry.

11. The Petitioner/Respondent avers that steps taken to resolve the issue, including adding the Petitioner as a party on the platform, successfully requesting and paying for a mention date, and serving the Respondent/Applicant with a mention notice for 21st October 2025.

12. The Petitioner/Respondent argues that by the time the Respondent/Applicant filed its application, he had already taken steps to progress the case, and therefore the application is made in bad faith, is unmeritorious, and amounts to an abuse of the court process.

13. Parties canvassed the application by way of written submissions.

Respondent/Applicant's submissions

14. The Respondent/Applicant relied on Order 17 Rule 2 of the Civil Procedure, which 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.
>
> 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.
>
> Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> A suit stands dismissed after two years where no step has been undertaken.
>
> A party may apply to court after dismissal of a suit under this Order."

15. The Respondent/Applicant argued that the Petitioner/Respondent has failed to prosecute the suit for over two years and two months, warranting dismissal under Order 17 Rule 2(5) of the Civil Procedure Rules. The Respondent/Applicant submitted that this prolonged delay has prejudiced the Applicant, infringed its right to access justice, and undermined the judicial system's goal of expeditious case disposal. The Respondent/Applicant further submitted that the Petitioner/Respondent's negligence amounts to an abuse of the court process, offends the principles of fair and timely adjudication under

sections 1A and 1B of the *Civil Procedure Act* and Article 50 of *the Constitution*, and lacks sufficient justification; thus, the suit should be dismissed for want of prosecution.

16. The Respondent/Applicant relied on the case of Ivita V Kyumbu [1975] KEHC 4 (KLR), the court stated as follows:

> " So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.....Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay, the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen v McAlpine, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied."

17. In Lutta & 2 Others V Co-operative Bank of Kenya [2023] KEHC 19568 (KLR), the court cited the case of Mwangi S. Kimenyi V Attorney General & another [2014] KEHC 4220 (KLR), where the court set out the principles that guide the court to exercise its discretion in an application for dismissal of suit for want of prosecution, which include:

> " Whether there has been inordinate delay on the part of the Plaintiffs in prosecuting the case;
>
> Whether the delay is intentional, contumelious and, therefore, inexcusable;
>
> Whether the delay is an abuse of the court process;
>
> Whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant;
>
> What prejudice will the dismissal occasion to the plaintiff?
>
> Whether the plaintiff has offered a reasonable explanation for the delay;
>
> Even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the court?"

18. The Respondent/Applicant contended that the Petitioner/Respondent's prolonged failure to prosecute the suit violates equitable principles such as "delay defeats equity", "equity serves the vigilant and not the indolent", and "he who comes to equity must do equity." The Respondent/Applicant argued that since the Court is a court of equity, the suit should be dismissed, as the Petitioner/Respondent has shown no intention to act equitably. The Respondent/Applicant adds that keeping the matter pending for over two years without justification causes it significant prejudice.

19. The Respondent/Applicant relied on the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium V M.D. Popat and others & another [2016] KEHC 6855 (KLR) where the court stated as follows:

> " The plaintiff filed suit, failed to get injunctive orders to preserve the status quo and went to slumber. He has not been vigilant or at all to have his suit heard and determined. The court shall therefore not hesitate to have the suit dismissed because the continued delay no doubt infringes on the defendants' rights and legitimate expectations that disputes against them should be resolved expeditiously. Albeit the defendants have a counter claim, they are not bound to prosecute the plaintiff's suit."

20. In Naftali Onyango V National Bank of Kenya Ltd [2005] KEHC 1746 (KLR), the court cited the case of Allan V Sir Alfred McAlphine & Sons Ltd [1968] 1 All 543, where the court stated as follows:

> " The Court of Appeal stated that the above principles apply in Kenya and had been followed consistently by Kenyan Courts. Cheson J, as he then was, applied the principles in the case of Ivita -v- Kyumbu (l984) KLR 441. When he observed that:- The test applied by the Courts in an 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."

21. For costs, the Respondent/Applicant relied on the case of M'ndaka Mbiuki V James Mbaabu Mugwiria [2016] KEHC 6788 (KLR), where the court cited the case of Republic V Rosemary Wairimu Munene, Ex-Parte Applicant V Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review No. 6 of 2014, where the court held as follows:

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event... It is well recognized that the principle that costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

22. In Peter Muriuki Ngure V Equity Bank (K) Ltd [2018] KEHC 10038 (KLR), the court relied on the seminal work of Justice (Rtd.) Kuloba in Judicial Hints on Civil Procedure, 2nd ed. (Nairobi: Law Africa, 2011), page 94, as follows:

> " The costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part."

23. The Respondent/Applicant prays that this Honourable court award costs as the Petitioner/Respondent has failed to prosecute her case.

24. In conclusion, the Respondent/Applicant urged this Honourable Court to allow the application as prayed.

Petitioner/Respondent's submissions

25. The Petitioner/Respondent argued that delays in prosecuting the Petition were caused by challenges with the court's e-filing system rather than disinterest. The Petitioner/Respondent emphasize that dismissal for want of prosecution is discretionary under Rule 43 of the Employment and Labour Relations Court (Procedure) Rules, 2024, and that the Petitioner has shown reasonable cause.

