

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ELC CASE NO 133 OF 2014

1. PAULINE AJIAMBO OUNDO 1ST

PLAINTIFF

2. VINCENT LEONARD OUNDO 2ND

PLAINTIFF

(Both suing as Legal Representative of the
Estate of William O. Kayoboi and Justus B. Kayoboi)

3. TIMOTHY AMOLO 3RD

PLAINTIFF

= VERSUS =

**BULUMA KAYOBIO alias
STEPHEN BULUMA AMBANI 1st**
DEFENDANT

AGGREY AMBANI KAYOBIO 2ND

DEFENDANT

JULIAS GILBERT KACHERO 3RD

DEFENDANT

THE DISTRICT LAND REGISTRAR BUSIA 4TH

DEFENDANT

THE HON. ATTORNEY GENERAL 5TH

DEFENDANT

R U L I N G

- PAULINE AJIAMBO OUNDO, VINCENT LEONARD OUNDO** and **TIMOTHY AMOLO** (the 1st, 2nd and 3rd Plaintiffs herein) filed this suit on 10th February 2012 later amended on 10th September 2013 against **BULUMA KAYOBIO** alias **STEPHEN BULUMA AMBANI, AGGREY AMBANI KAYOBIO, JULIAS GILBERT KACHERO, THE DISTRICT LAND REGISTRAR BUSIA** and **THE HON ATTORNEY GENERAL** (the 1st, 2nd, 3rd, 4th and 5th Defendants respectively). Their case was that the land parcel **NO SAMIA/BUKHULUNGU/179** was ancestral land registered in the names of **WILLIAM OUNDO, BULUMA KAYOBIO, TIMOTHY AMOLO** and **WILLY KAYOBIO** each holding $\frac{1}{4}$ share. However, on or about 9th August 2006, the 1st to 4th Defendants together with the 5th Defendant fraudulently and unlawfully removed the names of **WILLIAM OUNDO** and **WILLY KAYOBIO** (both deceased) and proceeded to close the register to the said land and created land parcels **NO SAMIA/BUKHULUNGU/1601, 1602** and **1603**. The land parcel **NO SAMIA/BUKHULUNGU/1602** was then registered

in the name of the 4th Defendant. The Plaintiffs therefore sought the restoration of the land parcel **NO SAMIA/BUKHULUNGU/179** into the names of **WILLIAM OUNDO, BULUMA KAYOBIO, TIMOTHY AMOLO** and **WILLY KAYOBIO** and the cancellation of the resultant subdivisions being **SAMIA/BUKHULUNGU/1601, 1602** and **1603**. The suit was later amended on 10th September 2013. The record shows that only the 4th Defendant **JULIAS GILBERT KACHERO** (the 3rd Defendant in the amended plaint) filed a defence denying the allegations of fraud levelled against him and adding that he was an innocent purchaser.

2. The record shows that the suit first came up before **S. M. KIBUNJA J** on 9th July 2014 but was Stood over Generally (**SOG**) as all the parties were absent. It next came up before **A. K. KANIARU J** on 30th November 2016 and the record of proceedings show that although all the parties were served with a notice dated 8th November 2026 to show cause why the suit should not be dismissed, none of them appeared. The Judge therefore dismissed the suit.

3. I now have for my determination the Plaintiffs' Chamber Summons dated 27th July 2025 and premised under the provisions of **Order XLIV Rules 1 and 2** and **Order 1XB Rule 8** of the **Civil Procedure Rules** as well as **Sections 1A, 1B** and **3A** of the **Civil Procedure Act**. The Plaintiffs seek the following orders:

1) Spent

2) That the order dismissing the Plaintiffs' suit on 30th November 2016 for want of prosecution/non attendance on the part of the Plaintiffs herein be and is hereby set aside.

3) That the suit be reinstated and proceed for full hearing and disposal.

4) That the matter be heard expeditiously on priority basis.

5) That costs of this application be in the cause.

4. The Motion is based on the grounds set out therein and is supported by the affidavit of the 2nd plaintiff.

5. The gravamen of the Motion is that when the case came up for hearing, his then counsel **MR WANYAMA** did not attend Court for unknown reasons and inspite having instructions to

do so. That the mistake of counsel should not be visited on a helpless innocent client. That it took them several inquiries over the years and from his counsel to know the progress of this case and has only been given false information, that in 2025 they were informed that this case which was previously **H.C.C.C. NO 8 of 2012** had been changed to **ELC CASE NO 133 of 2014** without informing the parties and this made it difficult for them to trace this file. It is therefore only fair that this suit be reinstated and heard on it's merit. The Plaintiffs are ready and willing to abide by any conditions which this Court may set.

6. The following documents are annexed to the Motion:
 - 1) Copy of a letter dated 19th June 2025 from the Deputy Registrar and addressed to **WASWA ABED & COMPANY ADVOCATES.**
 - 2) Copy of a letter dated 30th June 2025 from the Deputy Registrar and addressed to **WASWA ABED & COMPANY ADVOCATES.**
7. The Motion is opposed and the 3rd Defendant **JULIUS GILBERT KACHERO** filed a replying affidavit dated 28th August 2025 in which he has averred, inter alia, that the

same should be dismissed with costs for having been filed after an inordinate delay. That the same lacks merits and cannot be granted because there is no order from the superior Court on appeal.

