



REPUBLIC OF KENYA



**M’Nkubitu v Murira & another (Environment and Land Appeal
E052 of 2024) [2026] KEELC 120 (KLR) (19 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E052 OF 2024**

**BM EBOSO, J
JANUARY 19, 2026**

BETWEEN

MOSES GITONGA M’NKUBITU APPELLANT

AND

ISAAC KIRUKI MURIRA 1ST RESPONDENT

WILSON KINOTI KIRERA 2ND RESPONDENT

*(An appeal against the Judgment of the Senior Principal Magistrate Court at Githongo
[Hon. T A Sitati, SPM] dated 26/7/2024 in Githongo SPMC Civil Case No. 52 of 2014)*

JUDGMENT

Introduction

1. This appeal challenges the ruling rendered by the Senior Principal Magistrate Court at Githongo [Hon T A Sitati – SPM] on 26/7/2024 in Githongo SPMC Civil Case No. 52 of 2014. The key issue which falls for determination in the appeal is whether the suit was ripe for issuance of a dismissal order on the ground of want of prosecution on 2/3/2020. Before I analyse and dispose the issue, I will briefly outline the background to the appeal.

Background

2. On 20/3/2013, the appellant initiated Meru ELC Case No. 87 of 2013 against the respondents. He sought: (i) a declaration that he had rightfully and legally purchased land parcel number Abothuguchi/Katheri/265 [“hereinafter referred to as the suit land”]; (ii) a permanent injunction restraining the respondents, their agents and their successors against interfering with his possession, occupation, use and quiet enjoyment of the suit land; and (iii) costs of the suit. His case was that he purchased the suit land from the 1st respondent in 2012 vide a sale agreement dated 10/4/2012. He paid the agreed purchase price of Kshs 500,000 in full. On 21/8/2012, the Abothuguchi West Land Control Board



gave consent for the transfer of the suit land to him. When he presented transfer documents to the Lands Registry, the transfer could not be registered because the 2nd respondent had lodged a caution against the title. He contended that upon purchasing the land, he took possession and was in possession of the land at the time of lodging the suit.

3. The 1st respondent filed a statement of defence dated 31/1/2014 in which he admitted the appellant's claim in its entirety and averred that he did not support the maintenance of the caution over the suit land. He urged the court to lift the caution.
4. The 2nd respondent filed a statement of defence dated 4/11/2013 in which he averred that he was the legitimate owner of the suit land, having purchased it from the 1st respondent way back in 1994. He contended that he was in actual possession and occupation of the suit land. It was his case that the suit land was not available for sale to the appellant by the 1st respondent. He further averred that the suit land was the subject matter of litigation in Meru High Court (ELC) Civil Case No. 64 of 2013 which was pending and in which he had sued the 1st respondent seeking a transfer of the suit land to him. He added that the High Court [the ELC] had issued an order of inhibition in the suit. He denied the allegations that the appellant was in possession and actual occupation of the suit land. He urged the court to dismiss the appellant's suit.
5. By consent, the suit was transferred to Githongo Senior Principal Magistrate Court vide an order issued by P M Njoroge J on 4/12/2014. The suit was registered as Githongo SPMC Civil Case No. 52 of 2014.
6. The appellant subsequently amended the plaint on 29/3/2018 and pleaded that in January 2018, he discovered that the suit land had been transferred to the 2nd respondent on 23/6/2014 during the pendency of the suit and that the 2nd respondent had in turn transferred the suit land to a third party. Through the amendments, he introduced an alternative prayer for an order of specific performance or refund of the purchase price and interest.
7. Subsequent to that, the case came up for mention on 11/5/2018, 8/6/2018, 29/6/2018, 6/7/2018, 20/7/2018 and 3/8/2018. From 3/8/2018 to 24/1/2020 no steps were taken in the suit. On 24/1/2020, the Court Registry minuted the case for directions on 2/3/2020 in the following verbatim terms:

“Case is hereby fixed for mention for directions on the 2/3/2020. Mention notice to issue”.