26. The Petitioner/Respondent placed reliance on Republic V Chief of General Staff & another [2017] KECA 524 (KLR), where the Court of Appeal held that failure to file a further affidavit to controvert or rebut the Respondent's depositions or averments in the replying affidavit together with the annexures thereto leaves the Respondent's assertions therein unshaken. In Republic V District Land Adjudication Officer Meru Central & Buuri & 2 Others [2024] KEELC 1776 (KLR), the court stated that filing is complete only upon payment of requisite fees. In Wanjuki Muchemi V Standard Group

Limited & 2 Others [2018] KEHC 1634 (KLR), the court stated that justice favours sustaining suits where prejudice to defendants is unsubstantiated.

27. For costs, the Petitioner/Respondent placed reliance on Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others [2014] eKLR, where the court stated that "costs follow the event" but remain subject to judicial discretion.

28. The Petitioner/Respondent urged this Honourable Court to find that the application is unmeritorious and therefore prays that the same be dismissed with costs.

Analysis and determination

29. The court has considered the preliminary objection together with the submissions by both counsels; the singular issue for determination is whether the application is meritorious.

30. Rule 43 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides as follows:

> "In any suit in which no application has been made in accordance with rule 31 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and, if no reasonable cause is shown to its satisfaction, may dismiss the suit.
>
> If reasonable cause is given to the satisfaction of the Court, it may make such orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
>
> Any party to the suit may apply for dismissal as provided in sub-rule (1)."

31. In Airtel Networks Kenya Limited V Nyutu Agrovet Limited [2021] KECA 177 (KLR), the Court of Appeal cited the case of Winnie Wanjiku Mwai V Attorney General & 3 Others [2016] KEHC 8399 (KLR) where the court relied on Rowlands Ndegwa & 4 others v County Government of Nyeri & 3 Others; Agriculture, Fisheriers and Food Authority & Another (Interested Parties) [2020] KEHC 1939 (KLR), Fisheries and Food Authority and another (Interested Parties) [2020] eKLR, where the court observed:

> " With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is, however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay, with attention also being paid to the reasons for the inactivity...."

32. Still in Winnie Wanjiku Mwai V Attorney General & 3 Others (Supra), the court went on to observe as follows:

> " Firstly, there should be inordinate delay. In this regard, there is no laid down tariff as to what is inordinate, and the period will depend on the facts and circumstances of each case. Secondly, the inordinate delay ought to be inexcusable. Where there is no credible excuse, the inference is that the delay is inexcusable. Thirdly, it must be evident that the trial of issues between the parties will be seriously prejudiced. The longer the delay, the more likelihood of prejudice."

33. In this instant case, the Respondent/Applicant argued that the Petitioner/Respondent had not taken steps in prosecuting the matter, which had taken more than one year, while the Petitioner/Respondent argued that it had challenges with the e-filing system when it came to mapping.

34. The court is of the view that, indeed, there was an inordinate delay in prosecuting the matter. Further, the court is guided by Article 159 (2)(b) of *the Constitution* that justice shall not be delayed. The e-filing system was introduced during the COVID-19 pandemic in 2020, and everyone has become accustomed to the said system. There seems to be an oversight when it came to the mapping of the parties, which the Petitioner/Respondent actioned immediately. The court is not convinced by the explanation given by the Petitioner/Respondent to the reasons for the delay.

35. This court is very careful not to lock any party from the seat of justice. However, if a party is indolent the court will not excuse such to the detriment of the Respondent. The law offers justice to both Petitioner as well as the Respondent.

    The Petitioner in this case seems not to be serous about her case. This was a case which was filed as a petition on 14th July 2023. The Petitioner had been served with her dismissal letter dated 21st January 2019 but dismissal was effective from 27th April 2018. The Respondent did not raise the issue of time bar but it is clear the petition was filed after the prescribed time under Section 89 of the *Employment Act*.

36. Thereafter, the Petitioner did not take action to set her petition for hearing upto 24th July 2025. The Petitioner blames the court's filing system but she has produced nothing even communication between herself and the registry concerning the mapping. It is suspect indeed that there would have been an issue of mapping for so many months. The court holds that is more of baseless excuse and the Petitioner simply slept on his job.

37. The Petitioner claims the Respondent filed the application after the Petitioner had requested for a mention date which she said she served the mention notice on 15th September 2025 and that he had already set the matter for mention on 21st October 2025.

    By the way, all these allegations are not adding up as this application was filed on 24th July 2025 and even if there was a mention notice it is said to have been set on 21st October 2025.

38. The court is reliant on the case of IVITA -VS- KYUMBU (Supra) which as earlier cited in this ruling states that if the defendant satisfies the court there is prolonged delay and the Plaintiff does not give sufficient reason for the delay, the court will presume the delay is not only prolonged but is also inexcusable and the court will dismiss that suit.

39. The court finds the Petitioner's delay in filing her suit and also in taking action after filing the same is both prolonged and also inexcusable. The application for dismissal by the Applicant is therefore merited and is granted. The petition dated 23rd February 2022 is dismissed.

40. Each party will bear their costs of the petition and of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF JANUARY 2026.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions

of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.