



REPUBLIC OF KENYA



**KENYA LAW**  
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**Murathi & 15 others v County Government of Murang'a & 3 others; Cabinet Secretary,  
Water & Sanitation & 9 others & 10 others (Interested Parties) (Constitutional  
Petition 14 of 2019) [2025] KEHC 2359 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2359 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CONSTITUTIONAL PETITION 14 OF 2019  
CW GITHUA & CW GITHUA, JJ  
FEBRUARY 27, 2025**

**BETWEEN**

**MAGOCHI MURATHI ..... 1<sup>ST</sup> PETITIONER**  
**MAGOCHI MURATHI & 15 OTHERS ..... 2<sup>ND</sup> PETITIONER**  
**FRANCIS MICHIRI KIEMO ..... 3<sup>RD</sup> PETITIONER**  
**BEATRICE WAWARUINU MAINA ..... 4<sup>TH</sup> PETITIONER**  
**JOHN MURITU NDWACHU ..... 5<sup>TH</sup> PETITIONER**  
**ANTHONY MWANGI NGONYOKU ..... 6<sup>TH</sup> PETITIONER**  
**KELVIN MBURU ..... 7<sup>TH</sup> PETITIONER**  
**STEPHEN NGANGA ..... 8<sup>TH</sup> PETITIONER**  
**KELVIN NJOROGE ..... 9<sup>TH</sup> PETITIONER**  
**JULIUS MWANGI ..... 10<sup>TH</sup> PETITIONER**  
**VICTOR NDUATI ..... 11<sup>TH</sup> PETITIONER**  
**SALOME MAINA ..... 12<sup>TH</sup> PETITIONER**  
**JOSPHAT NDIRANGU ..... 13<sup>TH</sup> PETITIONER**  
**MARY NJERI MWANGI ..... 14<sup>TH</sup> PETITIONER**  
**JOSEPH GATHENGA MWANGI ..... 15<sup>TH</sup> PETITIONER**  
**JOSEPH MURIUKI MAINA ..... 16<sup>TH</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MURANG'A ..... 1<sup>ST</sup> RESPONDENT**



COUNTY ASSEMBLY OF MURANG'A ..... 2<sup>ND</sup> RESPONDENT  
COUNTY GOVERNMENT OF MURANG'A ..... 3<sup>RD</sup> RESPONDENT  
COUNTY ASSEMBLY OF MURANG'A ..... 4<sup>TH</sup> RESPONDENT

AND

CABINET SECRETARY, WATER & SANITATION & 9  
OTHERS ..... INTERESTED PARTY  
CABINET SECRETARY, WATER & SANITATION ..... INTERESTED PARTY  
WATER SERVICES REGULATORY BOARD ..... INTERESTED PARTY  
ATHI WATER WORKS DEVELOPMENT AGENCY ..... INTERESTED PARTY  
WATER RESOURCES AUTHORITY ..... INTERESTED PARTY  
THE ATTORNEY GENERAL ..... INTERESTED PARTY  
KAHUTI WATER & SANITATION CO. LTD ..... INTERESTED PARTY  
GATAMATHI WATER & SANITATION CO. LTD ..... INTERESTED PARTY  
GATANGA COMMUNITY WATER SCHEME ..... INTERESTED PARTY  
MURANG'A WATER & SANITATION CO. LTD ..... INTERESTED PARTY  
MURANG'A SOUTH WATER & SANITATION CO. LTD . INTERESTED PARTY

#### RULING

1. In its Notice of Motion dated 19<sup>th</sup> May 2023, the 1<sup>st</sup> respondent, the County Government of Murang'a (hereinafter the applicant) sought that the Petition dated 14<sup>th</sup> May 2018 and filed on 11<sup>th</sup> June 2019 be dismissed for want of prosecution and that costs of the application and the petition be borne by the petitioners.
2. The application is based on grounds that for over one year, the petitioners had not taken any step to prosecute the petition; that it was only fair and just that the applicant be relieved from the anxiety of defending a petition that the petitioners had lost interest in prosecuting; that the pendency of the petition violated the overriding objective of the court which was to justly and expeditiously resolve disputes.
3. In its supporting affidavit, the applicant re-iterated the above grounds and added that apart from inviting the applicant to attend the court registry to fix a hearing date through letter dated 13<sup>th</sup> January 2020, the petitioners had not taken any other action towards prosecuting either the petition or the interlocutory application they had filed under a certificate of urgency together with the petition. Further, the applicant contended that the petitioners had lost interest in pursuing their petition and it was in the interest of justice that the same be dismissed with costs for want of prosecution.
4. The application was contested through a replying affidavit sworn on 8<sup>th</sup> July 2024 by the 1<sup>st</sup> petitioner, Magochi Murathi on his own behalf and on behalf of the other petitioners. In his affidavit, Mr. Murathi deposed that the delay in prosecuting the petition was not intentional and that it was caused by circumstances beyond the petitioners control. He explained that the delay was caused by the outbreak of the Covid -19 pandemic which brought the entire world to a stand still and that after



normalcy returned, the physical file could not be traced in the court registry; that unavailability of the physical file in the court registry made it impossible for them to fix a hearing date for the petition.

