REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 071 OF 2018 (OS)

MAURICE MOSI.....PLAINTIFF/APPLICANT

VERSUS

SAMWEL OCHIENG OCHUMBA (sued on his behalf and on behalf of the ESTATE OF SILFUNUS JAJI OCHUMBA (DECEASED).....DEFENDANT/RESPONDENT

RULING

(On whether the applicant's suit should be reinstated)

The Application

1. The Applicant herein filed a Notice of Motion application dated 9th June 2025. He brought it under Certificate of Urgency. The application is brought under sections 3, 3A of the Civil procedure Act as well as Order 12 Rules 2 and 7 of the Civil Procedure Rules.
2. The applicant seeks **ORDERS THAT**:
    1. This honourable court be pleased to set aside and/or review its orders dismissing this suit of 19th January 2022 and reinstate the hearing of this suit on priority basis.

2. That the costs be in the cause.

3. The application is founded on several grounds outlined on the face of the application as well as the depositions in the supporting affidavit of Maurice Mosi, the applicant herein. The applicant states that this court dismissed for want of prosecution the instant suit on 19th January 2022. The dismissal was occasioned by non-attendance on the part of his counsel one Clitus Oyoo, whom he maintains was persistently unwell and eventually died.

4. The applicant further maintained that he became aware of the dismissal sometimes in 2025 when he instructed his new counsel, now on record to, inquire into the status of the suit. In addition to the foregoing, the applicant maintained that mistakes of counsel should not be visited upon a client. Further, that the Respondent would not suffer any prejudice should the court allow the application since he had neither entered appearance nor tendered evidence in relation to the matter.

5. The applicant also maintained that there are peculiar issues raised by the suit that require this court's determination, and he is willing to prosecute the matter.

6. Finally, the applicant maintained that his application was brought in good faith and without any unexplained inordinate delay and prayed that the same be allowed.
7. The supporting affidavit reiterated the contents of the application save to add that the applicant deponed that, on the day scheduled the for the notice to show cause why the matter should not dismissed for want of prosecution, the applicant's counsel had been taken ill. He also deponed that the said advocate was an associate in the firm of Edward Kisia & Associates (*sic*) and that he expected the firm to take over the matter, given the health status of his then advocate on record.
8. The Respondent filed a lengthy replying affidavit sworn on 19th July 2025 whose contents I can only summarize. In a nutshell, the Respondent deponed that he was never served with Summons to Enter Appearance in the instant suit and only got an official notification of this suit on 20th June 2025.
9. The Respondent deponed that the applicant filed a similar suit at the lower court, being Migori Chief Magistrates court ELC Case no. 29 of 2023 in which he seeks similar orders as in the instant suit in relation to the same parcel of land. In this latter

suit, the Respondent maintained, the applicant has been represented by the firm of E. Kisia & Associates, Advocates and Mr. Kisia, advocate attended court on behalf of the applicant herein. The respondent annexed court attendances to prove this allegation.

10. The Respondent also stated that the applicant had come to court with unclean hands by alleging that his suit was dismissed on account of his advocate's illness yet he had the responsibility of ensuring that his case was expedited. He also deponed that the applicant was represented by the firm of E. Kisia & Associates, Advocates and it had not just a single advocate in the law firm.

11. In addition to the foregoing, the Respondent deponed that there was no mention of Clitus Oyoo, advocate (deceased) in the applicant's application filed on 17th May 2018. Equally, the Respondent contended that there was no evidence tendered by way of affidavit disclosing the reasons as to why the said E. Kisia & Associates, Advocates took no action concerning the suit for a period exceeding seven (7) years.

12. The Respondent also alluded to the fact that the applicant did not provide evidence as to when his advocate fell ill and eventually died. As such, he deponed that the applicant was simply seeking sympathy from the court and at the same time attempting to hoodwink this court with the intention of resuscitating a suit that is already dead.

13. Further to the foregoing, the Respondent maintained that, contrary to the applicant's allegation that he only became aware of the fact of the dismal of his suit sometimes in 2025, it could not be true as the plaintiff knew or ought to have known that his suit had already been dismissed on 16th December 2021. The Respondent referred to the court record and argued that the inordinate delay in filing the instant application has not been explained. Equally, he reiterated that the matter could have been taken up by any other advocate in the firm that was representing. He added that the applicant had not demonstrated to the court the steps he had taken in engaging the said law firm or any other firm for purpose of expediting the hearing of his suit.

