



REPUBLIC OF KENYA



Tinga & another v Melo Twenty-Seven Holdings Co Limited & 2 others (Environment and Land Miscellaneous Application 32 of 2019) [2025] KEELC 4029 (KLR) (14 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 32 OF 2019
EK MAKORI, J
MAY 14, 2025**

BETWEEN

MICHAEL JEFWA TINGA 1ST APPLICANT

JOSPHINE MARIE GOMMANS 2ND APPLICANT

AND

MELO TWENTY-SEVEN HOLDINGS CO LIMITED 1ST RESPONDENT

ROSE ACHIENG WILLIAMS 2ND RESPONDENT

RODGERS KAIBUNGA 3RD RESPONDENT

RULING

1. The matter at hand is a Notice of Motion application dated December 16, 2024, filed under a Certificate of Urgency and brought forth under sections 1A, 1B, and 3A of the *Civil Procedure Act*, as well as Order 22 and Order 51, Rule 1 of the *Civil Procedure Rules*. The Applicants seek orders to:
 - a. Expended.
 - b. Expended.
 - c. It is respectfully requested that the honorable court set aside the orders dated February 27, 2024, which dismissed the application dated September 4, 2019, for want of prosecution and reinstate the application for hearing and determination on its merits.
 - d. The court should determine that the Respondents are not entitled to costs or, alternatively, list the bill of costs for taxation inter partes.
 - e. Costs be provided.



2. The application finds substantiation in the grounds presented therein and the affidavit sworn by the 1st Applicant on 16 December 2024. In this affidavit, he asserts that their application dated 4 September 2019 was dismissed for want of prosecution on 27 February 2024, without the receipt of a notice to show cause. The Applicants remained unaware of this dismissal until 4 December 2024, at which point their advocate received a letter dated 26 November 2024. He further stated that on 6 June 2024, the Respondents filed a bill of costs, which was subsequently served upon his advocate on 11 October 2024, despite the absence of an accompanying notice of taxation. According to the 1st Applicant, the failure to act on the main application resulted from an inadvertent oversight by the previous advocate who managed the matter and has since departed from the firm of Mwaure & Mwaure Waihiga Advocates. He additionally asserted that the Respondents were not entitled to costs initially, as the court suo moto dismissed their application, and they did not engage in any action towards the prosecution of the same.
3. In response, the 3rd Respondent filed a replying affidavit on January 29, 2025, requesting that the court dismiss the application with costs. The 3rd Respondent alleged that the Applicants failed to effectively prosecute their case, as it was last presented in court in May 2020 before its dismissal. Consequently, the court issued and served a notice to show cause as to why the matter should not be dismissed on February 27, 2024. The Applicants failed to appear on the material date, resulting in the ultimate dismissal of the matter.
4. The 3rd Respondent articulated that his legal representatives subsequently prepared a bill of costs and a notice of taxation, dated June 6, 2024, which were duly served upon the company secretary, who received and acknowledged receipt of their copy with a signature. Consequently, the Third Respondent maintains that the application lacks merit, constitutes a vexatious action, and represents a complete abuse of the judicial system.
5. The application was meticulously reviewed through written submissions, which I have painstakingly considered.
6. The law regarding the setting aside of ex parte orders is outlined in Order 12, Rule 7 of the [Civil Procedure Rules](#), which states:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
7. In addressing the matter of ex parte orders, the court must be convinced of one of two conditions: either that the Respondent was not duly served with the summons, or that the Respondent failed to appear in court at the scheduled hearing for justifiable reasons. In the present case, the record indicates that when the matter was set for the Notice to Show Cause hearing regarding the potential dismissal of the suit, only counsel for the Respondents, Ms. Oloo, was in attendance. The Applicants contend that their absence from court on the date designated for the Notice to Show Cause hearing was attributable to inadequate notification of the hearing date.
8. A preliminary examination of the notice to show cause dated January 24, 2024, reveals the names and addresses of the firms representing the parties involved herein. However, this notice does not provide sufficient evidence of service upon counsel.
9. Notwithstanding the aforementioned, a significant question arises as to why this application was submitted approximately ten months after the dismissal of the matter in February 2024, even though the Applicants acknowledged service of the notice of taxation and bill of costs on October 9, 2024. Furthermore, the Applicants have not offered a satisfactory explanation for their failure to schedule the



matter for hearing within one year from the last court appearance in 2020. The Applicants attributed the delay to the departure of the advocate who had previously handled the matter from the firm of Mwaure & Mwaure Wahiga Advocates, which was then on record. However, as mentioned above, they have not disclosed the date upon which the advocate ceased to be employed by the firm. Additionally, it was asserted that the firm's Malindi branch did not have a practicing advocate available to prosecute the matter. I consider these explanations imprecise, unsubstantiated, and lacking merit.

10. Also, the Applicant's credibility is questioned by his assertion that he was not served with the notice of taxation. This claim is contradicted by a copy of the notice annexed to the replying affidavit, as RKK-2, which clearly shows that it was received and signed by the firm's secretary, Regina. This leaves no doubt that the service was duly effected. Notably, this is not the first time the Applicants have denied service. They previously alleged non-service of the notice to show cause. The recurrence of such unsubstantiated denials further undermines the reliability of the Applicants' account and casts serious doubt on their good faith in these proceedings.
11. After careful consideration, the Applicants have not sufficiently demonstrated grounds that would justify the exercise of this court's discretion in their favor. Consequently, the application dated December 16, 2024, is hereby dismissed with associated costs.
12. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 14TH DAY OF MAY 2025.

E. K. MAKORI

JUDGE

In the presence of:-

Dr. Chitembwe and Ms. Kyule for the Applicants

Ms. Oloo for the Respondents

Happy, Court Assistant

