



REPUBLIC OF KENYA



Kadenge v Land Registrar, Kilifi Land Registry (Constitutional Petition 21 of 2022) [2024] KEELC 13821 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION 21 OF 2022
EK MAKORI, J
DECEMBER 16, 2024**

BETWEEN

KADZO KAINGU KADENGE PETITIONER

AND

THE LAND REGISTRAR, KILIFI LAND REGISTRY RESPONDENT

RULING

1. The Respondent filed the application dated 12th January 2024 seeking for orders:
 - a. The suit herein be dismissed with cost for want of prosecution.
 - b. The cost of this suit be awarded to the respondent.
2. The application is brought under Section 3(A) and Orders 42 Rules 13 and 35(i) of the *Civil Procedure Act*. The application is supported by grounds therein and the supporting affidavit of Mr. Ojwang, the State Counsel on record
3. The petitioner filed Grounds of Opposition and a replying affidavit. The Grounds of Opposition disclose that:
 - a. The application is premature, incompetent, misconceived and an abuse of the Court process.
 - b. The application offends the provisions of Rules 15, 16, 20, 21 and 22 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*.
 - c. The application ignores the fact that hearing dates for constitutional petitions are fixed by the Registry.
4. The application was canvassed both by way of written submissions and orally by the parties.



5. Considering the materials and submissions placed before me the issues that fall for the determination of this Court is whether the petition should be dismissed for want of prosecution.
6. Counsel for the Applicant in the Motion for dismissal Learned Counsel Mr. Ojwang and for the Respondent Dr. Chitebwe ably argued for and against the motion beforehand. They cited the Constitutional and Statutory provisions and the *Civil Procedure Rules* they relied on. Besides they supplied this Court with sufficient legal precedents on the subject matter at hand.
7. I frame the issues for this Court's decision as whether the current petition should be dismissed for want of prosecution and who should bear the costs of the motion.
8. On the prolonged delay in fixing the matter for hearing, Mr. Ojwang submits that the Petitioner has demonstrated an undue delay of over one year in prosecuting the petition, which is in direct violation of the principles of expeditious resolution of disputes as enshrined under Article 159(2)(b) of the *Constitution* of Kenya, 2010 and Order 17 Rule 2(3) of the *Civil Procedure Rules, 2010*. The same is also against the judiciary guidelines on active case management, which this Court has worked hard to ensure they are adhered to.
9. He avers that an inordinate delay such as this is prejudicial to the Respondent, who has a right to see the matter brought to a fair, just, and timely conclusion. As put in the case of *Nelly Chelangat Mutai v Joseph Waititu Mwangi & others* [2018] eKLR, the Petitioner cannot and should not be allowed to hold a sword over the head of the Respondent. To put it in another way, the continued dormancy of this petition subjects the Respondent to continuous uncertainty and prejudice. The Respondent has been kept under undue legal threat for a prolonged period without any steps being taken to progress the suit. The Petitioner was to take steps, in reliance of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, albeit erroneously, wants this court to believe that the steps were to be taken by the Respondent, who was dragged to court.
10. In response to the prolonged delay, Dr. Chitebwe, for the Respondents, contends that the petition herein was filed on 17th August 2022. The Respondent was served on the same day. It took the Respondent over two months (September and October) to enter an appearance on 2nd November 2022. Under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms, Practice and Procedure Rules, 2013*, Constitutional Petition Rules). Rule 15 (i) gives the Attorney General or any state Organ fourteen days (14) days from the date of service to respond to a petition. Rule 15(11) requires the Attorney General to respond through a replying Affidavit. No Replying Affidavit has been filed by the Attorney General. Rule 15(2) deals with Respondents, not in the Attorney General or State Organ category, which provides for filing a memorandum of appearance. Technically, the memorandum of appearance filed by the Attorney General is misplaced and unnecessary. The court has not been told why no replying affidavit has been filed. The Memorandum of Appearance was not served upon the Petitioner's Advocate. No affidavit of service was filed.
11. Regarding computation of time, Dr. Chitebwe submits that the Petitioner could not have done anything from 2nd November up to the expiry of the next fourteen (14) days, 16th November 2022. Even then, the petitioner could have had the liberty to file a response to the reply to the petition in essence; therefore, assuming the Memorandum of Appearance was served on the same day, 2nd November 2022 which is not the case then pleadings would have closed on 23rd November 2022 that is to say if the AG had taken fourteen (14) days under Rule (15) (1) to file a replying affidavit and the Petitioner another seven (7) days to file a response. Those are 21 days from 2nd November 2021, under Order 50 Rule 4. Time does not run between 21st December to 13th January 2023. This could have



