



**Mogayi v Chepkemoi & 8 others (Environment & Land Case
87 of 2016) [2025] KEELC 4472 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 87 OF 2016**

**CK NZILI, J
JUNE 11, 2025**

BETWEEN

JULIA WAKESU MOGAYI PLAINTIFF

AND

JANEFER CHEPKEMOI 1ST DEFENDANT

SARAH WANJIRU 2ND DEFENDANT

MIRRIAM NYAMBURA 3RD DEFENDANT

MONICAH CHEPKOSGEI 4TH DEFENDANT

CHARLLES CHEBII 5TH DEFENDANT

DANIEL KIPSIGOR 6TH DEFENDANT

MUSA MASAFU 7TH DEFENDANT

EUNICE CHEPKAT 8TH DEFENDANT

KIBET SOGOR 9TH DEFENDANT

RULING

1. In an application dated 23/1/2025, the court is asked to vacate and or set aside its orders of 26/4/2023, dismissing the applicant's suit for want of prosecution, and set down the suit for hearing on merit.
2. The application is based on grounds on the face of the motion and in an affidavit sworn by the applicant on even date. The applicant avers that she was not served with the Notice to Show Cause for 24/3/2023, when the suit was dismissed, since she failed to attend court and was not being represented by an advocate. The applicant also avers that parties were exploring an out of court settlement but failed to agree.



3. That is was upon her visit to the court's registry on 5/12/2024 to peruse the court file, that she discovered the matter had been dismissed. She however avers that she is desirous of prosecuting the suit and has complied with pretrial requirements. Further, the applicant avers that the respondents have continued to encroach on her land Cherangany/Kapcherop/605 measuring 25 acres, yet she is the registered owner. A copy of the title deed is annexed as JWM- 1.
4. The applicant avers that the respondents encroached the suit land in 2015 and she as a result sought eviction orders, an injunction and damages. She terms the dismissal of the suit as a grave prejudice on her and that unless the matter is reinstated, she will be punished unheard.
5. A return of service is on record indicating that the 1st, 2nd and 4th respondents were served in person and on behalf of other respondents. That notwithstanding, they are yet to file their responses to the application.
6. Order 17 Rule 2(1), of the Civil procedure Rules governs dismissal of suits for want of prosecution, it provides: "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."
7. Whether or not to dismiss a suit for want of prosecution is purely a discretionary power. However, a court must bear in mind that such discretion should be exercised judiciously. It is trite law that dismissal of suits is a draconian measure only reserved for the most hopeless situations. The aim of the court should be to preserve suits in order to allow parties their right of access to justice.
8. In *Et Monks & Company Ltd v Evans* [1985] KLR 584 , the court held:-"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable".
9. In this case, the suit was filed in 2016. The matter has been mentioned severally in court and has never commenced hearing despite being listed for hearing a number of times. There were attempts at an out of court with the hope that the parties would be able to reach an out of court settlement. This unfortunately did not materialize. The most prudent action was for the applicant to set down the matter for hearing. She instead went to slumber and filed this application after 2 years after its dismissal.
10. The Court of Appeal in *Vintage Investments Limited v Amcon Builders Limited & another (Civil Appeal 45 of 2019)* [2021] KECA 259 (KLR) (3 December 2021) (Judgment), cited *Allan v Sir Alfred Mc Alphine and Sons Ltd* [1968] 1 ALL ER 543, that as a rule, the longer the delay, the greater the likelihood of prejudice at trial.
11. In this application, reasons are that the applicant was acting in person and only discovered about the dismissal in 5/12/2024. From the record, the notice to show cause dated 9/3/2023 for 26/4/2023 was served upon the applicant through her address on 10/3/2023. This was after a series of mentions where parties had been absent albeit service of mention notices.
12. In a case where a reason for the delay is offered, the court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. Similarly, the court must consider whether the defendant has been prejudiced by the delay. It is now about 9 years since this suit was filed. A vigilant litigant should be keen in persecuting her or his suit in a timely manner. Over time, the defendants may lose memory or have their evidence destroyed which is prejudicial to their case. See *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR, where the Court of Appeal stated that there is no set rule as to what constitutes inordinate delay.



13. The role of the court is to do justice to the parties and not to impose discipline. The respondents have not said what prejudice they are likely to suffer if the suit is reinstated for hearing. The court would therefore give the applicant the benefit of the doubt and set aside the orders of 26/4/2023 to hear the suit on merits. The application is hereby allowed for the suit to be heard on a priority basis. No orders as to costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 11TH DAY OF JUNE 2025.

In the presence of:

Court Assistant – Dennis

Teti for the Plaintiff present

HON. C.K. NZILI

JUDGE, ELC KITALE.

