



REPUBLIC OF KENYA



**Balu & 10 others v Railway Housing Co-operative Society Limited & 7 others (Environment and Land Petition 23 of 2021) [2025] KEELC 7457 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND PETITION 23 OF 2021  
EK MAKORI, J  
OCTOBER 23, 2025**

**BETWEEN**

**MUPA BALU ..... 1<sup>ST</sup> PETITIONER  
MULONGO KAKUNDE ..... 2<sup>ND</sup> PETITIONER  
MICHAEL K. FONDO ..... 3<sup>RD</sup> PETITIONER  
TOBIAS KADENGE KATANA ..... 4<sup>TH</sup> PETITIONER  
KADZO KAINGU ..... 5<sup>TH</sup> PETITIONER  
GEORGE MUNYIKA ..... 6<sup>TH</sup> PETITIONER  
JACKLINE NGALA ..... 7<sup>TH</sup> PETITIONER  
JOSEPHINE CHISENGA ..... 8<sup>TH</sup> PETITIONER  
GEORGE RUNYA ..... 9<sup>TH</sup> PETITIONER  
BETTY MGHARO ..... 10<sup>TH</sup> PETITIONER  
REHEMA NDORO GONA ..... 11<sup>TH</sup> PETITIONER**

**AND**

**RAILWAY HOUSING CO-OPERATIVE SOCIETY LIMITED . 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
THE CABINET SECRETARY, THE MINISTRY OF LANDS AND PHYSICAL  
PLANNING ..... 3<sup>RD</sup> RESPONDENT  
THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT  
DIRECTOR OF SURVEYS ..... 5<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF KILIFI ..... 6<sup>TH</sup> RESPONDENT**



## RULING

1. The petitioners' application to this court is dated April 3, 2025. It is filed under Articles 47, 48, 50, and 159 of *the Constitution* of Kenya; Order 12 Rule 7, Order 51 Rules 1 and 15, and Order 42 Rule 6 of the Civil Procedure Rules; and Sections 1A, 1B, 3A, and 80 of the *Civil Procedure Act*. The application seeks the following reliefs:
  - a. Spent;
  - b. Pending the hearing and determination of this application, a prohibitory order shall issue restraining the 1st Respondent, his agents, servants, and/or assignees from evicting the Petitioners, interfering with their quiet possession, leasing, selling, or otherwise disposing of their interest in Kilifi/Kikambala Block 285/3, and the resultant titles being Land Parcels Nos. Kilifi/Kikambala/285/3/28, 29, 32, 33, 34, 35, and 43.
  - c. The orders issued on March 31, 2025, and/or April 1, 2025, dismissing the petition for want of prosecution, should be set aside, and the matter should be heard on a priority basis.
  - d. The petition and all related orders issued therein shall be reinstated.
  - e. The costs of this application should be provided.
2. The application is supported by the grounds stated on its face and the Supporting Affidavit of David Kinisu Sifuna, Advocate for the Petitioners. The Petitioners fully adopt and rely on the contents of the application, the affidavit, and annexures thereto.
3. The AG opposed the application, arguing that litigation should end and that this court properly dismissed the petition for lack of prosecution.
4. The main issue before this court is whether the current suit should be reinstated and who should bear the associated costs.
5. The Petitioner argues that the Petitioners' current advocates, Messrs Sifuna Kinisu & Company Advocates, officially came on record on August 9, 2024, as shown by the Notice of Change of Advocates filed in court, which replaced Messrs Atiang, Ngunyi & Associates, the previous advocates. Once on record, the current advocates quickly requested a hearing date through a letter dated October 28, 2024, sent to the Court Registry. Unfortunately, this request went unanswered and was not acted upon.
6. On January 7, 2025, the Court registry, through the Deputy Registrar, issued a Notice to Show Cause why the suit should not be dismissed for lack of prosecution under Order 17 Rule 2 of the Civil Procedure Rules.
7. According to the Petitioner, there is a procedural irregularity on the face of the notice, which was addressed to Messrs JP Ngoya & Austine Advocates LLP, Muturi Gakuo & Kibara Advocates, and OM Robinson & Company Advocates, but not to the current advocates on record (Messrs Sifuna Kinisu & Co. Advocates) or the former advocates (Messrs Atiang, Ngunyi & Associates). As a result, the Petitioners were not properly notified. Additionally, the notice mistakenly scheduled the show



cause appearance for March 31, 2025, which had already been gazetted as a public holiday through Gazette Notice No. 3861.

