



REPUBLIC OF KENYA



**Shakali & 3 others v NCBA Bank Kenya Limited & another (Civil Suit 1 of 2022) [2025] KEHC 13824 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13824 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUSIA  
CIVIL SUIT 1 OF 2022  
WM MUSYOKA, J  
OCTOBER 3, 2025**

**BETWEEN**

**DUNCAN OWUOR SHAKALI ..... 1<sup>ST</sup> PLAINTIFF  
DEBORAH AWUOR ..... 2<sup>ND</sup> PLAINTIFF  
BUSIA COTTAGE TOURIST HOTEL ..... 3<sup>RD</sup> PLAINTIFF  
GABRIEL OWUOR JUNIOR ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**NCBA BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT  
AUCKLAND AGENCIES AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application, that I am called upon to determine, is dated 23<sup>rd</sup> April 2025. It seeks the setting aside of orders that were made on 15<sup>th</sup> January 2025, dismissing the suit herein for want of prosecution. The grounds on the face of the Motion are that the Advocate on record appeared virtually and assumed that the cause list was to be used instead of the Advocates in open court being given priority, the 1<sup>st</sup> plaintiff had not been served nor informed of the hearing date, and the court had not given directions on the application which was on record.
2. The affidavit in support was sworn by Gabriel Owuori Junior, the 4<sup>th</sup> plaintiff, on 23<sup>rd</sup> April 2025. He avers that he attended court on 15<sup>th</sup> January 2025, when the matter came up. According to him, the matter was listed as number 16 in the cause list, but was the first to be called out, when the business of the court commenced that day. He claims that he desperately tried to get his Advocate to join, but the matter was dealt with in his absence.



3. The 1<sup>st</sup> defendant filed a reply, contesting the allegation that the Advocate for the plaintiffs had appeared virtually, for if that were so, he would have been heard just as the Advocate for the 2<sup>nd</sup> defendant was, who was online.
4. In the end, directions were given for disposal of the application by way of written submissions. I have seen and read through written submissions by the plaintiffs and the 1<sup>st</sup> defendant.
5. Wide discretion is given to the court, when it comes to setting aside of orders dismissing suits, consequent upon non-attendance and want of prosecution. The courts have laid out the principles that are to be taken into account, in such cases. In *Ivita vs. Kyumbu* [1984] KLR 441 (Chesoni, J), the considerations were said to include whether the delay is prolonged and inexcusable; whether justice can be done despite the delay; justice is justice for both sides, and so the positions of both sides must be considered; whether the other side would be prejudiced, by justice not being done by the prolonged delay; and the reasons given for the delay. See also *Pithon Waweru Maina vs. Thuka Mugiria* [1983] eKLR [1983] KECA 117 (KLR) (Potter, Kneller JJA & Chesoni Ag JA).
6. Whether to reinstate a dismissed suit would call for exercise of discretion in line with Articles 50 and 159 of the *Constitution*, and the oxygen principle in sections 1, 1A and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya. These were discussed in *John Nahashon Mwangi vs. Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR [2015] KEHC 6789 (KLR) (Gikonyo, J), where it was stated that the fundamental principles of justice are enshrined in Article 159 of the *Constitution*, coupled with Article 50, with respect to the right to be heard, and to serve substantive justice to all. It was underscored that those principles ought to be factored when considering reinstatement of dismissed suits, bearing in mind that dismissal of suits is draconian.
7. This is an old matter, which was initially filed at the High Court at Kakamega, in 1996, as Kakamega HCCC No. 171 of 1996. It was then transferred to the Busia Magistrate's Court, vide an order of the Kakamega High Court of 23<sup>rd</sup> June 2016, where it became Busia CMCCC No. 295 of 2016, from where it was transferred to the Environment and Land Court, and became ELC No. 027A of 2021, before finding its way back to the High Court. The Busia High Court was first seized of it on 21<sup>st</sup> June 2022, when it was placed before the Deputy Registrar of this court. The parties were absent. It came up before the High Court, thereafter, whether before the Judge or Deputy Registrar, 18 times, before it was dismissed on 15<sup>th</sup> January 2025. When it came up on 21<sup>st</sup> June 2022, 5<sup>th</sup> July 2022, 1<sup>st</sup> February 2023, 16<sup>th</sup> March 2023 and 24<sup>th</sup> October 2023, none of the parties attended court. The suit was by the plaintiffs, yet on some occasions, the matter would come up, the other parties would attend court, but not the plaintiffs, as happened on 7<sup>th</sup> February 2024, 20<sup>th</sup> May 2024 and 15<sup>th</sup> January 2025.
8. On 2<sup>nd</sup> May 2023, a Motion, dated 3<sup>rd</sup> February 2022, was allowed, for amendment of the plaint. The matter was mentioned several times, after that, to confirm that the plaint had been amended or re-amended, based on the orders granted. Those mentions happened on 27<sup>th</sup> June 2023, 22<sup>nd</sup> February 2023, 19<sup>th</sup> December 2023, 7<sup>th</sup> February 2024, 7<sup>th</sup> March 2024, 30<sup>th</sup> May 2024 and 18<sup>th</sup> July 2024. No amended plaint was ever served, and the matter was fixed for hearing, scheduled for 15<sup>th</sup> January 2025, when the suit was dismissed as neither the plaintiffs nor their Advocates attended court.
9. The impression that one gets, from the record, is that the plaintiffs were never serious with prosecution of the matter, after it was transferred to the Busia High Court. It was in the Busia High Court between 21<sup>st</sup> June 2022 and 15<sup>th</sup> January 2025, and within that period the plaintiffs were never ready to proceed with the matter. Leave to amend the plaint was granted on 2<sup>nd</sup> May 2023, and by 15<sup>th</sup> January 2025, no amendments had been effected to that plaint. Clearly, the plaintiffs had no appetite for proceeding with the matter.



