

KENYA / JUDGMENT

Chepkuiyeng v Serem & 3 others

[2026] KEELC 5457 (KLR)

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COURT

Environment and Land Court

CASE / FILE NUMBER

Enviromental and Land Originating Summons 108 of 2019

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REPUBLIC OF KENYA IN THE ENVIRONMENT AND LAND COURT AT ELDORET ELC CASE No. 108 OF 2019 (0S) CHRISTOPHER CHEPKUIYENG..... PLAINTIFF/RESPONDENT -VERSUS- RAPHAEL AYABEI SEREM 1ST DEFENDANT/APPLICANT VINCENT LELEI 2ND DEFENDANT/APPLICANT NELSON CHEPKUIYENG..... 3RD DEFENDANT/APPLICANT JOSEPH KIBET 4TH DEFENDANT/APPLICANT

RULING

1. The 1st to the 4th Defendants (hereinafter referred to as “1st to 4th Applicants”) did file Notice of Motion Application dated 25.03.2025 (hereinafter referred to as “the present Application”) seeking the following Orders against the Plaintiff (hereinafter referred to as “the Respondent”) herein; - A. THE PLAINTIFF’S SUIT BE DISMISSED FOR WANT OF PROSECUTION. B. THE PLAINTIFF BE CONDEMNED TO PAY COSTS OF THE SUIT AND THIS APPLICATION. 2. The facts pleaded by the 1st to 4th Applicants in support of the present application are contained in the Supporting Affidavit sworn by the 2nd Defendant/Applicant and can be summarised as follows; - ELC.108 of 2019 RULING 1 (i) The Respondent herein did file the present suit on the 17.09.2019. (ii) Since then, the Respondent has never prosecuted the same to its logical conclusion. (iii) The last time this suit was listed before the Court and/or prosecuted was on the 24.05.2021. (iv) It has therefore been over a period of three (3) years since the Respondent did take any action in this matter.
- (v) In essence, the 1st to 4th Applicants did plead that the Respondent was no longer keen to prosecute this matter and its pendency has caused both emotional and psychological strain on them. (vi) It was the 1st to 4th Applicant’s view that based on the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, this suit stands automatically dismissed having been dormant for two years. (vii) The 1st to 4th Applicants did plead and submit that litigation must come to an end and this is one of those cases that the Court should dismiss for want of prosecution. (viii) In conclusion, the 1st to 4th Applicants did pray that the present application be allowed and the Respondent condemned to pay costs of both the main suit and the present application. 3. The present Application was duly served on the Respondent.

4. The Respondent in opposition of the present application did file a Replying Affidavit dated 16.09.2025. ELC.108 of 2019 RULING 2 5. The Replying Affidavit dated 16.09.2025 did oppose the present application on the following facts; - (i) To begin with, the Respondent did admit that the present suit was filed on the 17.09.2019. (ii) Together with the Plaint filed on the 17.09.2019, the Respondent did file an Interlocutory Application wherein the Court did grant an Order of Status Quo pending the hearing and determination of the main suit. (iii) The Respondent did further concede that the last time the present suit was before the Court was on 24.05.2021. (iv) The Respondent did state that although the provision of Order 17 Rule 2 (5) of the Civil Procedure Rules, 2010 did indeed provide for a dismissal of the suit for want of prosecution, such an Order should be granted as a last resort.

- (v) The Respondent did aver the delay and/or inaction in prosecuting, the matter since the year 2021 was the COVID-19 pandemic which did affect the operations of the Court. (vi) Further to the foregoing, the Respondent had faced various health challenges which made it difficult for him to peruse and/or take the relevant steps to ensure the matter is prosecuted. (vii) The Respondent therefore did state that the delay to prosecute the suit herein was beyond his control and not intentional. (viii) In addition to the foregoing, the Respondent did disclose to the Court that parties herein had been negotiating about the dispute with a view of reaching an amicable settlement. ELC.108 of 2019 RULING 3 (ix) The Respondent did consequently commit to forthwith expeditiously prosecute this matter to its logical

conclusion.

