



**Okello v Attorney General & 5 others (Environment and Land Appeal E107 of 2024) [2026] KEELC 234 (KLR) (22 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 234 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E107 OF 2024**

**E ASATI, J  
JANUARY 22, 2026**

**BETWEEN**

**JANE ALICE OKELLO ..... APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF SURVEY OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**JACOB OSIDA OLANG AJERO ..... 4<sup>TH</sup> RESPONDENT**

**OKIRI OLANG AJERO ..... 5<sup>TH</sup> RESPONDENT**

**YONAH OLANG ..... 6<sup>TH</sup> RESPONDENT**

*(Being an appeal against the ruling of Hon. Elias Ngugi Mwenda-PM dated 9th December 2024 I KSM MCEL CASE NO. 181 OF 2018)*

**JUDGMENT**

1. Vide the Memorandum of appeal dated 16<sup>th</sup> December 2024, the Appellant appealed against the ruling in Kisumu MC ELC No. 181 of 2018 dated 9<sup>th</sup> December 2024 on the grounds that:-
  - a. The learned Magistrate erred in law and fact to hold that no step had been taken in the suit for over 2 years hence the suit stood dismissed which was not the case.
  - b. The decision of the Magistrate declining to reinstate the suit offends the provisions under Article 25 and 159 of the Constitution and Sections 1A, 3 and 3A of the Civil Procedure Act.
2. And sought that the appeal be allowed, the ruling of the lower court be set aside. The appellant's application to reinstate the suit before the trial court be allowed and the Respondent bears the costs.



3. A brief background of the appeal as can be gathered from the record of appeal dated 31<sup>st</sup> March 2025 and the Supplementary Record of Appeal dated 29<sup>th</sup> May 2025 is that the Appellant filed a suit against the respondents herein in the ELC Kisumu namely; KSM ELC CASE NO.168 OF 2017 which was subsequently vide court order dated 20/3/2018 transferred to the Magistrates' Court at Kisumu for hearing and disposal.
4. The record shows that on 23<sup>rd</sup> November 2020 when the suit came up for mention before the trial Magistrate, there was no attendance by any of the parties.
5. The Court dismissed the suit for want of prosecution.
6. The record shows further that vide a Notice of Motion application dated 27<sup>th</sup> August 2024, brought under certificate of urgency the, the Appellant sought for the following orders:-
  - a. The order made on 23/11/2020 dismissing the suit for want of prosecution be set aside or vacated and the suit reinstated.
  - b. Upon grant of prayer (a) above, the court be pleased to give such directions as may deem fit for expeditious hearing and disposal of the suit.
  - c. Costs of the application be provided for.
7. The record shows that the application was heard by way of written submissions and vide its ruling dated 9<sup>th</sup> December 2024, the trial court found that the applicant had not explained where she had been since 23<sup>rd</sup> November 2020 when the suit was dismissed. That the delay without explanation was inexcusable. That there had been no steps taken in the suit for the last 2 years and 10 months and that to exercise discretion in favour of the applicant (appellant herein) would be an abuse of the court's discretion.
8. The court therefore dismissed the application and awarded costs thereof to the Attorney General.
9. The Appellant was aggrieved by the ruling and preferred the present appeal.

### **Submissions**

10. Pursuant to directions given on 19/06/2025, the appeal was heard by way of written submissions.
11. Written submissions dated 23<sup>rd</sup> June 2025 were filed on behalf of the appellant by the firm of Nyamori Nyasimi & Co. Advocates.
12. Counsel submitted that no prior notice had been issued to the parties to show cause as required under Order 17 of the Civil Procedure Rules, that the trial Magistrate failed to be guided by trite principles of law governing reinstatement of suits. Counsel relied on the case of CMC Holding Ltd vs Nzioki (2004) eKLR, Ivita vs Kyumbu (1984) eKLR 441 and Naftali Opondo Onyango vs National Bank of Kenya Ltd (2005) eKLR.
13. Counsel urged the court to allow the appeal.
14. On behalf of 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents written submissions dated 19<sup>th</sup> July 2025 were filed by MaryAnne Omondi Litigation Counsel who submitted that reinstatement of suits is a matter of discretion of the Court which discretion ought to be exercised in a just manner. Counsel relied on the cases of Bilha Ngonyo Isaac vs Kambu Farm Ltd & another (2018) and Shah vs Mbogo & another (1967) EA 116 and submitted it is the duty of the court, litigants as well as advocates to ensure that matters are concluded expeditiously as provided for in sections 1A and 1B of the *Civil Procedure Act*.



15. Counsel submitted that re-opening the case will be prejudicial to the respondents as witnesses may be missing and evidence weak due to disappearance of human memory resulting from lapse of time.
16. Counsel urged the court to dismiss the appeal.
17. The rest of the respondents did not participate in the appeal. Affidavit of service sworn by Kennedy Nyasimi Advocate show that all the respondents were served with the record of appeal and submissions.

