



**Koi v Masinde & 3 others (Environment & Land Case 102 of 2009)
[2024] KEELC 13851 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 102 OF 2009
EK MAKORI, J
DECEMBER 11, 2024**

BETWEEN

CHENGO KATANA KOI PLAINTIFF

AND

PROTUS EVANS MASINDE 1ST DEFENDANT

CHAIRMAN, NATIONAL LAND COMMISSION 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 4TH
DEFENDANT**

RULING

1. The 1st Defendant's application dated 31st July 2023 and a Supporting Affidavit of even date seeks the following orders:
 - i. That the Honourable Court be pleased to dismiss this suit for want of prosecution;
 - ii. The Plaintiff/Respondent bears the cost of and incidental to this suit and application.
2. In an affidavit in support of the application for dismissal for want of prosecution deposited by one Protus Evans Masinde on 31st July 2023, the Applicant avers that since the file was ordered for a retrial by the Court of Appeal on 29th January 2021, the Plaintiff/Respondent has never any steps to prosecute the matter. His lawyer has twice had the matter mentioned before the Deputy Registrar of this Court, hence the current application.
3. The Respondent Chengo Katana Koi, in his affidavit deposited on 20th May 2024 in opposition, is of a different view that from the background of the matter, the threshold for dismissal of a suit has not been attained as provided in order 17 Rule 2(1) of the Civil Procedure Rules. Since the matter was



ordered for a retrial before another judge other than Olola J., one year has never lapsed to merit the dismissal. The matter was last in Court on the 18th of September 2023 before the Deputy Registrar of this Court, Hon. Wasike. Besides, to dismiss the matter will gravely affect the members of the Koi clan who have lived on this land since time immemorial.

4. The Court directed the application to be canvassed through written submissions. Having carefully considered the material and submissions, I will decide whether the application for dismissal of the suit for want of prosecution has been achieved. Who should bear the costs of the application?
5. The test for dismissal of a suit for want of prosecution is as espoused in *Ivita v Kyumbu* [1984] KLR 441:

“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.”

6. The history of this matter shows that it was heard by this court (Olola J). There was an appeal. The Court of Appeal ordered a retrial. That process of appeal took some time.
7. The file was forwarded to the ELC for another judge to take over. It has been mentioned twice before the Deputy Registrar of this Court. I do not think there has been an inordinate delay in fixing the matter for a hearing. In my view, the appropriate thing to do is to set the matter down for a hearing on merit and fast-track it.
8. The application dated 31st July 2023 is hereby dismissed—costs in the cause.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 11TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Khaseke, for the Defendants

Mr. Otieno H/B for Sagana for the Plaintiff

Abdrashid: Court Assistant