8. The Petitioner argues that despite this obvious mistake, the Court still dismissed the Petition on April 1, 2025, without giving the Petitioners a new notice to show cause. This move was procedurally improper and unfair to the Petitioners.
9. In the circumstances, the Petitioners argue they were condemned unheard, contrary to the rules of natural justice and Article 50 of *the Constitution*. This justifies reinstating the Petition to its status before dismissal.
10. The Petitioners argue that the record also supports their proactive stance, demonstrating that they took steps to advance the matter before the incorrect and challenged notice was issued.
11. Furthermore, the Petition raises crucial issues of public interest, and the Petitioners have occupied the suit land for decades. Ongoing negotiations aimed at compensating the 1st Respondent indicate the possibility of an amicable resolution. In light of the above, the Petitioners respectfully request that the application be granted with costs in the cause.
12. The AG strongly believes that litigation should end and that, under Order 17 Rule 2 of the Civil Procedure Rules, there was no need to give notice to litigants who leave their matters unattended for over a year after filing. However, in this case, the petitioners were properly served with the NTSC but failed to attend court.
13. The AG cites decisions in *Kestem Company Ltd v Ndala Shop Limited & 2 others* [2018] KEELC 1605 (KLR) and *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya* [2022] KEELC 1453 (KLR), emphasizing that Order 17 Rule 2 of the CPRs does not require service of the NTSC on a party who has failed to prosecute a dormant matter for over a year.
14. Furthermore, a party cannot claim protection under Article 159(2)(d) when they are in a difficult situation caused by their own errors and omissions, such as failing to pursue a matter within a year of filing—see *Jacob Njeru Karuku v Njagi Njuguna* [2021] KEELC 4169 (KLR).
15. I concur with the submissions of learned state counsel Mr. Ojwang for the state that once a matter has been filed, it ought to be pursued to its logical conclusion. Courts should never be used as parking bays for filed matters.
16. The Petitioners filed this petition on October 12, 2021, accompanied by a certificate of urgency. In a ruling dated June 20, 2023, this court, presided over by Odeny J., issued injunctive orders restraining the respondents from evicting the Petitioners from the suit properties pending a hearing on this Petition.
17. Since the issuance of that injunction, the Petitioners never took steps to prosecute the matter until this court issued the NTSC and finally dismissed the Petition for want of prosecution on 1<sup>st</sup> April 2025.
18. The NTSC was properly issued and served, but the scheduled date to address the NTSC, which is March 31, 2025, was gazetted as a public holiday. As a result, all matters scheduled for that day were rescheduled to the next working day, April 1, 2025. A notice was properly issued to all advocates and litigants regarding these changes caused by the gazette notice. None of the parties appeared, and the Petition was properly dismissed for want of prosecution.
19. Mr. Sifuna's claim of improper service is invalid because a court can dismiss a case for want of prosecution after more than a year without notice, allowing it to focus on other matters. Courts aim to dispense with petitions within a year, in line with their internal performance standards.



20. The law permits dismissing and reinstating suits to serve justice, per Order 17 Rule 2, Section 3A of the *Civil Procedure Act*, and Article 159(2)(d) of *the Constitution*, which emphasizes substantive over procedural justice. Reinstatement is not automatic; applicants must demonstrate compelling reasons and show due diligence in their application. Courts prefer hearing cases on their merits rather than dismissing them on technicalities, provided a fair trial is possible. See *Olumbe v Obanyi* [2025] KEHC 5386 (KLR), where Musyoka J. held as follows:

“The law on reinstatement of suits dismissed is Order 12 Rule 7 of the Civil Procedure Rules, where the court may set aside the dismissal order, on such terms as may be just. The power to reinstate is discretionary.

6. Dismissal of suits for want of prosecution turns largely on the delay in getting the suit prosecuted. The overriding principle is the mantra that there ought to be no delay in the dispensation of justice, based on the maxim that justice delayed is justice denied. The justification behind the remedy, of dismissal of suits for want of prosecution, is that litigation must be expedited and concluded by the parties. There can be no justice in filing a cause in court, and then leave it parked there, unprosecuted, hanging over the head of the other party like the famed sword of Damocles. Dismissals help in clearing backlogs in court, created by parties who lack appetite to prosecute their cases. Pendency of unmoving cases create a logjam, which generates a crisis of public mistrust and lack of confidence in the Judiciary. Dismissals reduce the ever-increasing caseloads, and the backlogs, caused by stale suits clogging the judicial system.
7. The courts have set out the factors that are to be taken into account, in such cases. In *Ivita v 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.
8. 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 v 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.”

21. Following the cited principles, I was persuaded that this Petition should not be reinstated until I considered Mr. Sifuna's argument that the parties are negotiating behind the scenes and that there could be a settlement on the horizon, which led me to believe that the current Petition ought to be reinstated.



22. Consequently, the application dated April 3, 2025, is hereby allowed to the extent of setting aside the dismissal orders of this court dated April 1, 2025. The Petition is to be set down for hearing at the earliest opportunity will be directed by the court.

23. No order regarding costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 23<sup>RD</sup> DAY OF OCTOBER 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Sifuna for the Petitioners

Mr. Ojwang for the 3rd, 4th, 5th, and 8th Respondents

Mr. Mohammed for the 6<sup>th</sup> Respondent

Happy: Court Assistant