### **Issues for determination**

18. The sole issue for determination is whether or not the trial court erred in dismissing the application for setting aside the order dismissing the suit for want of prosecution.

### **Analysis and determination**

19. This being a first appeal, this court is obligated to re-analyse the evidence/material placed before the trial court and draw its own conclusions. In *Selle & Another vs Associated Motor Boat Company Limited and Others* [1968] EA 123 it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact by the court below. It stated

“an appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

20. The issue that was before the trial court for determination was whether or not to set aside its order dismissing the suit for want of prosecution and reinstate the suit for hearing on merit.
21. A reading of the record shows that the order sought to be set aside was made ex parte. That when the matter came up for mention on 29<sup>th</sup> September 2020, the trial court was on official duty. It also shows that the parties were absent.
22. The matter was therefore adjourned to 23<sup>rd</sup> November 2020 for mention.
23. The record shows that on 23<sup>rd</sup> November 2020 when the matter came up for mention as scheduled, both parties were absent and the court proceeded to dismiss the suit for want of prosecution.
24. The Appellant’s explanation for non-attendance on 23/11/2020, as contained in the Supporting Affidavit sworn by Nyamori Nyasimi Advocate on 27/8/2024 was that the plaintiff was not served with mention notice for the mention of the case on 23/11/2020 and that no notice to show cause why the suit should not be dismissed for want of prosecution was served.
25. The principles for setting aside of orders made ex parte are that the applicant must explain to the satisfaction of the court why he/she did not attend court and/or participate in the proceedings leading to the ex parte order, whether or not the applicant has a case/defence that raises triable issues and whether the respondent will suffer prejudice if the order sought is granted.
26. The grounds upon which the application before the trial court were brought were that the order for dismissal of the suit was made prematurely in breach of the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules and that the parties were taking steps to have the suit heard.
27. Power to dismiss suits for want of prosecution is donated to the court vide the provisions of Order 12 and 17 of the Civil Procedure Rules.



28. Order 12 provides for dismissal of a suit when the plaintiff fails to attend court on the date fixed for hearing of the suit (Order 12 Rule 3). Similarly, Order 17 Rule 3 allows the court to dispose of suits in any of the modes provided for in Order 12 Civil Procedure Rules if the parties fail to attend court on any day to which the hearing of the suit is adjourned.
29. The dismissal order made in the suit before the trial court was a dismissal for want of prosecution. This is provided for in Order 17 Rule 2 that;
- “(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.
- (4) The court may dismiss the suit for non-compliance with any direction given under this Order.”
30. There is no evidence that any party applied for dismissal of the suit as no party was present in court when the dismissal order was made.
31. There is no evidence that Notice to show cause why the suit should not be dismissed was served on the Appellant. And it is clear from the proceedings that the date of 23<sup>rd</sup> November 2020 had been given by the Court in the absence of the parties and there is no evidence on record that the parties were notified of the mention date. Where the court gives a date for an activity in a matter in the absence of the parties, the court has the obligation to sufficiently notify the parties.
32. The ruling shows that the trial court correctly noted that the power to set aside the order dismissing the suit and reinstate the suit to hearing was within the court’s discretion and that the discretion must be exercised judiciously.
33. The trial court observed further that judicious exercise of the discretion will be where the applicant explains away his failure to show cause why the suit should not be dismissed. The court further noted that the matter was mentioned 5 times in the absence of the parties and the trial court faulted the applicant for failure to explain where she was between the date of the dismissal order (23<sup>rd</sup> November 2020) and the date of the application. The court found this to be inexcusable delay.
34. I have considered the grounds of appeal, the ruling of the trial court and the written submissions filed. While it is true that the matter has been in court since the year 2017 when it was filed, it is also true from the proceedings that the trial court failed the litigants by fixing mention dates in the absence of the parties and failing to notify them.
35. It is also clear that the trial court dismissed the suit for want of prosecution without compliance with the provisions of Order 17 of the Civil Procedure Rules.
36. The trial Magistrate acknowledged that there was sufficient ground for setting aside of dismissal orders as there was no evidence that notices were sent out to the parties.



37. Although it is true that there was delay in bringing the application, the delay does not, in my view justify the un-procedural way in which the suit was dismissed. The appellant indicates that she was desirous of prosecuting the suit.

38. I find that the appeal has merit and hereby allow it as follows:

1. The ruling of the trial court dated 9/12/2024 is set aside and substituted with an order allowing the application dated 27/8/2024 in the following terms:
  - a. The order dated 23/11/2020 dismissing the suit for want of prosecution is set aside and the suit reinstated to hearing on condition that the appellant takes a date for hearing of the suit within forty-five (45) days hereof failing which the suit shall stand dismissed.
  - b. Costs of the application dated 27/8/2024 are awarded to the respondents.
2. Each party to bear own costs of the appeal.

Orders accordingly.

**JUDGEMENT SIGNED AND DATED AT KISUMU AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF JANUARY 2026.**

**E. ASATI,**

**JUDGE.**

In the presence of:

Maureen-Court Assistant.

Parties absent.