taken a further seven days, and from the 21st of December 2023 to the 13th of January 2024, the time was not running. The computation is as follows:

- a. Between 23rd November, 2022 to 20th December, 2022
 - b. Between 17th January, 2023 to 17th February, 2023.
 - c. Between 17th February, 2023 to 17th March, 2023
 - d. 17th March, 2023 to 17th April, 2023
 - e. 14th April, 2023 to 14th May, 2023
 - f. 14th May, 2023 to 14th June, 2023
 - g. 14th June, 2023 to 14th July, 2023
 - h. 14th July, 2023 to 14th August, 2023
 - i. 14th August, 2023 to 14th September, 2023
 - j. 14th September, 2023 to 14th October, 2023
 - k. 14th October, 2023 to 14th November, 2023
12. Counsel states that above computation only gives eleven months. From 21st December 2023 to 13th January 2024, time was not running. The application was quickly filed on 12th January 2024, which indicates that the Respondent was anxiously waiting to have the suit dismissed after the expiry of one year without responding to it. The Respondent contends that the application is premature and should be dismissed. It is an abuse of the court process. The above computation assumes that the Memorandum of Appearance was served on the same day it was filed on 2nd November 2022.
13. Regarding the principles for dismissing suits for want of prosecution, Dr. Chitembwe cites the test as laid out in *Ivita v Kyumbu* [1975] KEHC 4 (KLR), which states that the court has discretion to consider whether justice will be served despite prolonged delay on a case-to-case basis.
14. I agree with Mr. Ojwang that it was up to the Petitioner to move the Court and progress the matter. But applying the test as laid by Chesoni J. in *Ivita v Kyumbu* [1975] KEHC 4 (KLR):

“The authorities I have considered here show that the law and principle upon which courts go are clear. The test was enunciated by Lord Denning MR in *Allen v Sir Alfred McAlpine & Sons Ltd* at p 547, and it was repeated by Edmund Davies LJ in *Paxton v Allsopp* [1971] 3 ALL ER 370 at p 378, who put it as follows:

“If I may be acquitted of immodesty by quoting some words of mine used in *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 2 All ER 753 where having set out the familiar tests to be applied in such cases, I said: ‘But these questions are, as it were, posed enroute to the final question which overrides everything else and was enunciated by Lord Denning MR, in *Allen v Sir Alfred McAlpine & Sons Ltd*, in these words:

“The principle on which we go is clear: when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away”. So, the overriding consideration always is whether or not justice can be done despite



the delay. Thus, Lord Denning MR referred later in his judgment in that case, to “delay.....so great as to amount to a denial of justice’.....”

So, the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and 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 however 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 before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. 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.”

15. In this matter, the Applicant has highlighted that the Respondent could have proceeded in other civil matters and abandoned this petition. Although no affidavit was filed in reply to the petition by the Applicant, perhaps this would have been germane to consider.
16. Based on the materials I have, the directions I will take will be that the application for dismissal of this petition for want of prosecution is declined. Still, towards expeditious disposal of the same, the Court will provide the following directions:
 - a. The petition will be canvassed through affidavits, statements, and written submissions.
 - b. The AG has 30 days from this date to file a reply to the petition, with a corresponding leave of 21 days for the Petitioner to file a rejoinder if need be.
 - c. After that, parties have 14 days apart to file written submissions and a date must be taken forthwith to take a judgment date.
 - d. Costs in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Dr, Chitembwe for the Petitioner/Respondent

Mr. Wakhungu for the Respondents/Applicant

Happy: Court Assistant