14. The Respondent deponed that the instant application was brought in bad faith as the applicant had failed to disclose important material facts relating to the suit. This included the fact that there in another suit filed by the applicant in the lower court that that touched on the subject matter of the instant suit. To this end, the respondent maintained that the instant suit would be barred by the doctrine of *res sub judice.*

15. The Respondent concluded that the circumstances of the application was not one where the court should excuse his delay in prosecuting his case on account of the mistake of his counsel. Rather, the Respondent contended that the instant case was one of a careless and negligent litigant who failed to follow up his matter for seven years and only woke up to seek the reinstatement of his suit after the same had been dismissed for more than four years. The Respondent maintained that the applicant had come to this court with unclean hands as he was aware of the date of the hearing of the notice to show cause but inordinately long to move the court.

Parties' Submissions

16. The application was canvassed by way of written submissions. The applicant filed his submissions dated 2nd September 2025. He raised three issues for determination by this court, namely: whether the applicant has demonstrated sufficient cause to warrant reinstatement of the suit; whether the mistake of counsel should be visited upon the litigant; and whether the respondent will suffer prejudice if the suit is reinstated.

17. On the first issue, the applicant submitted that he had provided candid explanation regarding the cause of his delay in prosecuting his suit. he argued that persistent illness on the part of his advocate and the eventual death of the said advocate was fully beyond his control. He relied on **Ivita v Kyumbu [1984] KLR 441** to argue this court should consider whether the delay in question is prolonged and excusable and whether justice can still be done irrespective of the delay. he submitted that the delay is excusable on account of his advocate's illness and eventual death.

18. The applicant also relied on **Philip Chemwolo & another v Augustine Kubede [1982-88] KAR 103** to argue that a party

should not suffer the penalty of having his case heard on merit on account of a mistake.

19. As to whether the mistakes of counsel should be visited upon a client, the applicant submitted that the mistake that led to the delay of the prosecution of his suit was purely a mistake of his counsel and that he was an innocent litigant in the circumstances. He relied on **Belinda Murai & others v Amos Wainaina [1979] eKLR** to buttress the argument that the mistake of counsel should not be visited upon a litigant.

20. As to whether the respondent would suffer any prejudice should the suit be reinstated, the applicant argued that the only prejudice raised by the respondent was passage of time, which can be remedied by way of costs. He further argued that the subject matter of the suit is land whose value and character remain intact and as such, justice can still be done. The applicant placed reliance on **Agip (Kenya) Limited v Highlands Tyres Limited [2001) KLR 603** to argue that justice can still be done despite the delay.

21. The applicant further submitted that failing to reinstate the suit offends article 159 (2) (d) of the constitution as well as the

overriding objectives of justice provided in the Civil Procedure Act. He prayed that order dismissing the instant suit be set aside and that the court be pleased reinstate the suit and order that it be fixed for expeditious hearing.

22. The Respondent filed his written submission dated 26th August 2025. He argued that the application ought to dismiss on account of various reasons. Foremost, the respondent submitted that there was inordinate delay in bringing the application and no plausible reason had been advanced to explain the said delay. The respondent submitted that the applicant has not demonstrated the steps he took to have the matter heard between the period the matter was instituted and the time is was dismissed, which period constituted three and half years. Similarly, the respondent argued that the applicant did not demonstrate the actions he took the have the matter herd since the matter was dismissed up to 9th June 2023 when the instant application was made.

23. The Respondent placed reliance on **Rajesh Rughani v Fifty Investments & another, Civil Appeal no. 80 of 2007** where the Court of Appeal held that it was insufficient for a party

blame previous counsel without the said party demonstrating the steps he took to show that he did not condone or collude in the delay.

24. The Respondent also submitted that the application should be dismissed since it was barred by the doctrine of *res sub judice* since the applicant has filed a counterclaim in the lower court and the subject matter in the said counterclaim is the same as the suit herein.

25. In addition to the foregoing, the applicant submitted that the instant application should be dismissed because it was filed in bad faith and by suppression of material relevant facts. In this regard, the respondent contended that the applicant failed to disclose to this court the existence of another suit by way of a counter claim and relied on the Court of Appeal decision in **Richard Apela & another v Emmanuel Ngesa Nyaoke [2006] KECA 282 KLR** where the court dismissed an application that did not disclose material facts.

