Omollo & 2 others v Yusuf & 4 others (Enviromental and Land Originating Summons E006 of 2020) [2025] KEELC 7723 (KLR) (6 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7723 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2020

FO NYAGAKA, J

NOVEMBER 6, 2025

IN THE MATTER OF THE LAND PARCEL NO. N. KARACHUONYO/ KONYANGO/721

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP. 22 LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37 RULE 791) OF THE CIVIL PROCEDURE RULES

BETWEEN

SAMWEL OGINA OMOLLO ..... 1ST APPLICANT

FRANCIS AMUOM OMOLLO ..... 2ND APPLICANT

KENNEDY ONYANGO OUMA ..... 3RD APPLICANT

AND

KHALIFAN OMOTI YUSUF ..... 1ST RESPONDENT

ZUBIER OGINA MADORO ..... 2ND RESPONDENT

AMIR OKEYO YUSUF ..... 3RD RESPONDENT

MABUOR NAFTAH ..... 4TH RESPONDENT

SAAD MIRAY ..... 5TH RESPONDENT

(On setting aside an order of dismissal of suit for want of prosecution and reinstatement of the same)

RULING

The Application

1. Before me is an application dated 19th December 2024. It is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 51 Rules 1, 3 and 15 of the Civil Procedure Rules. It seeks Orders:

    1. ...Spent.

    2. That this honorable court be pleased to set aside the orders made of 19th June 2024 dismissing the suit and reinstating the same for hearing and determination.

    3. That costs of this application be provided for.

2. The application was based on nine (9) grounds. These were that the suit was dismissed for want of prosecution on 19th June 2024. Then when counsel for the Applicants perused the court record, he discovered that the e-mail this honorable court used for sending correspondence was not active or was out of service. They, therefore, did not receive the Notice to Show Cause when it was served. The Notice was served to an e-mail address which was inactive, hence learned counsel could not attend court. The applicant's e-mail developed technical issues that were beyond his control and measures to retrieve the same became futile. Therefore, he greatly apologized for the mishap.

3. He added that by the time the Applicants acquired another e-mail address, correspondence had already been made in their inactive e-mail. The dismissal was not intended (sic) by the counsel for the applicants. The mistake was occasioned by learned counsel for the applicants and should not be visited on the innocent litigants. They deposed further that in the interest of justice, this suit should be reinstated and determined on merits. Justice still tilted in favor of allowing the instant application.

4. The application was supported by the Affidavit sworn by the three plaintiffs, namely. Samuel Oginga Omolo. Francis Amuom Omollo and Kennedy Onyango Ouma on 19th December 2024. The deposition largely repeated the contents of the grounds in support of the application except that at paragraph 7 the deponents give an e-mail address, being, ericksonomogusu@yahoo.com which was the active one.

5. The Respondents opposed the application through a Replying Affidavit sworn by the 1st Respondent, Zubier Omolo Madoro, on 20th March 2025. The deponent stated that he had authority to swear the affidavit on behalf of the other Respondents. Further, he deported that the Applicants filed the suit on 25th July 2022. It was dismissed on 9th June 2024. That was a period of two years. He added that the suit was lawfully dismissed because it had been inactive for over 2 years.

6. They deposed further, that Applicants had legal and statutory duty to expedite the hearing of the suit without waiting for the court to issue a Notice to Show Cause for dismissal of the suit before they would act. It was not disputed that before the court dismissed the suit, it issued a notice to the parties as required by law. There was no evidence by the Applicants to prove that their advocate, then on record, did not receive the Notice to Show Cause.

7. He added that the Applicants' e-mail had not changed because the same e-mail referred to in paragraph 7 of the Supporting Affidavit was the same one used during the filing of the Originating Summons. Further, the suit was dismissed in June 2024 while the application was brought in December 2024, over 6 months after the court's action. The delay constituted an inordinate one. The application lacked merit, was an afterthought, and should be dismissed.