5. In paragraph 9 and 10 of the affidavit, the deponent averred that some of the orders sought in the petition may have been overtaken by events. He did not however specify the orders he had in mind. This notwithstanding, he stated that he was still desirous of prosecuting the petition if given a chance; that under Article 50 of the Constitution, he had a right to be heard and his case determined on merit.
6. The application was prosecuted through written submissions which the principal parties, that is, the applicant and the petitioners duly filed and which I have carefully considered together with the affidavits on record and all the authorities cited in support and in opposition to the Motion.
7. Having considered all the material placed before me, I find that the only issue arising for my determination is whether the applicant has demonstrated that the instant petition was suitable for dismissal for want of prosecution.
8. As correctly submitted by the petitioners, the court's power to dismiss a suit for want of prosecution is discretionary. Needless to state, this discretion, just like any other judicial discretion, must be exercised judiciously in accordance with established legal principles taking into account the facts and circumstances of each case. The discretion should be exercised objectively and not arbitrarily or capriciously.
9. There are no hard and fast rules regarding how the court should exercise its inherent power and discretion in deciding whether or not to dismiss actions for want of prosecution. There is, however, a plethora of case law which elucidates principles that guide courts in the exercise of the aforesaid discretion. While it is not possible to replicate most of them here, it will suffice to cite just a few of them.
10. In the case of *Wilson Kiarie Njoroge v Family Bank Ltd & Another* 2015] EKLK which has been cited by the petitioners, the court stated as follows;

“...while I note that a plaintiff has a primary duty to take steps to progress its case, the law prohibits impulsive inclination and requires that before making such an order as the one sought herein i.e dismissal of a suit, the court must first satisfy itself that there was inordinate delay in prosecuting the matter, that the said delay was deliberate and inexcusable and is an abuse of the court process, that the said delay shall occasion prejudice to the other party....”

11. In *Dock Workers Union of Kenya v Kenya Ports Authority; Portside Freight Terminals Limited & another (Interested Parties)* (Constitutional Petition E006 of 2020) [2022] KEHC 12951 KLR which was cited by the applicant, Mativo J ( as he then was) pronounced himself as follows;

“...In light of these principles, it is my view that the rules permit a court to dismiss, in appropriate circumstances, an action for want of prosecution. It will constitute a justifiable limitation of a plaintiff's constitutional right of access to the courts. An intention not to prosecute a suit may reasonably be inferred particularly where there is an inordinate or unreasonable delay in prosecuting the case or application. In order to have the advantage of the courts exercise of discretion, the plaintiff must show that he was prevented by sufficient cause from prosecuting the case. Sufficient cause means something beyond the control of the party. The words “sufficient cause” should be liberally construed. The applicant must satisfy the court that he was not negligent and inactive. It must be considered that when there is a delay in prosecuting a case or the time filing the application or an appeal lapses a valuable right accrues to the successful litigant....”



12. Lastly, in the celebrated case of *Ivita v Kyumba* [1984] KLR the court laid down the test to be applied in applications such as the one before me in the following terms;

“.....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.... 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.”

13. From the foregoing authorities, it is clear that the most important consideration the court should bear in mind when exercising its discretion in applications of this nature is whether delay in prosecution of a suit or petition has in fact been established; the length of the delay; whether the delay was inordinate and whether it was inexcusable. The court should also consider whether the defendant or applicant has been prejudiced by the delay or was likely to be prejudiced by any further delay if the application was not allowed. It is important to note that whether or not delay was inordinate will depend on the circumstances of each case but it will be inexcusable if no reasonable excuse or satisfactory explanation is given for the delay.

14 . It is pertinent to note that the rationale for dismissal of suits is the need for expedition in the resolution of disputes which need has been elevated to a constitutional principle enshrined in Article 159 (2) (b) of the Constitution which decrees that justice shall not be delayed. It is trite that once a party files a dispute in court, it behooves that party to take all necessary steps to ensure that the dispute was heard and concluded without delay.

15. In this case, the petitioners have conceded that there has been considerable delay in the prosecution of their petition. They have sought to explain the delay by attributing it to factors beyond their control. Firstly, they blamed it on the outbreak of the Covid- 19 pandemic claiming that when the pandemic broke out, they could not have done anything to progress hearing of the petition since to use their own words, “ the world came to a stand still”.

Secondly, they claimed that when normalcy resumed, the court file could not be traced in the court registry and they were unable to fix hearing dates without availability of the physical file.

15. I have perused the court record. The record shows that the petition was filed together with a Notice of Motion under a certificate of urgency on 11<sup>th</sup> June 2019. The court declined to certify both the petition and the application as urgent and directed that they be served on the respondents and a hearing date be taken in the registry. On 19<sup>th</sup> June 2019, the petitioner’s counsel secured 27<sup>th</sup> November 20219 as the hearing date for the application. It is not clear from the record what happened on that date since no proceedings were recorded in the court file that day.

