



**Joseph v Nyambuoro (Environment and Land Case 424 of 2017)
[2026] KEELC 232 (KLR) (26 January 2026) (Ruling)**

Neutral citation: [2026] KEELC 232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE 424 OF 2017
FO NYAGAKA, J
JANUARY 26, 2026**

BETWEEN

ROSE ATIENO JOSEPH PLAINTIFF

AND

FANUEL ONYANGO NYAMBUORO DEFENDANT

(On whether the appellant's appeal should be dismissed for want of prosecution under order 17 Rules 2 of the Civil procedure rules, 2010)

RULING

1. This suit has been pending for hearing since the year 2017. It is worth noting that several actions have been made in the intervening period. At one time, immediately prior to the issuance of the instant Notice to Show Cause the parties intended to have a settlement of the suit. Therefore, as late as 21st November 2024 it was referred to a court annexed mediator. However, it did not bear fruit hence the suit was also fixed for inter partes hearing on the 27th of March 2025.
2. When it came up for hearing on the material date, the parties once more informed the court that the mediation failed because they were not contacted by the mediator. On that date, the court once more referred the matter to another court annexed mediator. It gave the contacts of the parties to the Deputy Registrar who, upon appointment of the mediator, was to pass the contacts to him or her. It fixed the matter formation before the Deputy Registrar on the 28th of March 2025.
3. On that material date, a mediator was appointed. The suit was given a further mention date, being 14th May 2025 when a report was expected about the mediation process. On 28th May 2025, the Deputy Registrar issued a certificate of non-compliance and fixed it for mention before this Court on the 28th of June, 2025.
4. The parties did not attend court. It issued a notice to show cause why the case should not be dismissed for want of prosecution. On the 29th of September 2025, learned counsel for the plaintiff sought more



time to show cause by way of affidavit. The court fixed the Notice for hearing on 8th December 2025. On that date, the counsel indicated that they had shown the cause. Thus, the court fixed the matter for ruling on the 26th of November January 2026.

5. In the Affidavit she swore on the 5th of December 2025, the plaintiff gave a brief history of how the matter has been progressing in court since the year 2012 when she instituted on the 23rd October of that year. She deponed further that on a number of instances between 30th September 2020 and 17th June 2021 the case was adjourned at the instance of the Defendant. Then on 17th of June 2021, the court closed the Defendant's case, noting that the date was taken by consent but neither the Defendant nor his Advocate attended the hearing. Parties were directed to file written submissions, and a judgment date was to be on notice.
6. Come on the 1st of November 2022, the Defendant informed the court that he had filed an application that on 15th December 2021 seeking to set aside the orders of 10th March 2020. The application was unprosecuted and since 15th December 2021 without an explanation.
7. She attributed the delay to the Defendant's lethargic and inimical behavior. She added that on 27th April 2023 the court decided on the application and delivered a ruling by which it allowed the defendant's application and reopened his case. The Defence hearing was fixed for the 30th of May 2023. Following that, various dates, being, the 18th July 2023, 17th October 2023, 16th October 2023 and January 2024, were taken the Defense did not proceed. Subsequent to that, the Defendant indicated between 15th July 2024 and 31st October 2024 that he wished to engage the plaintiff/ deponent with a view to settling the matter out of court. The court allowed it. The Plaintiff prepared a draft consent for execution, but the Defendant's counsel declined to sign or approve it. She annexed the draft.
8. Ultimately, the suit was fixed for hearing on 27th March 2025. Again, in the interest of justice, the court referred the suit for mediation because the parties alleged that the earlier one did not take place because the mediator did not contact them. But the defendant was never interested in attending the mediation proceedings. The court then directed that the matter proceeds but since the parties were absent again, it fixed the same for the Notice to Show Cause.

Analysis And Determination

9. I have considered the matter before me. This Court proceeds to decide the dispute using the Issue, Rule, Application and Conclusion (IRAC) method.
10. The issue, (I), for determination is whether the Plaintiff has shown cause why the suit should not be dismissed for want of prosecution.
11. The relevant law, (R), on dismissal of suits for want of prosecution where there is inaction for some time is Order 17 Rule 2 of the Civil Procedure Rules. It provides in the relevant part as follows:-
 - “(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.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.”



12. The Rule is to the effect at that time where no step has been taken by either party in a matter for over one year the Court can issue to the parties a notice in writing to show cause why the suit should not be dismissed. The party who had not moved the court bears the burden of showing why the court should not dismiss the matter.
13. In my view, both the Plaintiff and the Defendant bear this burden because the sub-Rule (1) provides that it is “either party” whose conduct of inaction for one year comes into play. The Defendant should be as much an active party as the Plaintiff. This is more obligatory so because in the instant matter, it is shown and the record clearly shows that the plaintiff had prosecuted her case and closed it. She had gotten to the stage of awaiting the Defendant to present his case.
14. A Defendant is not like the flower girls in weddings who, after making everything look beautiful and awesome, never get married in that wedding: they live to marry another day.
15. In applying the law to the facts, (A), herein, the defendant has not shown that he took any steps to move the court, more so after the court reopened his case. Thus, it would not be in the interest of justice to dismiss this suit when the facts clearly show that it is the defendant who has delayed it. There is no good faith on the part of the defendant. In my humble view good faith on the part of a Defendant is only exhibited in one of two ways. One is that the defendant may take a step to prosecute the matter by fixing it for hearing if the plaintiff does not do so. That is a first and prudent step. The second one is that he may make an application to dismiss the suit for want of prosecution. It is not open for a defendant to do nothing and wait for the plaintiff to fix for his defence hearing or take advantage of the court’s step of issuing a notice for dismissal of the suit for want of prosecution.
16. In *Josphat Mabilia Akoyo v George Mabele Sifuna & John Odhiambo* [2022] eKLR, the Court held as follows:-

“Upon this background I restate the law on the setting aside of a matter dismissed for want of prosecution. In such an instance the Court is called upon to exercise discretion. The discretion is very wide. However, it should be exercised judiciously and on a case by case basis. The facts of each case and the circumstances of both the dismissal and application for setting aside should be carefully evaluated. The Court should consider the reasons advanced for failure to prosecute the case and for delay in bringing the application to set aside the order.”
17. Additionally, in *Ivita vs. Kyumbu* [1984] KLR 441 the Court laid down principles for issuance of an order of dismissal of suit for want of prosecution. It stated:

“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 it 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, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.



18. Having looked at the circumstances of this case the court takes the view, in conclusion, (C), that the explanation given by the plaintiff is satisfactory and sound. For this reason, this suit is spared from dismissal for want of prosecution. The Defendant is given a LAST CHANCE by being ordered to proceed with the entire defence case on a date to be taken after the mention date of 26th February 2026 in case the negotiations fail. Mr. Owino Advocate to cajole the negotiations that stalled.
19. There shall be no order as to costs.
20. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 26TH DAY OF JANUARY, 2026.

HON. DR. IUR. NYAGAKA,

JUDGE

In the presence of,

Mr. Langat Raymond Advocate for the Plaintiff

Mr. Owino Samuel Advocate for the Defendants