8. The application was disposed of by way of written submissions. The applicants filed their submissions dated 16th May 2025. In them, they gave brief facts of the case and set forth only one issue for determination. It was whether the application was merited.

9. They summarized that Order 12; Rule 7 of the Civil Procedure Rules was the relevant Rule for the instant applicant. They reproduced it. They contended that the substratum for dismissal of suits for want of prosecution was founded on principles that litigation must be expedited, and there should be no delay to it. They argued, however, that if there should be any delay arising from one substantive or justifiable logistical cause or reason, it should not be inordinate and reasonable, or inexcusable.

10. They added that the instant application appealed to the discretion of the Court. It, therefore, must exercise caution in order not to result in an injustice. They relied on the case of Richard Ncharpi Leiyagu v. Independent Electoral and Boundaries Commission and two others (2013) eKLR.

11. They argued that they had explained the reasons for the failure of the advocate to attend court on the material date. Further, there was no way of knowing the date in issue because the e-mail used was inactive. They called to aid the provisions of Order 5 Rule 22 B of the Civil Procedure Rules. They stated that it would not serve justice if the mistakes of counsel were visited upon the applicants who had been keen on prosecuting their matter, but they could not have known the date the matter was set down for dismissal without the information from their advocates formerly on record. They submitted that the application be allowed.

12. On their part, the Respondents filed submissions dated 28th August 2025. They too gave the background of the case. They summed that only two issues were for determination by the court. The first one was whether the applicant had demonstrated sufficient cause for setting aside the orders impugned. The second one was whether the Respondents should have the cost of the application.

13. Regarding the dismissal of the suit, they stated that the court relied on the provisions of Order 17 Rule 2(1) of the Civil Procedure Rules. They reproduced it. Then they contended that there was no provision for reinstatement of suits dismissed under this order hence it all depended on the discretion of the court. They added that the application could only be granted if there was sufficient cause. They argued that the applicants had not shown why they failed to act or they did not explain or show cause why they failed to take any action or prosecute their suit for a period of over 2 years, and also for not attending court when the matter was for dismissal.

14. They relied on the Court of Appeal decision of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government and others (sic), and the one of Daphene Parry vs Murray Alexander Carson (sic) from which they quoted a paragraph. They argued that the inaction of two years since the filing of the suit was inexcusable. They stated that the applicants had not demonstrated that they were prevented from prosecuting their suit for a good reason. So, they were the ones to blame for their inactivity. Lastly, they argued that. It was the discretion of the court to grant the orders sought.

ANALYSIS AND DETERMINATION

15. This court has considered the application, the law, and the submissions by the parties. It is worth starting this determination by advising that parties should give the proper citations of the decisions or authorities they rely on and if possible, print them and attach them to their submissions. This is because history has shown that often, many parties strain the point or finding of courts to suit their arguments. In the instant case, the proper citations of the authorities relied on by the Respondents were: The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village

Government & Others Civil Appeal No. 147 of 2006, and Daphene Parry v Murray Alexander Carson (Civil Case No. 140 of 1961) [1963] EACA 76 (30 July 1963).

16. That said, Issues for determination in this case are whether the application is merited. And hold to bear the costs thereof.

17. Starting with the first issue, it is important to note that this suit was instituted on 25th July 2022 and dismissed on 9th June 2024. Within that period, the plaintiffs took no concrete steps in the matter to prosecute it. As a result, the court issued a notice of why the suit should not be dismissed for want of prosecution as provided for under Order 17 Rule 2 of the Civil Procedure Rules. Indeed, when the notice to show cause came up for hearing, there was neither attendance on the part of the plaintiffs nor had they shown cause by way of an Affidavit sworn showing the cause. Therefore, the court dismissed the suit for want of prosecution. Before doing so, the court had, as the record shows, served the Notice to Show cause on their respective parties.

