



Omamo & another ((Suing as the personal representatives of the estate of the late SETH NYAWARE OMAMO) v Attorney General & 4 others (Petition 1 of 2019) [2024] KEELC 13906 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
PETITION 1 OF 2019
EC CHERONO, J
DECEMBER 17, 2024**

BETWEEN

**EDDITH OMAMO 1ST PETITIONER
VICTOR OGUTU OMAMO 2ND PETITIONER
(SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE
LATE SETH NYAWARE OMAMO**

AND

**THE HONOURABLE ATTONEY GENERAL 1ST RESPONDENT
AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT
KITALE-ELGON CO-OP UNION LIMITED 3RD RESPONDENT
MICHEL F.C KITIYO 4TH RESPONDENT
JOHN K. CHEPSIGOR(BOTH T/A PKURES FARM) 5TH RESPONDENT**

RULING

1. This ruling is in respect of the 4th & 5th Respondents Notice of Motion application dated 18/05/2024. The said application is expressed to be brought under Rule 4,5,6 & 19 Article 159 of the *Constitution* of Kenya, Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 seeking the following Orders:
 - a. The Petition dated 27th November, 2018 be dismissed for want of prosecution.
 - b. The costs of this application be paid by the Petitioners.



2. The application is based on grounds on the face of the said application supported by the affidavit of Michael Francis Chemonges Kitiyo, the 4th Respondent hereinsworn on 14/05/2024.
3. In the supporting affidavit, the Applicant deposed that the petitioners filed the current petition on 27/11/2018 and the same was mentioned on 31/01/2019 and transferred to Bungoma Environment and Land Court for determination. The matter was before the court again on 03/07/2019, 15/07/2019, 03/10/2019, 09/10/2019 and 12/10/2019 when the issue of the court's jurisdiction was determined. The petition was further mentioned for directions on 25/08/2021, 15/09/2021, 29/09/2021, and 15/10/2021, but the petitioners were absent on numerous occasions. That the matter has not been prosecuted for over 2 years and 9 months which period they argue is inordinate and demonstrates that the petitioners are not keen on prosecuting this Petition. They urged the court to exercise its discretion in the interest of justice by allowing the application.
4. Despite being served with the application, the petitioners did not file any Replying affidavit or Grounds in opposition to the application.

Legal Analysis and Decision

5. I have considered the application by the 4th and 5th Respondent to dismiss the petition for want of prosecution having been dormant for a period of 2 year and 9 months.
6. The legal principles upon which a constitutional petition ought to be dismissed for want of prosecution are not expressly provided in the *Constitution* of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Court of Appeal gave guidelines in cases that present such a lacuna in *Karl Webner Claassen v Commissioner of Lands & 4 others* (2019) eKLR where it stated as follows;

“...in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable *Civil Procedure Rules*. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the *Constitution*.”

7. The *Civil Procedure Rules*, 2010 allows such an application under Order 17, Rule 2.

[Order 17, rule 2] Notice to show cause why suit should not be dismissed.

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 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.

8. The legal principles upon which Courts make findings on dismissal of a suit for want of prosecution were summarized in *George Gatere Kibata v George Kuria Mwaura & another* (2017) eKLR as follows:

Besides the legal framework set out in Order 17 Rule 2, the guiding criteria to be applied in considering whether or not a suit should be dismissed for want of prosecution has been articulated and settled in a number of leading authorities, among them, the case of *Ivita -v - Kyumbu*(1984) KLR 441 where it is summarized as follows:

“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”

9. First, it is worthwhile considering the history of the proceedings before me. I note from the Court record that indeed the last time this matter was before the court was on 27/10/2021. Since then, no action has ever been taken towards prosecuting the matter and seeing to it that it is heard and determined expeditiously. It is discernible from the above-mentioned provision that the timeframe for dismissing a suit for want of prosecution is one year of inactivity of the suit by either party. In my view, it was the duty and obligation of the petitioners to prosecute their case to its logical conclusion. Where a matter remains inactive for more than two years, the only logical conclusion one can make is that the petitioners have lost interest in the matter.

10. The Court is not and cannot be at the beck and call of indolent parties who feel no obligation to proceed with a matter with expedition or to offer an explanation for their failure to do so. To hold otherwise would be to allow an abuse of the Court process, which this Court is not prepared to do.

11. For all reasons given hereinabove, I find the Notice of Motion application dated 18th May 2024 merited. Consequently, the said application is thus allowed and this is petition is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF DECEMBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of

1. Mr. Simiyu Wabuke for the Petitioner
2. Mr. Tarus for the Respondent/Applicant
3. Bett C/A

