



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC PETITION NO. E008 OF 2022

ONESMUS NZOMO MUTENGU
PETER MACHARIA RUGA
DAMARIS MURUGI THAINI (*Suing in their capacity
as the chairperson, secretary, treasurer and on behalf
of 650 members of Sabati Self Help Group*.....
PETITIONERS

-VERSUS-

NUMERICAL MACHINING COMPLEX LTD.....**1ST**
RESPONDENT
NATIONAL LAND COMMISSION.....**2ND**
RESPONDENT
THE COUNTY GOVERNMENT OF MACHAKOS.....**3RD**
RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....**4TH**
RESPONDENT

RULING

1. This ruling concerns the notice of motion dated 28 April 2025 in which the 1st respondent moved the court under **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 2 Rule 15(1) (a), (b), (c), 17 Rule (2) (1) & 51 Rule 1 of the Civil Procedure Rules** and it seeks the following reliefs from this court: -

a. Spent.

b. THAT this Honourable Court be pleased to strike out the entire petition dated 30 March, 2022, for want of prosecution.

c. THAT the costs of this application and of the suit be borne by the Petitioners.

2. The motion is supported by the grounds therein as well as the affidavit sworn on the same date by George Makaketo. In a nutshell, he states that the petitioners filed the substantive petition and application on 30 March 2022, alleging that their property rights were violated and that they obtained a court order preventing their eviction from land registered in the name of the 1st respondent. In October 2022, the petitioners' erstwhile law firm on record, **Ms. Fred K. Musyimi & Associates Advocates**, was discharged, and the petitioners were told to appoint a new advocate. As of 3 March 2025, they had neither appointed a new advocate nor appeared in court, despite repeated notifications. Their absence has caused

significant delays and risks a fair trial, preventing the 1st Respondent from using the property for government projects.

3. The court is being asked to act in the interest of justice, as all other parties have diligently attended court, while the petitioners' conduct is considered inexcusable and an abuse of the court process.
4. In response, Onesmus Nzomo Mutengu, one of the petitioners, deposed an affidavit on 22 October 2025 in opposition to the motion. In brief, he avers their erstwhile law firm did not serve them with the application to cease from acting dated 8 September 2022, and that they even paid fees to this law firm, as evidenced by the receipt dated 23 October 2023.
5. Moreover, they attempted to settle the matter out of court by writing letters to the 1st respondent from 27 October 2023 to 24 November 2023, and their erstwhile counsel informed them that the 1st respondent had agreed to allow negotiations and that court proceedings would be stayed pending these discussions. Due to concerns about the progress of the matter, the petitioners conducted their own due diligence and, in September 2025, requested a file search at the court registry, and have recently learned that the 1st respondent filed the instant application.

6. In a brief rejoinder, George Makaketo filed a further affidavit sworn on 16 January 2026, asserting that the case belongs to the party and that the petitioners bear the responsibility to monitor its progress. Furthermore, he indicated that the application to cease acting was self-explanatory and informed the court that the receipt for the payment of fees to the former lawyer was questionable, and according to the record, no negotiations had taken place.
7. As directed by the court, the motion was considered through written submissions filed by the law firms of **Mss. Prof. Tom Ojienda & Associates**, for the 1st respondent, dated 16 January 2026, and **Ike Owiti & Co. Advocates** for the petitioners, dated 19 January 2025.
8. Now, turning to the substance of the matter at hand and having carefully considered the motion, its grounds, affidavits, and articulate submissions, including the provisions of the law and judicial precedents relied upon, the sole issue for determination is **whether the 1st respondent has demonstrated that the instant petition was suitable for dismissal/striking out for want of prosecution**
9. In resolving this matter, the court shall examine the relevant statutory provisions governing the dismissal of petitions, as well as review established jurisprudence pertinent to this

issue. It is important to observe that the rationale for the dismissal of suits is grounded in the necessity for expedition in the resolution of disputes, a principle which has been elevated to a constitutional mandate under **Article 159(2)(b)** of the **Constitution**, which stipulates that justice shall not be delayed. It is well established that once a party initiates a dispute in court, it is incumbent upon that party to take all necessary steps to ensure that the dispute is heard and concluded without unnecessary delay.

