



**Nduati & another v Harrison & another; Onuonga & 4 others (Interested Parties)  
(Environment & Land Case 317 of 2010 & Environment and Land Case Civil Suit  
860 & 874 of 2013 (Consolidated)) [2025] KEELC 2850 (KLR) (25 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2850 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 317 OF 2010 & ENVIRONMENT  
AND LAND CASE CIVIL SUIT 860 & 874 OF 2013 (CONSOLIDATED)**

**CA OCHIENG, J**

**MARCH 25, 2025**

**BETWEEN**

**STANLEY THIONGO NDUATI ..... 1<sup>ST</sup> PLAINTIFF**

**LEONARD KIRORI KARIUKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JAMES WACHIRA HARRISON ..... 1<sup>ST</sup> DEFENDANT**

**EMBAKASI RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ROBSON KONO ONUONGA ..... INTERESTED PARTY**

**SUSAN WAIRIMU KONDO ..... INTERESTED PARTY**

**STEPHEN JOSEPH NJUGUNA ..... INTERESTED PARTY**

**ELIJAH MWANGI NJUGUNA ..... INTERESTED PARTY**

**MARY WAITHERA MWANGI ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the Plaintiffs' in the main suit Notice of Motion application dated the 22<sup>nd</sup> May 2024 which is brought pursuant to Order 17 Rule 2 (1 & 2) and Order 51 Rule 1 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the *Civil Procedure Act* including Article 159 of *the Constitution*. The Plaintiffs seek the following Orders:
  - a. That this Honourable Court be pleased to set aside its orders of dismissal made on 18<sup>th</sup> October 2021, and reinstate this suit to be heard and determined on merit.



- b. That costs of this application be in the cause.
2. The application is premised on grounds on the face of it and the supporting affidavit of Stanley Thiongo Nduati. He avers that his former advocates failed to attend court to prosecute the matter despite having instructions to do so. Further, that upon perusal of the court file, the Plaintiffs' learnt that a hearing date of 28<sup>th</sup> January 2021 was given in court but his advocate did not inform him. He contends that he has been diligent in prosecuting the case and is desirous of doing so, to conclusion.
  3. The application is opposed by the 1<sup>st</sup> Defendant in the main suit vide the replying affidavit sworn by Kenneth Mburu, Advocate. He contends that the Plaintiff has been indolent in the matter to the extent that by the time the court was dismissing the suit on the 18<sup>th</sup> October 2021, there had been no activity in the file for over six (6) months. Further, that if the suit is reinstated, the 1<sup>st</sup> Defendant will continue to be prejudiced by being held at ransom in a suit that the Plaintiffs have lost interest in.
  4. The 1<sup>st</sup> Interested Party filed a reply in support of the application. He contends that if the suit is not reinstated, he will be prejudiced since he purchased his portion of land from the Plaintiff where he has built his matrimonial home.
  5. The 1<sup>st</sup> Defendant in ELC 860 of 2013 opposed the application vide his replying affidavit sworn on 20<sup>th</sup> June 2024. He avers that his advocates were not served with hearing notices of 28<sup>th</sup> January 2021 and 18<sup>th</sup> October 2021 respectively, as well as the instant application. Further, that over thirteen (13) years have lapsed without this suit being prosecuted by the Plaintiffs who frustrated the hearing by seeking for adjournments and failing to comply with the court's timelines.
  6. He contends that the delayed prosecution in the matter is prejudicial to him and other parties as key witnesses in the matter among them the former chairman and Director of the common 2<sup>nd</sup> Defendant in all three (3) consolidated suits has since died. Further, that the 1<sup>st</sup> Plaintiff herein is an advocate of this Honourable Court and therefore has always been in a position to follow up the progress of this case with his former advocates or personally through the judiciary's case tracking system (CTS).
  7. He avers that the Plaintiffs' suit has been overtaken by events as two (2) parcels that they claim against him, being Nairobi/Block 105/5811 and 5812 were transferred to him on 6<sup>th</sup> February 2018 and he was issued with respective Certificates of Lease in a title processing operation conducted by the 2<sup>nd</sup> Defendant and officials from the Ministry of Lands after the intervention of the then President, H.E Uhuru Kenyatta.
  8. He confirms that ELC Case No. 860 of 2013 has been overtaken by events since the 1<sup>st</sup> Defendant in the said matter willfully surrendered the suit property to him, after he realized that he was duped into purchasing it by the 1<sup>st</sup> Plaintiff, who did not have any title to the said property.
  9. The Applicant filed a supplementary affidavit reiterating his averments as per the supporting affidavit and contending that any Certificate of Lease acquired was obtained irregularly as there was a temporary injunction.
  10. The instant application was canvassed by way of written submissions.

## **Submissions**

11. The Plaintiffs submit that upholding of the dismissal order will greatly prejudice all parties. They contend that the Interested Parties, who had no control of the prosecution of the case, face the risk of being evicted from their homes while the Defendants will be forced to institute cases to evict the said Interested Parties from the subject properties in order to take possession. They contend that the delay



is excusable and they have provided reasons for the same. To buttress their averments, they relied on the following decisions: *Agip (Kenya) Limited v Highlands Tyres Limited* [2001] KLR 630 and *Mwangi S. Kimenyi v Attorney General & Kenya Institute for Public Policy Research and Analysis (KIPPPRA)* 2014 KEHC 4220 (KLR).