16. What is clear however is that by the time the applicant filed the instant application over three years later, the petitioners had not taken a single step to prosecute their interlocutory application or to fix their petition for hearing.



Instead, their learned counsel attended the court on 7<sup>th</sup> March 2024 and applied for the petition to be marked as settled with no orders as to costs. The 1<sup>st</sup> respondent insisted to be awarded costs and the court allowed the parties time to negotiate on the issue and record settlement on 26<sup>th</sup> June 2024. But when the parties attended court on 26<sup>th</sup> June 2024, the petitioners' counsel indicated that the petitioners had changed their position and wanted the petition to proceed for hearing.

15. Given the above facts, the question that I must now seek to answer is whether the explanation offered by the petitioners for their delay in prosecution of the petition was satisfactory.

Starting with the claim that they were prevented from taking any action to progress hearing of the petition by the outbreak of the Covid – 19 Pandemic, I take judicial notice of the disruption and adverse impact the pandemic had on court operations and overall administration of justice. I however hasten to add that although the pandemic had hit some parts of the world in late 2019, it was not until March 2020 that it broke out in Kenya leading to scaling down of court operations and restrictions of movement. I also take judicial notice that in March 2020, the Hon. Chief Justice Emeritus David Maraga issued guidelines allowing limited access to court registries and anybody who wanted to access court services would have had access under those guidelines. Be that as it may, it is important to note that some form of normalcy in court operations resumed towards the end of 2020 or early 2021.

15. Besides blaming the Covid-19 outbreak for their inaction, the petitioners did not explain why they did not move the court by fixing either a mention or hearing date post the outbreak or when normalcy in court operations resumed if indeed they were interested in prosecuting their petition as they claim.

16. From the court record, it is evident that from 19<sup>th</sup> June 2019 when their learned counsel obtained a hearing date for their interlocutory application, the petitioners and their learned counsel went into deep slumber and were not even awakened by filing of the instant application in June 2023. I say so because even after being served with the application, the petitioners did not take any action. This was several years after the Covid -19 pandemic had been vanquished yet the petitioners did not offer any explanation for their inaction.

17. In my considered view, the petitioners prolonged delay in prosecuting the petition cannot in all fairness be blamed on the Covid-19 pandemic. If they were diligent and were desirous of pursuing their petition, nothing stopped them from taking steps to facilitate hearing of the petition post the Covid-19 period. Their attempt to attribute the delay to the pandemic is clearly implausible and smacks of dishonesty and bad faith on their part.

18. Another reason given for the delay in question is the alleged disappearance or misplacement of the court file in the court registry. These claim was not substantiated by any evidence. The petitioners did not for instance avail any correspondence addressed to the court inquiring about the file or showing any effort they may have made to seek the court registry's intervention in tracing the file if in fact it was missing at any point in time. They did not also give particulars regarding the dates or the period they allegedly discovered that the court file was missing.

19. The above general and unsubstantiated claim by the petitioners must be considered against the fact that the applicant was able to access the court file and file the instant application on 19<sup>th</sup> May 2023 apparently without any difficulty. Even if, for the sake of argument, the court were to accept the petitioner's claim that the court file was misplaced in the court registry prior to May 2023, the petitioners have not explained what prevented them from taking action to progress hearing of either their interlocutory application or the petition after May 2023 when the file was obviously available in the court registry.



20. Given the foregoing, I have come to the conclusion that the reasons given by the petitioners for the delay in prosecuting the petition are not credible or convincing. The delay spanning about four years is long and inordinate. As demonstrated above, the delay has not been sufficiently explained and is clearly inexcusable.
21. In my considered view, the long delay is a strong indicator of the petitioners sheer lack of diligence and or loss of interest in prosecuting the petition. Their loss of interest was demonstrated by their counsel's application on 17<sup>th</sup> March 2024 to have the petition marked as settled before they thereafter changed their mind for undisclosed reasons.
22. Having failed to demonstrate sufficient cause for failure to prosecute their petition since it was filed in 2019, the petitioners cannot now turn around and claim to be interested in pursuing the petition after they have been threatened with its dismissal. They cannot sit on their right to a hearing only to assert it over four years later when canvassing an application for dismissal of the petition for want of prosecution. In my view, this amounts to an abuse of the court process.
27. For the foregoing reasons, i am satisfied that the interests of justice in the circumstances of this case do not justify exercise of this court's discretion in the petitioners favour. It is consequently my finding that the application dated 19<sup>th</sup> May 2023 is merited and it is hereby allowed. The petition dated 4<sup>th</sup> June 2019 is accordingly dismissed for want of prosecution with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**HON. C. W. GITHUA**

**JUDGE**

In the Presence of:

Ms. Wanyingiholding brief for Mr. Kiroko Ndegwafor the petitioners.

Mr. Sharmaholding brief for Mr. Ngan'gafor the 1<sup>st</sup> respondent.

Ms. Wanjirufor the 5<sup>th</sup> Interested Party (the Hon. AG )

Susan Waiganjo, Court Assistant