18. Order 17 Rule 2(1) and (2) of the Civil Procedure Rules provide that,

> "(1) 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.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit."

19. In the instant case, it is clear from the record that the plaintiffs took no steps for two years shy of one month. The court issued the Notice to Show Cause and served it. The Plaintiffs/ Applicants argued that the reason for failure to attend the court at the hearing of the Notice to Show Cause was that they were not duly notified of the Notice because their e-mail was not working, and it was beyond their control. They, in the instant application, gave a different email which was almost similar to the one used at the time of filing the Summons except that it had the letter "o" added between the name Erickson and Mogusu in the email itself. This was ericksonomogusu@yahoo.com instead of ericksonmogusu@yahoo.com.

20. This court has carefully considered the facts as deponed by the applicants. It is not in dispute that they had hired a different learned counsel, the firm of N. E. Mogusu Associates Advocates, who were on record at the time when the suit was dismissed for want of prosecution. The said Advocates were the ones through whom the plaintiffs brought the instant application.

21. One telling fact is that, on matters factual to them as the ones whose email address in issue is said to have had technical challenges, they have not sworn an affidavit even through their Office Administrator to support that fact. To me they did not indicate or state the fact that, indeed, their earlier e-mail was not working at the time of service of the notice to show cause. They did not also swear an affidavit to show what technical challenges there were regarding the old E-mail or when the old e-mail stopped working, and when the one said to have been current at the time of the application was procured for communication purposes. In any event, the notice to show cause was served on the parties via emails only.

22. Additionally, the Plaintiffs did not show the steps they took for the two years since the matter was filed, to prosecute it. If they had done anything, it would not have been possible for the notice to show cause to be issued and acted upon. It is incumbent that any party who moves the court for certain reliefs should act expeditiously and diligently in their matter. They cannot file matters and leave them

pending for all the period and purport to be innocent when the matters are dismissed as required by and within the procedures and timelines set by the law.

23. Furthermore, the applicants failed to show how they came to know that their suit was dismissed for want of prosecution if, indeed, there was no communication to them from court about the notice to show cause for dismissal of the matter before it came up for hearing. They placed the reliance on Order 5 Rule 22 B of the Civil Procedure Rules to argue that of course, no delivery of the notice to show cause via e-mail as required by law. It is trite that he who alleges proves. That is stipulated under Section 107 of the *Evidence Act*, Laws of Kenya.

24. Whereas in the instant case, the court would have agreed with the applicants about service of the notice to show cause via e-mail not being sufficiently proved by merely sending the e-mail and there being no evidence of delivery receipt as required under Order 5 Rule 22 B of the Civil Procedure Rules, it is surprising that the same parties who alleged that they were not served with the notice to show cause are the ones who allege that they knew that the matter was dismissed. However, they failed to show how and when they got to know that indeed the suit was dismissed for want of prosecution if they relied on communication via e-mail and the same e-mail was not working at all to the extent that they got to use a different e-mail. Once they stated that they knew of the dismissal, it was incumbent upon or the burden of proof now rested on them to prove, on a balance of probabilities, through their learned counsel that the notice to show cause was not delivered to them and that they learned of the dismissal through other means other than via the e-mail. They did not do so.

25. Lastly, the period of six months from the time of dismissal of the suit to the time of making the instant application has not been explained whatsoever. The delay is inordinate, besides failure to explain it.

26. The glaring gaps in terms of the factual position of service, or lack thereof, as analyzed above goes to show that no sufficient cause has been shown by the applicants to warrant the setting aside of the orders made on 19th June 2024.

27. The upshot is that the application is dismissed with no order as to costs.

28. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM ON THIS 6TH DAY OF NOVEMBER 2025.

HON. DR. IUR NYAGAKA- JUDGE

In the presence of,

Court Assistant: Ms Fiona M.

Ms. Ochieng Advocate for the Applicants

Achillah Advocate for the Respondents