



**Abdalla v Ali & another (Environment & Land Case 302 of 2015)
[2023] KEELC 265 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 302 OF 2015
NA MATHEKA, J
JANUARY 25, 2023**

BETWEEN

IDD SHILLINGI ABDALLA PLAINTIFF

AND

SAUDA SULEIMAN ALI 1ST DEFENDANT

EDWARD K. MULONGO 2ND DEFENDANT

RULING

1. The application is dated August 20, 2020 and is brought under order 17 rule 2(3) and order 51 rule 1 of the [Civil Procedure Rules 2010](#) and section 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. That this honorable court be pleased to dismiss this suit for want of prosecution.
 2. That the plaintiff bears the costs of the application as well as the costs of the suit.
2. It is based on the grounds that the plaintiff/respondent has neglected and/or otherwise failed to set down this suit for hearing and/or prosecute the same for a period of more than four (4) years. That the plaintiff/respondent is in the circumstances, guilty of laches and inordinate delay in the prosecution of this suit and has thereby caused prejudice to the defendant/applicant herein. That this delay in prosecuting the matter is not only inordinate and inexcusable but is also prejudicial to the interest of the defendant/applicant who may be unable to trace his witnesses. That it is only proper and just that both the defendant/applicant and the court be disencumbered by the proceedings that the plaintiff/respondent has no further interest in. That it is the interest of justice that this application be allowed.
3. The plaintiff/respondent submitted that the plaintiff was previously represented by the firm of Mwashunga Mtana & Co Advocates who then had instructions to represent the plaintiff before the said firm partner was suspended and since the plaintiff was out of the country the said matter could not



proceed as the plaintiff was unable and could not understand the process. That the plaintiff is ready and willing to prosecute the matter to its finality.

4. This court has considered the application and the submissions therein. Order 17 rule 2 of the Civil Procedure Rules provides that;

"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 should not be 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."

5. In the case of Ivita vs Kyumbu (1984) KLR 441 the court held as follows:

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

6. In the case of Mwangi S Kimenyi vs Attorney General and another, Civil Suit Misc No 720 of 2009, the court restated the test as follows:-

"1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.

2. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."

7. I have perused the court record and find that on the January 18, 2018 the court issued a notice to show cause (NTSC) to the parties why this suit should not be dismissed for want of prosecution. The notice to show cause (NTSC) come up on February 20, 2018 and the suit was dismissed as both parties were absent. There is no suit to be dismissed again. I find this application is not merited and is dismissed with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JANUARY 2023.

N.A. MATHEKA



JUDGE