10. As indicated above, the suit did not originate at the Busia High Court in 2022. It was initially filed at the High Court at Kakamega, in 1996. It was not prosecuted there. The parties, between 1996 and 2016, merely litigated several applications before the Judge, before the matter was transferred to the Busia Chief Magistrate's Court in 2016. Not much happened there either, for, between 2016 and 2019, the matter was mentioned several times, before it was decided that it should be moved to the High Court, but it ended up at the Environment and Land Court, as Busia ELC No. 027A of 2021. For the 1 year the matter was at the Environment and Land Court, not much happened, for it was only mentioned there several times, before it was decided, on 15<sup>th</sup> June 2022, that it be transferred to the High Court, on grounds of jurisdiction, ostensibly following the decision in *Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 others* [2017] eKLR [2017] KECA 79 (KLR)(Visram, Karanja & Koome, JJA).
11. Overall, despite the matter being in the courts since 1996, it has never proceeded to hearing. The plaintiffs have never been ready to advance it to hearing. They have been dilly-dallying all over. I see, from the record of 26<sup>th</sup> September 1996, that temporary orders were granted ex parte, and the same were confirmed on 28<sup>th</sup> November 1996. It would appear that those orders remained in force, until 15<sup>th</sup> January 2025. The plaintiffs have been enjoying them, at the expense of the defendants, while at the same time making no effort to have its main suit heard, 29 years after it was filed, in 1996. A party cannot have its cake and eat it. It cannot have both. 29 years of stalling a suit in the courts is more than enough. The courts have been overly gracious and lenient to the plaintiffs, but that grace and leniency have been abused.
12. The other issue is that the dismissal happened on 15<sup>th</sup> January 2025. The application, that I am called upon to determine, was not filed until April 2025, after a 4-month delay. That delay has not been explained, given that the plaintiffs and the Advocate claim to have been aware of the date of 15<sup>th</sup> January 2025, and were in fact in court, both physically and virtually.
13. Were the 4<sup>th</sup> plaintiff and his Advocate in court on 15<sup>th</sup> January 2025, whether physically or virtually? I have nothing before me, to support the allegation that they were in court. My record, of that date, indicates that only the Advocates for the defendants were in attendance, and they did address me, when they sought dismissal of the matter. If the Advocate for the plaintiffs had logged in, he would have announced his presence, and responded to the application for dismissal of the suit. If the 4<sup>th</sup> plaintiff was in court, he would have alerted the court to the fact of his presence, and sought time to get his Advocate to either log in, or to come to court physically. The said Advocate, if he was unable to be in court when proceedings commenced, should have either contacted the Advocates for the defendants, and requested them to indulge him as he made his way to court, or sought out another Advocate to hold his brief, to have the file placed aside. No such efforts were made, as the plaintiffs were clearly not prepared for the hearing scheduled for 15<sup>th</sup> January 2025.
14. Given the history of this matter, which I have outlined above, I am not persuaded that there exists a proper case for exercise of discretion to accommodate the plaintiffs. The oxygen rule cannot help them. Articles 50 and 159 of the *Constitution* cannot help them either. Those principles were not designed to aid parties in abusing the court process. There has been indolence, in the manner the plaintiffs have approached this matter, ever since it was initiated in 1996. Equity only aids the vigilant, never the indolent. Consequently, I decline to grant the orders sought, in the application dated 23<sup>rd</sup> April 2025. The same is hereby dismissed, with costs. It is so ordered.

**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 3<sup>RD</sup> DAY OF OCTOBER 2025.**



**W MUSYOKA**

**JUDGE**

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Jumba, instructed by Erick Jumba & Company, Advocates for the plaintiffs.

Mr. Bogonko, instructed by Bogonko Otanga & Company, Advocates for the 1<sup>st</sup> defendant.

Mr. Magina, instructed by Kibet Adoli & Magina, Advocates for the 2<sup>nd</sup> defendant.

