



**Kisilu & another (Suing as the personal representatives/administrators of the Estate of John Kisilu Kilonzo - Deceased) v Mwea Farmers Co Limited & 2 others (Environment and Land Case 4 of 2009) [2025] KEELC 6015 (KLR) (16 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6015 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 4 OF 2009  
AY KOROSS, J  
SEPTEMBER 16, 2025**

**BETWEEN**

**BONIFACE KILONZI KISILU ..... 1<sup>ST</sup> PLAINTIFF**

**CHARLES NZYOKI KISILU ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE PERSONAL REPRESENTATIVES/ADMINISTRATORS OF  
THE ESTATE OF JOHN KISILU KILONZO - DECEASED**

**AND**

**MWEA FARMERS CO LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BENARD KIVOI MUTHOKA (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF MUTHOKA MUNYAO - DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**KILONZO NGAANGA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The present motion that is the subject of this ruling, dated 8/07/2024, is stated to have been filed in accordance with provisions of Sections 1A, 1B, and 3A of the *Civil Procedure Act*, as well as Orders 12 Rule 7 and 40 Rules 1, 2, 3, & 4 of the Civil Procedure Rules. The plaintiff's representatives seek the following reliefs from this court: -
  - a. Spent.
  - b. Spent.
  - c. Spent.
  - d. That the honourable court be pleased to reinstate this suit and all the attendant orders and directions issued since filing.



- e. That costs be provided for.
2. The motion is supported by the grounds therein as well as the affidavit sworn on the instant date by the administrators of the deceased plaintiff. A summary of the grounds in support of the motion are inter alia: a) the suit was dismissed under the watch of the plaintiff's previous advocates, and such omission ought not be visited upon the plaintiff, as they had been visiting the offices of their previous advocates to get updates without knowing the suit was dismissed in 2022; and
3. B) It was only in the first week of July 2024 when they changed advocates, that they learnt of the fate of the suit and promptly filed the instant motion c) They have previously and diligently been actively prosecuting this case until information dwindled on the progress of the suit, d) the defendants will not be prejudiced and to conclude, e) orders had been issued against the defendants restraining them from interfering with the suit property until the hearing and determination of the suit.
4. The 3<sup>rd</sup> defendant opposed the motion by filing a joint notice of preliminary objection (PO) and grounds of opposition dated 16/01/2025, which stated as follows: -
  - a. The motion is bad in law, embarrassing and prejudicial to the defendants as it raises no justiciable issues.
  - b. The motion offends the provisions of Order 9 of the Civil Procedure Rules.
  - c. The injunctive orders cannot be issued against the 3<sup>rd</sup> defendant since he is in possession and active use of the suit property.
  - d. The motion is an abuse of the court process, as there is no existing suit.
  - e. The deceased plaintiff is guilty of inordinate, unexplained and unjustified laches of more than 2 years ever since the suit was dismissed.
5. As directed by the court, the motion was canvassed through written submissions filed by the law firms of Mss. Kaveke Mwanja & Co. Advocates for the plaintiff, dated 13/02/2025, and Munyasya & Co. Advocates for the 3<sup>rd</sup> defendant, dated 7/03/2025 and the court is grateful to the counsels in this regard.
5. As a preliminary issue, it emerged from the 3<sup>rd</sup> defendant's submissions that some of the grounds of the PO and grounds of opposition were abandoned, and in consequence, this court will not belabour on them.
5. Now, turning to the substance of the matter at hand and having carefully considered the motion, its grounds, affidavits, and articulate submissions, the sole issue for determination is whether the deceased plaintiff has met the legal threshold to warrant the reinstatement of the suit. In determining this issue, this court will examine the relevant provisions of law that permit this court to entertain the reinstatement of dismissed suits and also review the settled jurisprudence on this matter.
5. Regarding the law, the relevant provision relied upon by the plaintiffs is found in Order 12 Rule 7 of the Civil Procedure Rules, which states that where a judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order on such terms as may be just. Therefore, the motion is properly before this court.
5. The jurisprudence that guides this court in the exercise of judicious discretion in dealing with such motions is settled, and the decision of *Shah v Mbogo and Another* [1967] EA 116 Limited [2020]



eKLR, which cited with approval in the case of John Waweru Njenga & 5 others v Motor Botique, detailed the guiding principles in the following manner: -

“This discretion (to set aside ex parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

5. These criterion is also restated in the long-cited decision of Ivita v Kyumbu [1975] KEHC 4 (KLR) that has been buttressed by the plaintiffs’ counsel whereby in this case, the court held that the tests to be applied are whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay.
5. In the circumstances of this case, this suit was filed on 1/11/2002, which was over 23 years ago, and up to the point of dismissal by this court on 31/01/2022, the suit had been in court for many years. During this intervening period, the deceased plaintiff and his kin enjoyed the status quo orders issued on 23/05/2003, which subsisted pending the hearing and determination of the suit. The administrators of the deceased plaintiff were only jolted from their inertia in July 2024 when the 3<sup>rd</sup> defendant sought to bury his kin on plot no 207 in L.R. no 1190 (suit property) that is situated in Ndithini in Machakos County.
5. It is also observed that the deceased plaintiff and 2<sup>nd</sup> defendant died in the course of the proceedings. Additionally, as depicted in the citation, it is also probable that the 3<sup>rd</sup> defendant, Benard Kivoi Muthoka, is also deceased and died in the course of these proceedings. It is uncertain if he was formally substituted.
5. To explain their delay, the deceased plaintiff’s representatives have offered an excuse; their advocate failed to follow up diligently on the case. They defended themselves against the dismissal by stating that they had been visiting the advocate for updates on the case’s progress, and he assured them that he was seeking a hearing date from the court. The question that arises is whether these reasons, as presented, are justifiable. When faced with similar circumstances whereby litigants blamed their counsel for the delay, the Court of Appeal in Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR affirmed thus;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

14. Further in the Court of Appeal decision of Rajesh Rughani –Vs- Fifty Investment Ltd. & Another (2005) eKLR that was cited with approval in Habo (Supra), the court stated: -

“It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy.”

15. Guided by established precedents and our constitutional principles, it is essential in the interests of justice that trials are concluded with reasonable expedition. This court finds that the deceased plaintiff’s representatives have not provided sufficient and justifiable reasons to justify exercising discretion in their favour, as relying solely on alleged dithering by counsel without presenting any supporting



documentary evidence is insufficient. Furthermore, there are numerous ways they could have obtained records regarding the status of their case, including visiting the court registry.

15. Furthermore, this matter has been in court for 23 years, which is a lengthy period, and most of the original parties involved have since died. Reinstating the suit would cause significant difficulty, injustice, and prejudice to any remaining defendants. In conclusion, this court finds that the notice of motion dated 8/07/2024 has not met the legal requirements and is therefore dismissed, with each party bearing their own costs. This file is now officially marked as closed.

It is so ordered.

**DELIVERED AND DATED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**16.09.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

M/s Achieng holding brief for Mr Bosire for applicant.

Mr Munyasia for the respondent/3<sup>rd</sup> defendant.

Ms Kanja- Court Assistant.