- (x) The Respondent did therefore seek this Court to dismiss the present application and allow the matter to proceed on merit. 6. The Replying Affidavit by the Respondent was duly served on the 1st to 4th Applicants who did file a Further Affidavit dated 14.05.2026 in response to the same. 7. In the Further Affidavit dated 14.05.2026, the 1st to 4th Applicants did state as follows; - (i) To begin with, the 1st to 4th Applicants did point out the Respondents admission that this matter was lastly in Court on the 24.05.2021. (ii) The 1st to 4th Applicants did reiterate that since 24.05.2021, it had been more than three (3) years since the Respondent did prosecute the same. (iii) As regards the reasons given for the inaction in this file, the 1st to 4th Applicants were of the view that there was no evidence adduced by the Respondent to demonstrate how the COVID 19 pandemic, his ill health and/or the family negotiations had hindered the prosecution of this matter. (iv) Consequently, the 1st to 4th Applicants did plead that there is no sufficient reason advanced by the Respondent that would give a satisfactory reason as to why the present suit had not been prosecuted since the year 2021.
- (v) In essence, the 1st to 4th Applicants did pray that the present application be allowed as pleaded. ELC.108 of 2019 RULING 4 8. The Court did direct that the present application would be heard by way of written submissions. 9. In compliance, 1st to 4th Applicants did file their submissions dated 02.06.2026 while the Respondent filed her submissions dated the 05.06.2026.

10. The Court has carefully perused the present Application, the Response thereof and the submissions by both parties and identifies the issues for determination as follows: - ISSUE NO. 1: WHEN WAS THE LAST TIME THE PRESENT SUIT WAS LISTED IN COURT? ISSUE NO.2- HAS THE FAILURE TO LIST THE MATTER FOR HEARING TERMINATED THE PRESENT SUIT? ISSUE NO.3: IS THE PRESENT APPLICATION MERITED OR NOT? ISSUE NO.4- WHO BEARS THE COSTS OF THE PRESENT APPLICATION?
11. Having identified the above issues for determination, the court will proceed to analyse them as hereinbelow. ISSUE NO. 1: WHEN WAS THE LAST TIME THE PRESENT SUIT WAS LISTED IN COURT?
12. The first issue for determination is when last was the present suit before the Court.
13. According to the 1st to 4th Applicants pleading and submission, the present suit was last in Court on the 24.05.2021.
14. This fact was similarly admitted by the Respondent herein in her Replying Affidavit. ELC.108 of 2019 RULING 5
15. Consequently, it is clear from the parties herein that indeed the last time the matter was listed in Court was the 24.05.2021. ISSUE NO.2- HAS THE FAILURE TO LIST THE MATTER FOR HEARING TERMINATED THE PRESENT SUIT?
16. The second issue for determination is whether or not the failure by the Respondent to prosecute the present suit terminated the same pursuant to Order 17 Rule 2 of the Civil Procedure Rules, 2010?
17. According to the 1st to 4th Applicants, the failure of the Respondent to prosecute the present suit since 24.05.2021 did result to an automatic termination of the same.
18. The 1st to 4th Applicants did in particular rely on the provision of Order 17 Rule 2 (5) of the Civil Procedure Rules, 2010 which states as follows; - “(5) A suit stands dismissed after two years where no step has been undertaken.”
19. In essence, the 1st to 4th Applicants did submit that the Court herein did not have any discretion but to dismiss the present suit keeping in mind that no step had been undertaken by the Respondent in this file for the last two years.
20. The Respondent on the other hand did put forward a number of explanations as to why no steps were taken in the file for the last two years.
21. There were three main explanations advanced by the Respondent for the inaction being namely the COVID-19 pandemic, his bad health and the negotiations for an amicable solution. ELC.108 of 2019 RULING 6
22. Is it true that indeed, the whole world did experience a shift in the manner in which things were being done during the COVID-19 pandemic.

