



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC CASE NO. 112 OF 2018

MOHAMMED **ISAAK**
ABDI.....PLAINTIFF

VERSUS

EXPORT **PROCESSING** **ZONE**
AUTHORITY.....DEFENDANT

RULING

1. The subject of this ruling is the plaintiff's notice of motion dated 4/10/2023. It stated to have been filed in accordance with provisions of **Articles 48, 50 and 159 (2) (d) and (e)** of the **Constitution, Sections 1A, 1B, and 3A** of the **Civil Procedure Act**, as well as **Order 12 Rule 7** of the **Civil Procedure Rules**. The plaintiff seeks the following orders from this court: -

a. Spent.

b. Spent.

c. Spent.

d. THAT the order issued on 4/10/2023 by this honourable court dismissing the plaintiff's suit for want of prosecution be set aside and/or discharged and the suit reinstated for hearing on its merits inter parties.

e. THAT the costs of the motion be in the cause.

2. The motion is supported by the grounds therein as well as the affidavit sworn on the same date by counsel Mr Timothy Ondara and Gilbert Josiah Mungu. In a nutshell of both, they state that when the hearing date of 4/10/2023 was scheduled, the law firm on record made great efforts to prepare for it, including serving a witness summons against Mohammed Billow, Land Registrar Mombasa, but unfortunately, on 13/09/2023, they were informed that he was out of the country on official duties.
3. Moreover, as fate would have it, the plaintiff, who is an elderly, informed them on 29/09/2023 that he was unwell and on medication. Therefore, they promptly informed the defence counsel about the illness, promising to share the sick note. They maintain that, on the hearing date, the court declined to grant an adjournment on the basis that there was no evidence the plaintiff was unwell. Immediately after the court session, they sent a court assistant to file a scanned copy of the sick note. Counsel also made attempts to present the original sick

sheet, only to find that the suit had been dismissed for want of prosecution.

4. In a brief response, counsel **Mr Austin Adoyo** filed a replying affidavit sworn on 28/01/2023, where he states that the overarching principle of the court, as envisaged by **Article 159** of the **Constitution**, is the timely conclusion of matters. He argues that the plaintiff has not provided convincing reasons why the matter should not be reinstated. To him, the plaintiff had in the past caused inexcusable delay in prosecuting the matter.
5. As directed by the court, the motion was considered through written submissions filed by the law firms of **Mss Oyugi & Co. Advocates** for the plaintiff, dated 5/02/2025, and **Kipkenda & Co. Advocates** for the defendant, dated 12/02/2025.
6. Now, turning to the substance of the matter at hand and having carefully considered the motion, its grounds, affidavits, and articulate submissions, including the provisions of the law and judicial precedents relied upon, the sole issue for determination is **whether the plaintiff has met the legal threshold to warrant the reinstatement of the suit.** It is essential to mention that the plaintiff's submissions also focused on the already spent issue of the injunction, which has been disregarded.

7. In resolving this matter, the court will examine the pertinent legal provisions that authorise the reinstatement of dismissed suits and will also review established jurisprudence regarding this issue. Concerning the law, and as correctly referenced by the plaintiff in the motion, the relevant statutory provision is found in our **Order 12, Rule 7** of the **Civil Procedure Rules**, which stipulates that where a judgment has been entered or the suit dismissed, the court, upon application, may set aside or vary the judgment or order on such terms as are just. Consequently, the motion is properly presented before this court.
8. The jurisprudence that guides this court in the exercise of judicious discretion in dealing with such motions is settled, and the decision of **Shah v Mbogo and Another [1967] EA 116 Limited [2020] eKLR**, which was cited with approval in the case of **John Waweru Njenga & 5 others v Motor Botique**, and has been relied upon by the plaintiff detailed the guiding principles: -

“This discretion (to set aside ex parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

9. These criterion is also restated in the long-cited decision of **Ivita v Kyumbu [1975] KEHC 4 (KLR)** that has been buttressed by the defendant's counsel, whereby in this case, the court held that the tests to be applied are whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. In this decision, the court stated thus:

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“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if 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 notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.”

10. This court has taken time and reviewed the record thoroughly. It has come to the court’s attention that counsel Mr Odara’s deposition has misrepresented facts. Specifically, it appears from the letter to the defence counsel dated 29/09/2023 that Mr Odara never authored the letter, as he claimed, but by counsel Ms Catherine Muiruri. Furthermore, contrary to his assertion, this letter never included a promise to forward the treatment note to the defence counsel.

11. Additionally, this letter raises more questions than it answers, which have not been satisfactorily explained to the court. The letter heavily emphasises that Mr Billow was out of the country; however, the record shows that no such summons was issued by this court against Mr Billow as claimed. Instead, on 13/02/2023, at the plaintiff's request, the court issued a witness summons against Mr A.A. Athimani, a surveyor, to

produce a surveyor's report. The record indicates that no such summons was ever extracted and served upon Mr Athimani.

12. Moreover, this letter of 29/09/2023 was never copied to the court; there is no communication addressed to the deputy registrar of this court informing the court, as is customary in cases of intended adjournment. There is also no record of such a letter in the court's Case Tracking System (CTS). During the hearing date, Mr Mungu neither indicated that he had sent a letter to the court nor did counsel depose to the fact that such a letter was submitted prior to the hearing date. Nevertheless, astonishingly, such a letter has been found within the court records and bears a court stamp dated 29/09/2023.

13. Considering this context and in the absence of any explanation regarding how this letter entered the court record, it is the considered view of this court that the letter was mischievously placed in the court file by the plaintiff's legal representatives, potentially in collusion with the registry staff, to mislead the court into granting their sought relief. Regarding the medical report, it raises suspicion, and this court inclines to doubt that it was authored by Kenyatta National Hospital, especially given that the name of the purported author and his credentials have not been provided, and it demonstrates that the plaintiff is not as elderly as alluded.

14. This court has expressed its concerns regarding the documentation submitted by the plaintiff, determining that it is riddled with falsehoods, presents significant misrepresentations of facts, and is incredible, all of which appear to have been orchestrated by deliberate attempts to mislead the court into granting the relief sought, which this court will not permit. Pointedly, it is perplexing that the plaintiff did not offer any affidavit deposition explaining his absence.
15. The court records show that no party appeared before the court at the scheduled time of 11:30 am, and no reasonable excuse has been offered to the court's satisfaction. Having considered the record, it is evident that the plaintiff has never been eager to prosecute this matter and has consistently provided one reason or another. In contrast, the defence has always been prepared and willing to proceed. In the circumstances, this court agrees with the defence counsel that the reasons provided by the plaintiff do not clearly meet the standards of being logical, rational, plausible, convincing, or a reasonable excuse. It also agrees with them that there has been an excessive delay in prosecuting the matter, which will prejudice the defendant, as this case had been in court for five years up to the time of dismissal, with no end in sight.
16. Guided by established precedents and our constitutional principles, it is essential in the interests of justice that trials are concluded with reasonable expedition. This court finds that

the plaintiff has not provided sufficient and justifiable reasons to justify exercising discretion in his favour. Reinstating the suit would cause significant difficulty, injustice, and prejudice to the defendants. In conclusion, this court finds that the notice of motion dated 4/10/2023 has not met the legal requirements and is therefore dismissed, with costs to the defence assessed at Kshs. 15,000/-.

It is so ordered.

Delivered and Dated at Machakos this 8th day of December, 2025.

**HON. A. Y. KOROSS
JUDGE
8.12.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Mr Manyara for plaintiffs.

Mr. Momanyi holding brief for Mr. Oduol for defendant/respondent.