



**Mbithi & 3 others v Wambua (Environment and Land Appeal
E005 of 2022) [2025] KEELC 7330 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E005 OF 2022**

**NA MATHEKA, J
OCTOBER 29, 2025**

BETWEEN

**MERCY WAWIRA MBITHI 1ST APPELLANT
MARTIN KILONZO 2ND APPELLANT
MAKUNDI MBITHI 3RD APPELLANT
LAWRENCE MUSANGI 4TH APPELLANT**

AND

JOSPHAT WAMBUA RESPONDENT

JUDGMENT

1. The Appellants being dissatisfied with the Ruling of the Lower Court in the Kithimani PMCC Case No. 293 of 2015 appeal on the following grounds of appeal:
 1. The learned Magistrate erred in law and fact by delivering a Ruling which was not reflective of the facts presented by the parties.
 2. The learned Magistrate erred in law and fact by failing to consider that the Appellants had proved their case on a balance of probabilities.
 3. The learned Magistrate erred in law and fact by failing to consider the Appellants' counsel's submissions and failed to critically analyze the same and according it the due weight it deserves.
 4. The learned Magistrate erred in law and fact by delivering a Ruling which was biased against the Appellants.
 5. The learned Magistrate erred in law and fact by misapplying the law as it regards dismissal of cases for want of prosecution.



6. The learned Magistrate erred in fact and law by taking into account extraneous matters which were not issues of determination before him.
2. The Appellants prays for;
 - a. The whole of Ruling of the Subordinate Court in Kithimani PMCC No. 293 of 2015 by B.S. Kaphoya Principal Magistrate be set aside and be substituted with an order allowing the Appellants' application for setting aside order dismissing the Appellants' case for want of prosecution.
 - b. The Appellants be granted costs of the appeal and costs in Kithimani PMCC No. 293 of 2015.
 - c. An order for costs.
3. This court has considered the application and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

4. Order 17 Rule 2(1), which governs dismissal of suits for want of prosecution, provides as follows:

In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

5. Further Order 17 Rule 2(3) states thus:

Any party to the suit may apply for its dismissal as provided in sub-rule 1.”

6. The power of dismissal for want of prosecution under Order 17 is a matter that is within the discretion of the court. In the case of Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium vs M.D. Popat and others & another (2016) eKLR, the court held that;

Nonetheless, Article 159 of *the Constitution* and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay. This is what the case of Ivita vs Kyumba [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied



with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”

7. In *Argan Wekesa Okumu vs Dima College Limited & 2 others* (2015) eKLR the court considered the principles for dismissal of a suit for want of prosecution and stated as follows;

The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of *Ivita –vs-Kyumbu* (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same.”

8. In *Naftali Opondo Onyango vs National Bank of Kenya Ltd* (2005) eKLR, the court noted that a court should be slow to dismiss a suit for want of prosecution if it is satisfied that the suit can proceed without further delay. The court stated that;

However, in deciding whether or not to dismiss a suit under rule 6 it is my view that a Court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the Defendant will suffer no hardship and that there has been no flagrant and culpable inactivity on the part of the Plaintiff.”

... Now applying the principles enunciated in the authorities, I have found that, the delay of under one year in this case may be long but it is not inordinate.”

9. I have perused the court file and find that the matter came up in court on the 15th December 2021 and the 4th Appellant attended court and was given time to respond to an application seeking to dismiss the matter for want of prosecution. On 5th January 2022 they again attend court with no response and wished to represent themselves. The matter was dismissed hence this application. The trial court found the advocate who drafted and filed the application was not properly on record and dismissed the application dated 24th January 2022 with costs. This assertion is not opposed and the Appellants did not file any submissions.

10. In the trial court this matter was filed way back in 2015. The suit was dismissed initially in 2022 after the Appellants were given ample time to respond. I find that the matter came up severally thereafter but the plaintiffs never complied and/or did not appear. The Appellants are guilty of laches in prosecuting this matter. Even in the current proceedings the Appellants have failed to attend court despite being served. I find the reasons given for the delay inexcusable and there is no sufficient ground for me to set aside the dismissal orders by the trial court. I find that this appeal is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF OCTOBER 2025.

N.A. MATHEKA

JUDGE