26. It was the Respondent's further submission that the application should be dismissed since the suit had already abated. He submitted that that he has never been served with

summons to enter appearance since the matter was instituted about seven years ago. As such, he argued that there is not suit capable of being revived and that the instant application ought to be dismissed.

27. Lastly, the Respondent submitted that the suit that the applicant seeks to reinstate is fatally defective suit for failing to comply with the mandatory requirements of Order 37 Rule 7(2) of the Civil Procedure Rules for failure to annex a certified extract of title to the supporting affidavit accompanying his originating summons. He relied **on Nicholas Sammy & 4 others v Daystar University & 4 others (Environment and Land Originating summons E002 of 2024) [2024] KEELC 6929 (KLR)** to buttress his argument.

28. In conclusion, the Respondent urged this court to find that there has been inordinate delay in prosecuting the suit for seven years, which delay has not been explained. He stated that the application lacked merit and the same should be dismissed.

Issues, Analysis and Determination

29. After analyzing the application, the response and the submission of the parties, it is my considered view that the issue that arises for this court's determination in the instant application is whether the instant application is merited. Attendant to this issue is the question of who should bear the costs of the application.

30. The applicant herein seeks reinstatement of his suit, after the same was dismissed by this court on 19th January 2022 for want of prosecution.

31. **Order 17 Rule 2** of the **Civil Procedure Rules** provides for dismissal of suits for want of prosecution where no action is taken to prosecute the matter. That was the fate of the instant suit.

32. **Order 12 Rule 2(6)** of the **Civil Procedure Rules** on the other hand provides for reinstatement of suits, where the same have been dismissed for non-attendance and not want of prosecution. Under the latter provision, courts are empowered to set aside or vary such orders on just terms and upon the application of the affected party.

33. The Court's power to reinstate a suit is discretionary and such discretion should be exercised judiciously so as to ensure justice for all the parties (See **Ivita v Kyumbu [1984] KLR; Olumbe v Obayi (civil appeal e014 0f 2024) [2025] KEHC 5386(KLR) and Ambalasi v Lovega (Civil appeal 27 of 2023) [2025] KEHC 590 (KLR)).**

34. In **Olumbe v Obay**i (supra) Musyoka, J aptly captured the rationale behind dismissal of suits for want of prosecuting as follows:

> *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 filling 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

35. There is no doubt that there was delay in prosecuting the applicant's suit. The question that this Court needs to consider is whether the said delay was justified and whether reinstating the case would serve justice to both parties, bearing in mind justice must be done to both the applicant and the defendant.

36. In **Ivita v Kyumbu** (supra) the court of appeal determined as follows:

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/respondent'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. To put it in the words of Salmon LJ in Allen v McAlpine, at p 561, as a rule, when inordinate delay is

established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all-time saying, which will never wear out however often said that, justice delayed is justice denied (emphasis supplied).

37. In the instant application, the applicant maintains that the delay in prosecuting his case was occasioned by factors beyond his control, that is, the frequent illness of his then counsel on record who eventually succumbed to his illness, in the circumstances. He argued that he was an innocent party and that the mistakes of his counsel should not be visited upon him.

38. The Respondent on the other hand argued that the applicant was 'careless' in prosecuting the matter since he did not demonstrate any or the steps he took to ensure that his matter was expeditiously heard and determined. Equally, the Respondent argued that a suit belongs the to litigant and not his counsel. As such, the litigant had an obligation of checking upon his counsel for updates on his suit. Lastly, the Respondent argued that the there was no evidence that the said advocate was exclusively in charge of the applicant's matter. It has never

been so in legal practice. The proper course of events, and the obligation, is that a party has the duty to follow up his matter before a lawyer and court so that he ensures it progresses. Where he does not do so, he is taken to be indolent. Such a conduct cannot be attributed to his learned counsel.

39. In any event, the applicant has another ongoing another suit and the same firm that represented him in this matter had an advocate representing him at the lower court.

40. I have carefully considered the court proceedings and noted that this matter was filed by E. Kisia Associates, Advocates vide an Originating Summons dated 17th May 2018, and which summons were supported by an affidavit sworn on 2nd February 2018. After this, nothing took place until 11th March 2021 when Mr. Kisia, Advocate appeared in court and prayed that pre-trial directions be given. The court fixed the matter for the said pre-trial directions on 24th May 2021.