8. The above minute was, however, not placed before the magistrate for signing and issuance of a formal order. Nonetheless, the case was listed before Hon S. Ndegwa PM on 2/3/2020. All the parties did not attend on the said date. The lower court proceeded to issue the following order:

“Notice to show cause why suit should not be dismissed for want of prosecution. Plaintiff and advocate absent. Duly served vide affidavit of service sworn on 26/2/2020. Suit dismissed for want of prosecution.”

9. No proceedings were taken in the suit between 2/3/2020 and 8/4/2024. On 9/4/2024, the appellant filed an application dated 2/4/2024 seeking an order settling aside the dismissal order and reinstating the suit. The application was subsequently heard by the lower court [Hon T. A Sitati]. Upon considering the application, the lower court rejected the application vide a ruling dated 26/7/2024 in the following verbatim terms:

“From the material placed before the court, it is clear from the cross-examination of the process server that the applicant was duly served with the dismissal notice but he failed to attend court and the dismissal made by the trial court. This dismissal was 4 years ago and the



present application is therefore an abuse of court process and is therefore unmerited and is dismissed with costs. Right of appeal is 30 days. It is so ordered.”

10. Aggrieved by the ruling, the appellant brought this appeal advancing the following grounds:
 1. That the Learned Trial Magistrate erred in law and fact in failing to hold that service of the notice to show cause was not sufficiently proved in the absence of the evidence of the received notice.
 2. That the Learned Trial Magistrate erred in law and fact in failing to find that the advocates on record were not served in the absence received and stamped notice to the firm.
 3. That the Learned Trial Magistrate erred in law and fact in holding that the stamped copy of the served notice to show cause was filled when none was indeed on court record, a fact the trial court acknowledged hence arrived at a wrong decision.
 4. That the Learned Trial Magistrate erred in law and fact in holding that the served and stamped notice to show cause was seen by the trial court before the dismissal order was made while none of that finding was recorded by the trial court vide the proceedings of 2nd March 2020.
 5. That the Learned Trial Magistrate erred in law and fact in holding that service of the notice to show cause was served and seen by the trial court, the name was missing from the court file hence it was an error to hold service which was done in the absence of the evidence.
 6. That the Learned Trial Magistrate erred in law and fact in failing to hold that in the absence of missing stamped copy of the alleged served notice to show cause, therefore service was not sufficiently proved.
 7. That the entire decision of the Learned Trial Magistrate is against the evidence and the law.
11. The appellant prayed for orders setting aside the ruling of the lower court dated 26/7/2024 and the dismissal order dated 2/3/2020. He also prayed for costs of the appeal.

Submissions

12. The appellant filed written submissions dated 13/8/2025 through M/s Joshua Mwiti Law. Counsel pointed out that the issues that fell for determination by the court were: (i) Whether proper service of a notice to show cause was effected upon the appellant; and (ii) Whether, in the absence of evidence of service, the dismissal was justified. Counsel pointed out that the respondents did not tender any evidence relating to their response to the application that culminated in the impugned ruling, adding that the logical interpretation of their decision not to tender evidence was that they would not suffer any prejudice in the event the suit was reinstated. Counsel argued that there was no evidence that the appellant had been served with a notice to show cause, adding that the absence of evidence of service was sufficient reason for reinstatement of the suit.
13. Counsel further argued that the appellant explained in the supporting affidavit that the delay in prosecution of the suit was occasioned by the criminal proceedings which had been preferred against the 1st respondent following a complaint by the appellant. Counsel added that the delay in bringing the application for reinstatement was similarly occasioned by the fact that the appellant focused on the criminal case and did not do a follow-up, adding that there was an inadvertent mistake on part of the appellant’s counsel in failing to pursue prosecution. Counsel urged the court to allow the appeal.
14. Both respondents did not tender submissions on the appeal.



