



REPUBLIC OF KENYA



**Mwende & another v Katana & 10 others (Civil Suit  
33 of 2010) [2019] KEELC 5101 (KLR) (9 April 2019) (Ruling)**

*Christine Mwende & another v Nicholas Kopu Katana & 10 others [2019] eKLR*

Neutral citation: [2019] KEELC 5101 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**CIVIL SUIT 33 OF 2010**

**JO OLOLA, J**

**APRIL 9, 2019**

**BETWEEN**

**CHRISTINE MWENDE ..... 1<sup>ST</sup> PLAINTIFF  
ANITA A. PAMBA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**NICHOLAS KOPU KATANA ..... 1<sup>ST</sup> DEFENDANT  
BARAKA MOHAMED ..... 2<sup>ND</sup> DEFENDANT  
HAMIS ORE ..... 3<sup>RD</sup> DEFENDANT  
KAZUNGU MASHI ..... 4<sup>TH</sup> DEFENDANT  
KAZUNGU WANJE ..... 5<sup>TH</sup> DEFENDANT  
PETER CHARO ..... 6<sup>TH</sup> DEFENDANT  
KATANA MASHAKAKA ..... 7<sup>TH</sup> DEFENDANT  
MWAMULANDA MAKIRANDA ..... 8<sup>TH</sup> DEFENDANT  
SANDEI ZIRO ..... 9<sup>TH</sup> DEFENDANT  
KITI J JEW A ..... 10<sup>TH</sup> DEFENDANT  
MAMA RITA ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

1. By their Notice of Motion application dated 2<sup>nd</sup> November 2018, the two Plaintiffs pray that the orders of this Court Made on 18<sup>th</sup> October 2018 dismissing this suit for want of prosecution be discharged,



- set aside and/or varied. In that regards, they urge the Court to reinstate the suit and to set it down for hearing.
2. The application which is supported by an affidavit sworn by their advocate G.N. Gakuo is premised on the grounds:-
    - a) That the Plaintiffs were served with a notice to show cause why the suit should not be dismissed for want of prosecution on 12<sup>th</sup> October 2018, a day after the date set therein for hearing;
    - b) That by the time they received the notices, the matter had already proceeded and had been dismissed for non-appearance and/or want of prosecution;
    - c) That it is in the interest of justice and fairness that the prayers sought in the application be granted.
  3. In a Replying Affidavit filed herein on 15th January 2019, the 1<sup>st</sup> Defendant Nicholas Katana Kopo on behalf of the other Defendants/Respondents avers that the Court acted within its limits in dismissing the suit. It is their case that other than physical service, the matter was served by an email and a notice placed on the Court's notice board for almost two weeks before the same was dismissed.
  4. The Respondents further aver that the contention by the Applicants that the Court file was missing is a mere excuse meant to delay further the conclusion of this matter. It is their case that the Applicants are no longer interested in the matter and they urge the Court to dismiss the present application.
  5. I have considered the application and the response thereto. I have equally considered the submissions by the Learned Advocates for the parties.
  6. The legal basis for dismissal of suits for want of prosecution is the requirement of expediency in the prosecution of civil suits and can be traced to Article 159(2)(b) of the Constitution which provides that justice shall not be delayed. Equally Section 3A of the Civil Procedure Act gives the Courts unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court.
  7. The procedural underpinning to these substantive provisions of the Constitution and the law is Order 17 Rule 2 of the Civil Procedure Rules which allows the Court on its own motion or on notice to the parties, where no action has been taken for one year in a suit to have it dismissed for want of prosecution.
  8. Examining the record herein, this suit was instituted on 15<sup>th</sup> April 2010. Not much has taken place since then. Between September 2012 and September 2015, no action was taken on the matter. On 18<sup>th</sup> September 2015, the Court listed the matter for dismissal for want of prosecution. Mr. Gakuo, Learned Counsel for the Plaintiffs then appeared and told the Court that they were unable to list the matter for hearing because their office had been burnt down and their file destroyed. He asked the Court to give the Plaintiffs 90 days to prosecute the suit. The Court then granted them 90 days to comply with Order 11 of the Civil Procedure Rules.
  9. From the record I am unable to see any such compliance. Indeed no action was again taken on the file between May 2017 and 11<sup>th</sup> October 2018 when it was listed and dismissed. The contention that the file was missing during that period is not backed by satisfactory evidence.
  10. In the circumstances, I find no merit in the application before me. The same is dismissed.
  11. Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 9<sup>TH</sup> DAY OF APRIL, 2019.**



**J.O. OLOLA**  
**JUDGE**

