REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCLA CASE NO. E067 OF 2024

MICHAEL KIVAI MATOLO::::::::::::::::::::APPELLANT/RESPONDENT

VERSUS

ELIJAH MULINGE::::::::::::::::::::::::::::::::RESPONDENT/APPLICANT

RULING

The application is dated 21st November 2025 and is brought under Order 42 Rule 35(1) of the Civil Procedure Rules seeking the following orders;

1. THAT this Honourable Court do dismiss the Appellant's/Respondent's appeal hereof for want of prosecution.
2. THAT the cost of this appeal be borne by the Appellant/Respondent.

It is based on the following grounds that no steps have been taken to set the appeal down for hearing since 15/11/2024. The continued pendency of this appeal and the inaction on the part of the Appellant/Respondent has greatly inconvenienced the Respondent/Applicant. It would be in the interest of justice to dismiss the appeal hereof. The Appellant/Respondent has lost interest in this matter. The Appellant/Respondent indolence herein is an affront to the long held principle that there must be an end to litigation.

This court has considered the application, supporting affidavit and the replying affidavit. Order 17 Rule 2(1), 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) states thus:

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

The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and others & another (2016) eKLR**,** the court held that;

> *"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 vs 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."

In Argan Wekesa Okumu vs Dima College Limited & 2 others (2015) eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated 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 –vs-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."

In Naftali Opondo Onyango vs National Bank of Kenya Ltd (2005) eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

"However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff."

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate."

I have perused the court file and find that the matter came up in court on the 28th April 2025 before Koross J where counsel for both parties were present and the matter was referred to this court which it was said had a similar matter. The matter has come up before this court severally thereafter. This application is dated 21st November 2025. The Respondent states that the record of appeal has been filed and the same is awaiting the courts directions. I find that this matter is ripe for hearing and bearing in mind that there are other related matters I will not be inclined to dismiss the same. For these reasons I find this application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2026.

N.A. MATHEKA

JUDGE