41. On 24th May 2021, the plaintiff attended court and stated as follows, ‘‘***I intend to act in person and may the matter be fixed for hearing’’***. The court directed the applicant to serve the requisite notice and fixed the matter for hearing on 10th

November 2021. On this latter date, the matter did not proceed as there was no attendance by the parties and the court fixed the matter on 16th December 2021. Again, the parties did not appear and the court fixed the matter for hearing on Notice to Show Cause why the matter should not be dismissed for want of prosecution on 19th January 2022. The court dismissed the suit on account of want of prosecution on 19th January 2022.

42. The applicant maintained that he was not aware that the suit had been dismissed for want of prosecution, a fact he stated he discovered sometimes this year upon instructing his current advocate on record to look into the status of his suit. Should this court believe this deposition of fact, particularly, given the above provided elaborate court record? I do not think so. The applicant was in court on 24th May 2021 and asked the court to act in person. The applicant had an obligation of following up on his matter, and he cannot be heard to argue that the did not know the status of his matter until sometimes in 2025 when he attended court in person and informed that he wished to represent himself.

43. As to whether the delay in prosecuting the applicant's case can be attributed to the mistakes of his counsel, this court has considered the court record and wishes to clarify that, the matter was filed on behalf of the applicant by the firm of E. Kisia Associates, Advocates. The applicant argued that his advocate, one Clitus Oyoo, was unwell and eventually succumbed to his illness. He stated that the Clitus Oyoo was an associate in the firm of E. Kisia & Associates, Advocates. The time of the illness and death of the said advocate have not been provided.

44. Besides, I agree with the Respondent that there was no evidence tendered by the applicant to demonstrate that the said advocate exclusively handled the matter on behalf of the applicant. This reasoning is reinforced by the fact that the applicant was represented by the same firm in the lower and Mr. Edward Kisia, advocate appeared for the applicant. An examination of the court record shows that the firm of Oyoo Z & Co. Advocates only filed a Notice of Change of Advocates on 9th June 2025 taking over the matter from E. Kisia & Associates, Advocates.

45. It is my finding that the firm of E. Kisia & Associates, Advocates was on record for the applicant, and there is not no reason advanced for the applicant to account for their inaction. the deposition that the Clitus Oyoo, Advocate contributed to the delay is not plausible. there no explanation why the firm of E. Kisia & Associates, Advocates or any other firm for that matter could not act for the applicant.

46. If ever there was a mistake, then the same should not be blamed on Clitus Oyoo, Advocate (deceased) as the suit was not filed in his name. Rather, the applicant should have endeavored to explain why the E. Kisia & Associates, Advocates which was on record on his behalf could not represent him if he wanted to blame his advocates for the delay.

47. Had the applicant offered a reasonable explanation along this line of thinking, perhaps the court might have been persuaded. In **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR**, the court held that ‘‘*from past decisions of this court, it is without doubt that courts will readily excuse mistake of*

counsel if it affords a justifiable, expeditious and holistic disposal of a matter.''.

48. In **Patriotic Guards Limited v James Kipchirchir Sambu [2018] KECA 799 KLR**, the court was persuaded by the arguments of an applicant who the court considered had given plausible reason as to why counsel could not attend and expressed itself as hereunder:

> *''In this case however, counsel for the appellant explained himself as to why he was late in availing himself in court. the reason was plausible. clearly, this is a case where the sins of counsel should not have been visited upon a litigant.''*

49. That said, it is important to note that dismissal of suits for want of prosecution serves an important role in our justice system, more so in enhancing access to justice by reducing unnecessary case backlogs. Musyoka J. Aptly captured this rationale in **Olumbe v Obay**i (supra) in the following terms:

> *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 filling 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

50. In my humble view, there being no sufficient explanation for the inordinate delay in prosecuting the applicant's case. I find that the instant application lacks merit. Accordingly, prayer 2 thereof is hereby declined.

51. On the issue of costs, it is trite that costs are awarded at the discretion of the court, and they follow the event, unless the court orders otherwise. The Applicant has lost in his cause. It is only him who can pay the costs of the application.

52. It is so ordered.

Ruling dated, signed and delivered virtually via the Teams Platform this 29th day of December 2025.

HON. DR. IUR NYAGAKA

JUDGE

From 09:30 AM in the presence of,

Mr. Oyoo Advocate for the applicant

Mr. Kenyatta Advocate for the Respondent