8. That from the time the suit was filed on 10th February 2012 upto 30th November 2026 when it was dismissed for want of prosecution, the Plaintiffs did not prosecute it and went to sleep and no plausible reasons have been given why the suit was not prosecuted. It is not the duty of the Court to move parties to prosecute their cases. That duty is on the parties themselves and therefore the Plaintiffs should not blame the Court for not informing them that their suit was coming up for dismissal on 30th November 2016. Should the Court grant the orders sought, then it should be with conditions that the Plaintiffs pay thrown away costs to the Defendant. Otherwise, this application should be dismissed with costs.
9. The Court directed that the motion be canvassed by way of written submissions. These were filed by **MR ABED** instructed by the firm of **WAISWA ABED & COMPANY ADVOCATES** for the Plaintiffs. The firm of **ELIZABETH CHUNGE & COMPANY ADVOCATES** who entered

appearance for the 3rd Defendant did not file any submissions.

10. The 4th and 5th Defendants filed a joint statement of defence dated 3rd May 2013 in which they averred, inter alia, that the Plaintiffs have no locus to sue in respect of the suit land and have not demonstrated what interest they have in the suit land. They also pleaded that the Plaintiffs have not proved fraud and are put to strict proof thereof and are not entitled to the orders sought.
11. I have considered the Motion, the rival affidavits and annexures thereof as well as the submissions by **MR ABED**.
12. It is common ground that on 30th November 2016, some ten (10) years ago, **KANIARU J** dismissed the Plaintiffs' case because none of the parties attended Court having been served with a Notice dated 8th November 2016 to show cause why this suit should not be dismissed. The Court no doubt has the power to dismiss a suit for want of prosecution. In the case of **IVITA -V- KYUMBU H.C. CIVIL CASE NO 340 of 1971 [1975 KEHC 4 KLR], CHESONI J** (as he then was), having cited cases from various

jurisdictions, had the following to say about the power of the Court to dismiss a suit for want of prosecution:

“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. 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 mine.

Order 17 Rule 2(1) of the **Civil Procedure Rules** which sets out the legal framework for dismissal of a suit for want of prosecution states that:

“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.” Emphasis mine

It is clear from the above that the dismissal of a suit for want of prosecution is not mandatory. The rule is permissive and any dismissal must be at the exercise of the Court’s discretion which, as is commonly said, must be based on reasonable grounds. The record of 3rd November 2016 when this suit was dismissed by **KANIARU J** for want of prosecution reads:

**“COURT: Both sides were sent a Notice dated 8.11.2016 to appear today to show cause why this matter should not be dismissed for want of prosecution. Nobody has turned up today. This suit is hereby dismissed.
30.11.2016”**

I have looked at the record. There is nothing to show that any Notice for dismissal of the suit was issued and served to either of the parties in this case or their counsel. Further, the

suit was last in Court on 9th July 2014 before the dismissal and it was Stood Over Generally (**SOG**). It is the Plaintiffs' case that even if their then counsel **MR WANYAMA** was served, he did not inform them why he did not attend Court and they should therefore not be punished for the failure by their then counsel to attend Court. It is of course correct that a case belongs to the party and not to the counsel. But where a party has a counsel on record, it is to be expected that the counsel will be served with any notices. In this case, the Court decided to issue notices to the parties dated 8th November 2026. Having taken that route, it is only proper and in the interest of justice that the said notices should have been served. That was not done in this case and if it was, there is no evidence to enable the Court determine that indeed service was done and ignored. It would be an injustice to condemn the Plaintiffs un-heard.

13. The Plaintiffs have also stated in ground **NO C** of their Motion as follows:

C: "That the Court Registry staff changed the Court case number from HCC NO 8 of 2012 to ELC case No 133 of 2014 without informing

the parties and this made it difficult to trace the physical Court file over the years.”

In paragraphs 4, 5 and 7 of his supporting affidavit, the 2nd plaintiff has averred as follows:

4: “That it took us several inquiries over the years from our counsels on the progress of our matter and every time we were fed with false information and instructed to come again at a later date only to be given false information again.”

5: “That we finally got tired and visited the Court Registry in the year 2025 where we were informed that the case number BUSIA HCCC NO 8 of 2012 belongs to another matter and not ours and it is at this moment that we demanded from our counsel to give us our file so we can appoint another advocate to follow up with our matter.”

7: “That the Court Registry staff changed the Court case number from HCC NO 8 of 2012 to ELC Case No 133 of 2014 without informing

the parties and this made it difficult to trace the physical Court file over the years (annexed and marked as VLO 1(a) and (b) are correspondence from the Court Registry).”