12. In his submissions, the 1<sup>st</sup> Defendant contends that the Plaintiffs had no interest in concluding the matter as they have been indolent throughout. Further, that the instant application contravenes the provisions of Order 9 Rule 9 of the Civil Procedure Rules as it was filed without first seeking leave. He argues that no plausible reasons have been given for the delay in filing the instant application. Further, that the Plaintiff has failed to demonstrate how he knew the suit had been dismissed. To support his argument, he relied on the decisions of *James Ndonyu v Njogu v Muriuki Macharia* [2020] eKLR and *S.K Tarwai v Veronica Mehlmann* [2019] eKLR.

### **Analysis and Determination.**

13. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether this Court should reinstate this suit which was dismissed on 18<sup>th</sup> October, 2021.
14. The Plaintiffs and the Interested parties have sought for reinstatement of this suit contending that upholding of the dismissal order will leave issues undetermined and force parties to institute new suits as the matters are convoluted, since the suit is consolidated.
15. While the court has discretion to reinstate a suit that has been dismissed for want of prosecution, an Applicant is required to demonstrate that he/she is deserving of an order for reinstatement. In *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR, it was held that:

“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. The defendant must however satisfy the court that he will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the Plaintiff’s excuse for 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.”

16. The Defendants contend that the issues in this suit have been overtaken by events and that the Plaintiffs were indolent in prosecuting their case. The Court of Appeal in *Tabuche v Tinga & 2 Others* (Civil Appeal E003 of 2022) [2024] KECA 551 (KLR) (24 May 2024) (Judgment) stated inter alia:

“In addition to narrating the assemblage of events to justify his inaction, the Appellant sought to lay blame at his counsel’s feet. With regard to the alleged mistake of counsel, we take to mind the High Court decisions in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR; and *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] eKLR where the court correctly held that it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of the litigation and that, while the mistake of counsel is excusable, if it is accompanied by a litigant’s carelessness and inactivity, then the refusal by the court to exercise discretion in favour of such a party cannot be impugned.” Emphasis Mine



17. While in *Manchester Outfitters Limited v Pravin Galot & 4 Others* [2020] eKLR, the Court of Appeal stated that:

“It is the combined responsibility of the parties, their advocates and the courts to ensure disputes are resolved in a more efficient and cost-effective manner. Parties and their counsel, but counsel, particularly being officers of the court, must never be seen to deliberately prolong the cases they have the conduct of indefinitely, by resorting to delaying tricks and tactics.”

18. In this instance, the Plaintiffs have sought to blame their erstwhile advocate for the dismissal of this suit on 18<sup>th</sup> October, 2021. They claim the Advocates never updated them of the progress of the matter nor that it had been dismissed. I note the Plaintiffs filed the instant application on 22<sup>nd</sup> May 2024 which was almost two and half years, after dismissal of the suit. The 1<sup>st</sup> Plaintiff has not denied that he is an Advocate of this Court and ordinarily should have known about court processes.

19. I note the Plaintiffs have filed the instant application using a new law firm and failed to apply for leave as envisaged under Order 9 Rule 9 of the Civil Procedures Rules on seeking change of an advocate post judgment.

20. I wish to highlight certain proceedings from the court record. I note the Plaintiff filed this suit in July 2013 through messrs Nduati and Company Advocates. Further, despite the court directing parties to undertake pretrial on 2<sup>nd</sup> December, 2014, there was a delay in doing so. On 25<sup>th</sup> February, 2015 and 29<sup>th</sup> May, 2015, parties did not attend court. While on 20<sup>th</sup> July, 2015, parties were still directed to undertake pretrial directions which they did not. On 5<sup>th</sup> April, 2017, the Court fixed the matter for hearing on 12<sup>th</sup> June, 2017, on which date the matter never proceeded. Further, there were several dates when the matter was mentioned and hearing was then fixed on 28<sup>th</sup> November, 2018 on which date the matter still never proceeded. There were several mention dates fixed in 2019 and matter was finally fixed for hearing again on 28<sup>th</sup> January, 2021, on which date it again never proceeded. Thereafter on 18<sup>th</sup> October, 2021, the Court mentioned the matter and it was dismissed for non-attendance and want of prosecution.

21. From the court record, which I have highlighted, in my view the Plaintiffs were not keen to prosecute this matter and that is why it took so long in court. Further, on perusal of the supporting affidavit, except for blaming their erstwhile advocates, the Plaintiffs have not tendered any plausible reason why they failed to prosecute their consolidated matters over a long period of time.

22. Based on the facts before me while relying on the legal provisions cited and associating myself with the decisions quoted, I find that the Plaintiffs have not provided plausible reasons to enable this court exercise its discretion and set aside the order dismissing this suit for want of prosecution. In my view, it is not enough to blame an erstwhile advocate as the Plaintiffs also had a responsibility to follow up on their case. I opine that the Plaintiffs' have been indolent and even took more than two years to file the instant application. The Interested Parties support the reinstatement of this suit claiming they are on the suit land. However, in my view, they can file a fresh case against the Plaintiffs and Defendants if they so wish.

23. In the foregoing, I find that the Notice of Motion application dated the 22<sup>nd</sup> May, 2024, unmerited and will dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>th</sup> DAY OF MARCH 2025**



**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Njoroge for Applicant

Ms Ndungu for 1<sup>st</sup> Defendant in 574 of 2013

Court Assistant: Joan