23. Nevertheless, the Kenyan Courts did come up with innovative mechanisms that did ensure smooth operation of Court proceedings including online filing.
24. Even if the Courts did downscale their operations, such action did not take more than one year to be up scaled to normal.
25. In other words, by the year 2023, most of the Courts in the Republic of Kenya were back in full operation and every litigant had access to both the premises and their individual files to prosecute the same.
26. As regards the bad health of the Respondent, no documentary evidence was tabled before the Court to at least support this allegation.
27. In other words, this Court is not persuaded that the inaction by the Respondent was premised on any bad health as no evidence to this effect had produced.
28. Lastly, if indeed the parties herein are in constructive negotiations as is alleged by the Respondent, then it was incumbent on the Respondent to at least have presented minutes of the ongoing discussions.
29. In the alternative, the 1st to 4th Applicants who are the other parties in the negotiations would have confirmed the existence of such talks.
30. Unfortunately, the 1st to 4th Applicants did not admit the purported negotiations and in the absence of any minutes demonstrating the same, this Court is not persuaded that the alleged negotiations are the reason why there has been no step taken in this matter for the last two years. ELC.108 of 2019 RULING 7
31. There is no doubt that indeed the Respondent did not take any steps in this matter for more than three (3) years prior to the 1st to 4th Applicants filing the present application.
32. In the case of IVITA-VERSUS- KYUMBU (1984) KLR,441, the Court did state as follows; -
“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.”
33. The period between 18.05.2021 and 18.07.2025 is the period of delay in this matter, and the Respondent is required to give a satisfactory explanation for the over four (4) years delay in prosecuting the suit before this Court.
34. This Court did consider the three main reasons advanced by the Respondent as explanations for the delay but none was persuasive to the Court as already determined.

35. The other reason that Respondent did advance for the delay in taking any action in this matter for over three (3) years was that the Advocate on record did not give him an update of the proceedings hence he was not aware of what was on going in the matter. ELC.108 of 2019 RULING 8
36. The Court of Appeal in the case of HABO AGENCIES LIMITED-VERSUS- WILFRED ODHIAMBO MUSINGO
- (2016) KECA 477 (KLR) did observe as follows; - “In the Kenyan case of Rajesh Rughani -v- Fifty Investments Limited & Another (2005) eKLR, this Court expressed that “it is not simply enough to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter.” Whereas it is true that in general, mistake of counsel should not be visited upon a client it is equally true that when counsel as agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences. (See Bains Constructions Co. Limited -v- John Mzare Ogowe
- (2011) eKLR).”
37. Based on the finding in the above authority, it is not sufficient reason for a party to blame the advocate for not informing him about the progress of his/her matter.
38. The Court did clearly indicate that the litigant also shoulders a bigger responsibility as the actual party in the proceeding to ensure that there is progress in a matter and the same is being conducted in accordance to his instructions as the principal party.
39. In essence, this Court is of the considered view and finding that there is no adequate reason advanced by the Respondent explaining why no step has been taken for a period of more than Four (4) years prior to the present application being filed.
40. In the absence of such reasonable explanations, this Court has no other alternative under Order 17 Rule 2(5) of the Civil Procedure Rules, 2010 other than to dismiss the same for want of prosecution. ELC.108 of 2019 RULING 9 ISSUE NO.3: IS THE PRESENT APPLICATION MERITED OR NOT?
41. The third issue is whether or not the present application is merited.
42. Based on the finding of this Court in the Issue hereinabove, this Court is of the view that the present application is merited and should be allowed. ISSUE NO.4- WHO BEARS THE COSTS OF THE PRESENT APPLICATION?
43. As to regards costs, the 1st to 4th Applicants being successful in the present application are awarded costs payable by the Respondent herein.

CONCLUSION

44. In conclusion, this Court hereby makes the following Orders in determination of the present application; - A. THE NOTICE OF MOTION DATED 25.03.2025 BE AND IS HEREBY ALLOWED. B. THE PLAINT DATED 17.09.2019 BE AND IS HEREBY DISMISSED FOR WANT OF PROSECUTION. C. THE RESPONDENT IS CONDEMNED TO PAY COSTS OF BOTH THE PRESENT APPLICANT AND THE MAIN SUIT HEREIN. DATED, SIGNED and DELIVERED at ELDORET this on this 17TH DAY OF SEPTEMBER, 2026. EMMANUEL M.WASHE ELC.108 of 2019 RULING 10 JUDGE IN THE PRESENCE OF: Court Assistant: Brian Advocate for 1st to 4th Applicants: Mr. Waweru Advocate for Respondent: Ms. Chesoo ELC.108 of 2019 RULING 11
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