



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAD COURT**

**AT KITUI**

**ELC CASE NO. 25 OF 2021**

**(FORMERLY MACHAKOS ELC CASE NO.63 OF 2019)**

**IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF ARTICLES 2,3,10,22,23,35,60,61,62,73,165,171,172,174,232,  
258 AND 260 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

***BETWEEN***

- 1. CHRISTOPHER NGUSU MULWA.....1<sup>ST</sup> PETITIONER**
- 2. PATRICK WAMBUA YUNGA.....2<sup>ND</sup> PETITIONER**
- 3. KELVIN PERMINUS KIMANZI.....3<sup>RD</sup> PETITIONER**
- 4. ELIZABETH MBATHA YUNGA.....4<sup>TH</sup> PETITIONER**
- 5. JUSTUS NGUNDO MUTHUI.....5<sup>TH</sup> PETITIONER**
- 6. JOHN YUNGA.....6<sup>TH</sup> PETITIONER**
- 7. MAURICE MWENDWA MULI.....7<sup>TH</sup> PETITIONER**
- 8. KILIKO KIMANZI.....8<sup>TH</sup> PETITIONER**
- 9. RICHARD MUSYOKI KIMANI.....9<sup>TH</sup> PETITIONER**
- 10. MATHEW MUTUA MWANZIA.....10<sup>TH</sup> PETITIONER**
- 11. JOHN WAMBUA MWANZI.....11<sup>TH</sup> PETITIONER**
- 12. JOSEPH KASEVE.....12<sup>TH</sup> PETITIONER**
- 13. BONFACE MUINDE MASAA.....13<sup>TH</sup> PETITIONER**
- 14. NZUKI KIMA KYAKA.....14<sup>TH</sup> PETITIONER**
- 15. MAURICE MBOYA KAMWILWA.....15<sup>TH</sup> PETITIONER**
- 16. MICHAEL MBOYA NZULE.....16<sup>TH</sup> PETITIONER**

17. ANDREW CORNELIUS KMUTISYA.....	17 <sup>TH</sup> PETITIONER
18. CECILIA MBENYA KI.....	18 <sup>TH</sup> PETITIONER
19. FELISTUS NDUNGI KIMANZI.....	19 <sup>TH</sup> PETITIONER
20. ELIZABETH MUMBI MUTEMI.....	20 <sup>TH</sup> PETITIONER
21. GERALDINE DORCAS KAVEMEB.....	21 <sup>ST</sup> PETITIONER
22. STEPHEN MUNYOKI MWANZIA.....	22 <sup>ND</sup> PETITIONER
23. ALPHONCE KANGWI NZULE.....	23 <sup>RD</sup> PETITIONER
24. CHARLES MUTUA.....	24 <sup>TH</sup> PETITIONER
25. LENARD MUSEMB.....	25 <sup>TH</sup> PETITIONER
26. CHRISTOPHER KAVUKUA MUTISYA.....	26 <sup>TH</sup> PETITIONER
27. MONICA MAINGI.....	27 <sup>TH</sup> PETITIONER
28. REUBEN MULINGWA MBUVI.....	28 <sup>TH</sup> PETITIONER
29. COSMAS MUIMI KIMANZI.....	29 <sup>TH</sup> PETITIONER

AND

THE COUNTY GOVERNMENT OF KITUI.....	1 <sup>ST</sup> RESPONDENT
DR. JULIUS MALOMBE.....	2 <sup>ND</sup> RESPONDENT

AND

THE NATIONAL LAND COMMISSION.....	INTERESTED PARTY
-----------------------------------	------------------

**RULING**

1. The petitioners filed the application subject matter of this ruling under Section 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11, Order 51 rule 1 of the Civil Procedure Rules. The application is dated 1<sup>st</sup> December 2020 seeking the following orders;

**A) Spent**

**B) That** this Honourable Court be pleased to stay the execution of the order for costs including the taxation of the Bill of Costs dated 1<sup>st</sup> November, 2019, pending the hearing and determination of this application.

**C) That** this Honourable Court be pleased to set aside the orders of dismissal made on 11th March, 2019 and to unconditionally reinstate the Petition.

**D) That** in any event, and in the alternative, this Honourable Court be pleased to review or vary the orders for payment of costs.

2. The application is supported by the affidavit of Christopher Ngusu Mulwa the 1<sup>st</sup> Petitioner and the same is based on the following grounds:

3. That this Petition was previously before the Environment and Land Court in Nairobi as ELC No.167 of 2016. And the same was transferred on 9<sup>th</sup> February, 2017 to the Environment and Land Court at Machakos and now it has a new case number, ELC 63/19. The Petitioners claim that on 9<sup>th</sup> March, 2017, when the matter was scheduled to be mentioned, the Advocate for the Petitioners proceeded to Machakos but the file was not listed and that the Machakos registry clerks could not trace the file because there was no record of whether or not the file had been received from Nairobi.

4. The Petitioners' lawyers claim that they could not get the new file and, consequently, they could not fix a hearing date as they did not know the file number and only got to know the new case number when they received a belated Notice of Dismissal from the Court on 13<sup>th</sup> March, 2019.