Among those annextures are a letter dated 5th June 2025 addressed to the Deputy Registrar of this Court by the firm of **WAISWA ABED & COMPANY ADVOCATES** for the plaintiff. In the said letter, the firm starts by clarifying that they have now come on record for the Plaintiffs having taken over the conduct of this suit from the firm of **WANYAMA & COMPANY ADVOCATES**. In paragraphs 2 and 3 of the said letter, counsel states thus in reference to **“BUSIA HCCC ELC NO 8 of 2012.”**

2: “We request you to assist us in tracing the above Court file. A copy of the amended plaint and Court receipt are annexed for your reference.”

3: “We are reliably informed that the Court file has been missing for a very long time now and your good office has verbally informed

the previous counsels on record and its based on that information that we request for official correspondence from your good office with ours in tracing this file.”

The official correspondence eventually came via the letter by the Deputy Registrar dated 19th June 2025 and addressed to counsel. In paragraphs 2 and 3 of the said letter, it is stated that:

“Kindly note that we have done an extensive search both in the CTS and physically, but we have not traced the above-mentioned file. It appears that it does not exist in our records. What we have is BUSIA ELC NO 8 of 2012 but with different parties being WILMINA ANYANGO ADEMBO -V- CHARLES WANYAMA KHAKHULO & 3 OTHERS with MARY SITWAYE MUKUDI being an Interested Party.

As such, to enable us conduct further search, kindly avail to us the pleadings bearing original Court stamp (not photocopies or scanned copies), which were filed in Court. Note to include the

plaint indicated to be dated 28.12.2011 and any other documents available.”

The documents in this file show that it was initially registered on 10th February 2012 as **BUSIA HIGH COURT CIVIL CASE NO 8 of 2012**, then **BUSIA ELC CASE NO 133 of 2014**. Indeed, vide another letter dated 30th June 2025 and addressed to the firm of **WASWA ABED & COMPANY ADVOCATES**, the Deputy Registrar states in the last paragraph thus:

“Kindly not that the ELC matter is ELC Case NO 133 of 2014 (formerly HCC NO 8 of 2012) and the said file is available for your perusal).”

The averments by the Plaintiffs taken together with the letters from the Deputy Registrar confirming that the Court file could not be traced lend credence to the Plaintiffs’ case that the case file could not be traced due to a change of numbers. And it is also clear that it was not until 30th June 2025 that this file was traced. This Motion was dated 27th July 2025 and filed on 2nd August 2025 just about one month after the file was traced. That demonstrates that the Plaintiffs have always been keen to prosecute their case but

were not only let down by their previous counsel but also by negligence on the part of the Court Registry in giving the file a new number, failing to notify the parties and also by misplacing it. Given those circumstances, it must be obvious that the orders issued on 30th November 2016 dismissing the Plaintiffs' suit cannot be allowed to stand as it is not even clear which suit was being dismissed.

14. The Plaintiffs have clearly explained the delay in filing this Motion some nine (9) years after the suit was dismissed. The delay is no doubt inordinate but there is nothing which they could have done in the absence of the file and the failure of the Court registry to avail it immediately after it was assigned a new case number. Sufficient reason for the delay has been given to the satisfaction of this Court.
15. As was stated in the case of **IVITA -V- KYUMBU** (supra), the Defendant must also demonstrate **“that he will be prejudiced by the delay.”** I have not heard the 3rd Defendant aver in his replying affidavit that the Defendants will be prejudiced in the trial if the order dismissing the Plaintiffs' suit is set aside and the case reinstated to hearing. In paragraph 7 of the replying affidavit, the 3rd Defendant

has averred that the Plaintiffs cannot be granted the orders sought **“unless there is an order from the superior Court in any appeal that ought to have been preferred by the applicants their suit having been dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Act (sic).”** No authority has been cited for that proposition. The Defendants have not suggested that due to the delay, they will be unable to avail their witnesses or documents.

16. From the circumstances of this case, it will be an affront to justice and in particular to **Article 50(1)** of the **Constitution** which provides that:

(1) “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

If the Motion is declined.

The Plaintiffs in this case cannot be said to have squandered their right to a fair hearing. Instead, that right was

obstructed principally by the Court itself by making it difficult for the Plaintiffs to access the case file. This application is well merited and the orders sought are for granting.

17. With regards to costs in the circumstances of this case, it is prudent that each party meets their own costs.
18. The up-shot of all the above is that having considered the Plaintiffs' Chamber Summons dated 27th July 2025, this Court makes the following disposal orders:

- 1) The order dated 30th November 2016 dismissing the Plaintiffs' suit for want of prosecution is hereby set aside.**
- 2) The Plaintiffs' suit is reinstated to hearing.**
- 3) The parties shall within 15 days of the delivery of this ruling file and serve their documents.**
- 4) Thereafter, pre-trial shall be held on 16th March 2026 to confirm compliance and take a date for hearing.**
- 5) The Plaintiffs and the 3rd Defendants shall meet their costs of this application.**

BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026

Ruling dated, signed and delivered by way of electronic mail on this 26th day of February 2026 with notice to the parties.

BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026

Explanatory notes:

This ruling was due on 22nd January 2026. However, following my transfer from Busia to Iten Court w.e.f. 15th January 2026, I had to prioritize my part heard hearings. That contributed towards the delay. The same is regretted.

BOAZ N. OLAO
JUDGE
26TH FEBRUARY 2026