



**Muganga & 156 others v Sherman & 194 others (Enviromental and Land Originating Summons E013 of 2023) [2025] KEELC 1222 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1222 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E013 OF 2023  
FM NJOROGE, J  
MARCH 12, 2025**

**BETWEEN**

**ALFRED KATANA MUGANGA ..... 1<sup>ST</sup> PLAINTIFF  
OMAR KENGA BENDERA ..... 2<sup>ND</sup> PLAINTIFF  
KALSTUS CHARO FUNDI ..... 3<sup>RD</sup> PLAINTIFF  
JOSEPH TONGA KATANA ..... 4<sup>TH</sup> PLAINTIFF  
KAHINDI TONGA KATANA ..... 5<sup>TH</sup> PLAINTIFF  
KAHINDI FONDO KUNDE KATANA CHENGO ..... 6<sup>TH</sup> PLAINTIFF  
SHABAN M. SALIM & 150 OTHERS ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**SAID SALEH SHERMAN ..... 1<sup>ST</sup> DEFENDANT  
ABDULLA AHMED QAHTHWAN ..... 2<sup>ND</sup> DEFENDANT  
STIMA INVESTMENT COOPERATIVE SOCIETY LTD ..... 3<sup>RD</sup> DEFENDANT  
COUNTY COUNCIL OF KILIFI ..... 4<sup>TH</sup> DEFENDANT  
STEPHEN GITHINJI MATIRI & 190 OTHERS ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant moved the court vide a notice of motion application dated 15/8/2024 seeking the following orders: -
  1. That the suit against the 3<sup>rd</sup> Defendant herein be dismissed with costs for want of prosecution;
  2. That the costs of this application and the entire suit be awarded to the 3<sup>rd</sup> Defendant.



2. The application is based on the grounds that the Plaintiffs have neglected and/or otherwise failed to set down the suit for hearing and that since the filing of this suit on 14/6/2023, the Plaintiffs have never taken any steps to prosecute the same. In support of the application is an affidavit sworn by Damaris Mutile, the 3<sup>rd</sup> defendant's Legal Officer, on an even date.
3. The application was served via email upon the Plaintiffs' counsel, Ambwere T.S & Associates. There is however no reply to the motion on the C.T.S. The application was heard by way of written submissions. Notably, on 20/2/2025 when the matter was mentioned before this court, Ms. Mdesia holding brief for Mr. Bwire, counsel for the 3<sup>rd</sup> Defendant, told the court that submissions to the present application had been filed on that same day. I have keenly perused the record on C.T.S, the only submissions filed on that day were in relation to another application dated 19/12/2024.
4. In its handling of an application in which there has been failure to file submissions in support, the court may either dismiss the application or grant it or make any other orders. The flexibility of the court in making orders in those circumstances will depend on the nature of the application before it. In an application seeking orders which the court would have granted suo moto such as an application for dismissal for want of prosecution, the court may proceed to handle the application even in the absence of any submissions filed by the applicant.
5. In the present case the grant of the orders prayed for depend simply on whether Order 17 Rule 2(3) has been satisfied. That order provides as follows:

“ 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.”
6. In this case, the court never issued notice but the present application is sufficient notice under Order 17 Rule (3) which provides as follows:

“ 3. Any party to the suit may apply for its dismissal as provided in sub-rule 1.”
7. The criteria for a dismissal of a suit under order 17 rule 2(3) are the same as those under Order 17 Rule (2) (1) only that the initiators or the dismissal proceedings are different. The criteria is whether any application has been made or step taken by either party for one year. This court shall establish whether that is the case.
8. The averment made in the supporting affidavit to the motion is that upon perusal the advocates for the applicant have established that the matter has never been mentioned in court since it was filed on 14/6/2023. The deposition of this fact was made on 15/8/2024.
9. This court is of the view that the action considered as capable from redeeming a suit from dismissal under the foregoing provisions of the CPR is not limited to listing a matter for hearing or mention. It includes any other step or application made to further the progress of the suit.
10. The suit herein was filed on 14<sup>th</sup> June 2023. Ambwere & Associates filed an application for substituted service on 14/1/2023. Memorandum of appearance was filed by Bwire & Associates on 19/7/2023. A replying affidavit was filed by the same firm of advocates on 6/9/2023, then the present application followed on 22/10/2024.
11. Between 6/9/23 and 22/10/24 is a period of more than the one year provided for in Order 17 Rule 2. The present application therefore has merit and I therefore make the following orders:



- a. The entire suit is hereby dismissed for want of prosecution;
- b. The costs of the suit and the application are hereby awarded to the 3<sup>rd</sup> defendant only.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 12TH DAY OF MARCH 2025.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