Analysis and Determination

15. The court has read and considered the entire original record of the trial court; the record filed in this appeal; the grounds of appeal; and the submissions tendered in the appeal. The court has also considered the relevant legal frameworks and jurisprudence. The appeal is unopposed. As pointed out in the opening paragraph of this judgment, the key issue to be determined in this appeal is whether the suit in the lower court was ripe for issuance of a dismissal order on the ground of want of prosecution.
16. A trial court's jurisdiction to dismiss a suit on the ground of want of prosecution is contained in Order 17 rule 2(1) of the Civil Procedure Rules which provides as follows;

“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.”
17. The tenor and import of the above framework is that the trial court must first satisfy itself that a period of one year has lapsed without any application being made or any step being taken in the suit. Secondly, once satisfied on the above requirement, the court is required to issue a formal order listing the matter for notice to show cause. Once the order for notice to show cause is issued, the order is extracted in form of a formal instrument of notice to show cause. The notice is clearly addressed to the party who is required to attend court on a specified date to show cause why the suit should not be dismissed on the ground of want of prosecution. The formal notice is thereafter served on the party and an affidavit of service is filed.
18. On the day appointed for notice to show cause, the trial court is required to satisfy itself that the notice to show cause was duly served on all the affected parties. If there is no attendance by the party or parties required to show cause, the suit is dismissed under Order 17 rule 2(1). If the party attends and gives a satisfactory reason why the suit should not be dismissed, the suit is set down for hearing under Order 17 rule 2(3).
19. In the matter giving rise to this appeal, the case was fixed for further mention on 10/8/2018. On that day, no proceedings were taken in the file. On 24/1/2020, the Court Registry retrieved the file and made the following verbatim minute in the file:

“24/1/2020
In the Civil Registry.
Case is hereby fixed for mention for directions on 2/3/2020. Mention notice to issue.
PM.”
20. Come 2/3/2020, the matter was placed before Hon S. Ndegwa. The plaintiff and the defendants were absent. The Learned Magistrate proceeded to dismiss the suit in the following verbatim order:

“Notice to show cause why suit should not be dismissed for want of prosecution. Plaintiff and advocate absent. Duly served vide affidavit of service sworn on 26/2/2020. Suit dismissed for want of prosecution.”
21. Clearly, there was no order setting down the matter for notice to show cause. The date of 2/3/2020 was reserved by the Court Registry as a date for mention for directions. It was not reserved as a date for notice to show cause. That is not all.



22. The affidavit of service which the trial court relied on in declining to set aside the dismissal order had, as an attachment, a notice to show cause in duplicate, addressed to M/s Wambugu & Muriuki Advocates. There was none addressed to the appellant's advocates on record at the time, M/s Kiautha Arithi & Co. Advocates. Further, there was no conclusive evidence demonstrating that the said notice had been served on the appellant's advocates. Whereas the deponing process server alleged that the receiving clerk accepted service by signing and stamping on her copy, there was no stamp on both the original and the duplicate notices which are in the original court file of the lower court. No explanation was tendered as to why both the original and the duplicate notices were still in the filed if indeed the notice had been served. For the above reasons, the court agrees with the appellant that the purported notice to show cause was not served on him
23. In the absence of a formal order listing the case for notice to show cause and in the absence of conclusive evidence of service of the notice to show cause, the finding of this court is that the case before the lower court was not ripe for issuance of a dismissal order on 2/3/2020.
24. Put differently, the dismissal order of 2/3/2020 was issued in error and cannot stand in the above circumstances. Consequently, this court comes to the conclusion that the lower court erred in the exercise of its discretion in declining to set aside the dismissal order. The result is that this appeal is allowed in terms of prayers 1 and 2 of the memorandum of appeal.
25. On costs, the err culminating in this appeal was committed by the lower court. Consequently, parties will bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF JANUARY, 2026

B M EBOSO [MR]

ELC JUDGE