5. They further claim that the Notice of Dismissal indicated that the matter was supposed to be in court on 8<sup>th</sup> March, 2019 for the Petitioners to show cause why the matter should be dismissed for want of prosecution. As such, the Petitioners and their lawyers could not have been Court as the Notice of Dismissal was received late.
6. Upon perusal of the Court file, the Petitioners 'lawyers discovered that the matter was actually in Court on 11<sup>th</sup> March 2019 and there was no appearance by any party. The matter was dismissed Again, this took place even before the Petitioners 'lawyers received the Court's notice. They claim that had the Court's Notice been received earlier, the Petitioners or their lawyers would have attended Court either on 8<sup>th</sup> March 2019 or 11<sup>th</sup> March 2019 and would have shown cause why the matter ought not to be dismissed.
7. They further indicate that by then, the matter had an Application dated 12<sup>th</sup> February, 2016 that only required a Ruling date since parties had filed submissions. They claim that the failure to fix the matter for either a mention or for hearing was inadvertent, it was not deliberate and the Petitioners never lost interest in prosecuting their matter.
8. Following the dismissal, the Respondents filed a Bill of Costs for taxation and the matter comes up for Submissions on 3<sup>rd</sup> December, 2020.
9. The Petitioners further claim that on 3<sup>rd</sup> March, 2016, the Court had issued a ruling granted conservatory orders in favour of the Petitioners. When the 1<sup>st</sup> Respondent learnt about the opinion expressed by the Court in the ruling on conservatory orders, the County Government of Kitui withdrew from the site, demolished the structures and handed the property back to the community.
10. They claim that the community then understood that action to mean that the County Government of Kitui did not want any agitation, that is why the County did not pursue the Petitioner and instead surrendered the suit property at the initial stages of the proceedings. As a matter of fact, the matters in dispute between the Parties were resolved when the County Government of Kitui withdrew from the suit property and demolished the structures. The land is now back to the community and the community is using it.
11. The Petitioners contend that the order on costs is unfair and does not really follow the event and, in the circumstances, the Petitioners are bound to suffer irreparably if the Petition is not reinstated or if the order on costs is not varied or set aside as the Petitioner will have been condemned for no justifiable reason.
12. The Respondents did not file any replying affidavit or grounds of objection to the application. The court gave directions on 18<sup>th</sup> October 2021 for hearing of the application by way of written submissions. None of the parties filed any written submissions.
13. I have considered the application dated 1<sup>st</sup> December, 2020, the supporting affidavit and the attached documents. It is noted that the applicants seek to set aside the orders of the court dated 8<sup>th</sup> March, 2019 and reinstate the petition. Alternatively, the applicant seeks review of the order on costs. I have perused the court order subject matter of the current application and issued on 8<sup>th</sup> March 2019 and the same reads as follows.

**“Order**

**Under Order 17 Rule 2(1) of the Civil Procedure Rules;**

*“Notice having been given to show cause why this suit should not be dismissed and there being no satisfactory response, the suit is hereby dismissed under order 17 Rule 2(1) of the Civil Procedure Rules”.*

.....

**JUDGE**

**8.3.2019**

14. The said order makes no award of costs. It is therefore not clear under what circumstances the Respondents Counsel filed a bill of costs for taxation. The same were not awarded by the court and costs are thus not payable.
15. On the prayer for setting aside the order of dismissal of the Petition and reinstatement of the same, I find that the same lacks merit for the following reasons:
  - (1) The applicants claim to have received the Notice of dismissal of the suit on 13<sup>th</sup> March, 2019, while the current application to set aside the order of dismissal was filed on 1<sup>st</sup> December, 2020 a period of *one year ten months*. I find that the delay in filing the application herein is inordinate, inexcusable and no explanation has been given for the said delay.
  - (2) Further the conduct of the Petitioners in failing to take any action to prosecute the suit since 2017 is not indicative of a party who would have attended court for the Notice to show cause.
  - (3) I further find that the explanation given in the supporting affidavit for failure to take a date for hearing of the petition is not sufficient to move the court to exercise its discretion for the reason that if there was an issue with getting a new number for the suit

after transfer from Nairobi to Machakos it was open to the applicant to write letters of inquiry on the whereabouts of the file either from Nairobi or Machakos Law Courts. No effort was made by the applicants until they were moved by the filing of the bill of costs and taxation of the same.

(4) The petitioners have further stated that when the 1<sup>st</sup> Respondent learnt about the opinion of the court in the ruling on the conservatory orders, the County Government of Kitui subsequently withdrew from the suit property, demolished the structures and handed the property back to the community.

(5) That the land is now back to the community and the community is using it. The said contention then may explain the reason the petitioners did not prosecute the petition after being granted the conservatory orders. It is the courts view that the petitioner's application for reinstatement of the petition would be asking the court to engage in an academic exercise in proceeding to hear a petition while the petitioners have already achieved what they set out to achieve by filing the petition. The court is not inclined to make an order in vain.

**Final Orders**

The application dated 1<sup>st</sup> December 2020 lacks merit and the same is dismissed.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 16TH DAY OF DECEMBER, 2021.**

**HON. LADY JUSTICE L. G. KIMANI**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITUI**

Ruling read in open court in the presence of-

C. Nzioka.....Court Assistant

N/A..... for the Petitioner/Applicants

Muatine.....for the Respondents

N/A.....for the Interested Party