



REPUBLIC OF KENYA



KENYA LAW
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**Macharia & 2 others v Mathenge & 6 others (Civil Suit 557 of 2015)
[2025] KEHC 13299 (KLR) (Commercial & Admiralty) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13299 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL SUIT 557 OF 2015
AA VISRAM, J
SEPTEMBER 25, 2025**

BETWEEN

**EVANSON THIONG'O MACHARIA 1ST PLAINTIFF
PETER GAKUNGA GITHIOMI 2ND PLAINTIFF
ROSE NJERI MUNORU 3RD PLAINTIFF**

AND

**THUO MATHENGE 1ST DEFENDANT
JAMES KAMAU NJURE 2ND DEFENDANT
STEPHEN KIMANI MIHIU 3RD DEFENDANT
GEORGE WAWERU NJUGUNA 4TH DEFENDANT
RAPHAEL MUCHIRI NDUATI 5TH DEFENDANT
JOSEPH KIMANI KANG'ETHE 6TH DEFENDANT
NATIONAL BANK OF KENYA 7TH DEFENDANT**

RULING

Introduction

1. I have considered the Notice of Motion dated 2nd August, 2024, together with the supporting affidavit of Evanson Thiong'o Macharia and annexures thereto, the response by the Respondents, and the submissions filed. The Application seeks reinstatement of this suit which was dismissed for want of prosecution on 3rd July, 2024, during a virtual court session.



2. The Applicants argue that the dismissal resulted from inadvertent non-appearance of Counsel due to internet connectivity problems, and that the non-attendance was not deliberate. The Respondents oppose, contending that the Applicants have been indolent and that the dismissal was justified.

Issues for Determination

3. The sole issue is whether the Applicants have shown sufficient cause to warrant reinstatement of the suit.
4. The Court's jurisdiction is anchored in Sections 1A, 1B and 3A of the *Civil Procedure Act* as well as Order 12, rule 7 and Order 45 of the *Civil Procedure Rules*. The principles governing reinstatement are settled in a long line of authorities. In *Ivita v Kyumbu* [1984] KLR 441, Chesoni J. (as he then was) stated that the test is whether the delay is prolonged and inexcusable, and if justice can still be done despite the delay.
5. In *Mobile Kitale Service Station v Mobil Oil Kenya Ltd & Another* [2004] eKLR, the court underscored that justice requires cases to be prosecuted expeditiously, bearing in mind the public interest in timely disposal of litigation.
6. Similarly, in *Shah v Mbogo & Another* [1967] EA 116, the court held that discretion to set aside is intended to avoid injustice arising from accident, inadvertence, or excusable mistake, but not to assist a litigant who has deliberately sought to obstruct or delay justice.
7. This reasoning was followed in *Toroitich Misoi Mereng v Simeon Kiprotich Katam* [2019] eKLR where the court emphasized that a plausible and persuasive explanation must be offered.

Analysis and Determination

8. From the record, the suit has been pending since 2015. It has been subject to delays, changes of Counsel, and repeated notices to show cause. The dismissal on 3rd July, 2024, followed the Applicant's non-appearance during a virtual session. The Applicant explained that Counsel's device suffered internet failure.
9. I accept that technological hitches are not uncommon in virtual hearings. However, the duty to prosecute the matter lies primarily on the litigant. The Applicant himself acknowledges that he had earlier changed Advocates due to breakdown in communication and delay in progress. That history demonstrates a pattern of inaction.
10. Moreover, this Court, has observed on more than once occasion that reinstatement must not be granted lightly where the record shows repeated non-attendance despite opportunities given. The same reasoning applies here. The dismissal was not on a first default; it was preceded by warnings and previous indulgence by the Court.
11. The Applicant argues that the mistake of Counsel should not be visited on him. While that principle has merit in appropriate cases, the Court of Appeal has clarified in *Tana & Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] eKLR that a litigant cannot wholly escape responsibility by blaming Counsel. Ultimately, the litigant must demonstrate vigilance.
12. Here, the Applicants have not shown consistent diligence over the years. The explanation of a dropped internet call, though plausible for that single date, does not address the broader delay of nearly nine years since the suit was filed.



Conclusion

- 13. In light of the foregoing, I find that the delay has been prolonged and not satisfactorily explained. The Court’s discretion should not be exercised in favour of a party who has repeatedly failed to move his case forward.
- 14. Accordingly, the Notice of Motion dated 2nd August, 2024, is dismissed with costs to the Respondents.
- 15. The file remains closed.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Lisper

- 1st Plaintiff/Applicant
-2nd Plaintiff/Applicant
-3rd Plaintiff/Applicant
- 1st Defendant/Respondent
-2nd Defendant/Respondent
-3rd Defendant/Respondent
-4th Defendant/Respondent
-5th Defendant/Respondent
-6th Defendant/Respondent
-7th Defendant/Respondent