10. Concerning the applicable law, the **Constitution of Kenya (Protection and Fundamental Freedoms) Practice and Procedure Rules, 2013 (“Mutunga Rules”)**, does not explicitly prescribe procedures for such dismissals; however, guidance may be derived from **Rules 3(6) and 3(8)** thereof, which impose duties upon counsel and litigants, and confer jurisdiction upon the trial court to dismiss a petition where it is deemed an abuse of the court process. These provisions state:-

Rule 3(6)

“A party to proceedings commenced under these Rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

***(a)participate in the processes of the Court; and
(b)comply with the directions and orders of the
Court.”***

Rule 8

“Nothing in these rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

11. The application of these legal provisions in the dismissal of constitutional petitions was upheld by the Court of Appeal in the case of **John Mwangi Muhia & 2 others v. Director of Public Prosecutions & 5 others [2019] KECA 845 (KLR)** as follows: -

“In our considered view, the trial court had jurisdiction under Rule 6 to issue directions and inherent jurisdiction under Rule 8 to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court.”

12. As properly submitted by both parties, the court’s authority to dismiss a case for lack of prosecution is discretionary. This discretion, like any judicial discretion, must be exercised carefully and in accordance with legal principles, considering

the facts and context of each case. It should be exercised objectively, avoiding arbitrariness or caprice. In making their arguments, both counsel have relied on several court decisions that elucidate the guiding principles, including **Ivita vs Kyumbu [1984] KLR 441** and **Argan Wekesa Okumu v Dima College Limited & 2 Others [2015] eKLR, among others.**

13. Based on these decisions, a summary of the guiding non-exhaustive principles for the court is that, when exercising discretion in such applications, the court should consider whether delay in prosecuting a petition has actually been demonstrated; the duration of the delay; and whether the delay was excessive and inexcusable. The court should also assess whether the applicant (in this case, the 1st respondent) has suffered prejudice due to the delay, or is likely to suffer prejudice if the application is denied. As to whether the delay was excessive depends on the specific circumstances of each case, but it is deemed inexcusable if no reasonable or satisfactory explanation for the delay is provided.
14. We turn to this case wherein the petitioners have articulated three grounds: firstly, that they only recently became aware that their erstwhile counsel had ceased to represent them; secondly, that the application which resulted in the issuance of such an order was never served upon them; and thirdly, that

the matter had been stayed pending out-of-court negotiations between the parties. They maintained that they have demonstrated diligence in pursuing their case, evidenced by their visit to the court registry in September 2025 to ascertain the current status of their proceedings. So what do the documents tell us?

15. On 20 July 2022, this court, upon consideration of an application filed by the petitioners dated 20 March 2022, issued an order to maintain the *status quo* concerning Land registration no. 11895/20, pending the hearing and determination of this petition. The primary purpose of this *status quo* order was to prevent the petitioners' eviction from the suit property. Subsequently, the matter was scheduled for directions on 25 October 2022. At that time, the 1st petitioner opposed the petition by filing a replying affidavit on 24 May 2022.
16. Shortly, the petitioners' erstwhile counsel filed the application dated 8 September 2022 with counsel Mr. Musyimi, indicating that the petitioners had disregarded his advice, and efforts to obtain instructions from them had been unsuccessful. A return of service, sworn by Kyalo Makau on 19 September 2022, details the process by which the petitioner's chairman (the petitioners' deponent) was served in the

presence of the secretary at 10:30 am on 9 September 2022. Additionally, it provides the chairman's telephone number.

17. Consequently, in light of the foregoing, the petitioners' assertion that they were never served with such an application is unfounded; they have neither contested the details contained in this affidavit nor sought to cross-examine the process server. They cannot now complain, having been served with the application and failing to appear in court on 25 October 2022 when the application was scheduled for hearing.

18. Subsequently, the matter was set for directions on multiple occasions, with Mr. Musyimi being served by the court instead of serving the petitioners personally; however, of particular significance is the court direction issued on 13 June 2024, which directed the 1st respondent to serve the petitioners personally with a mention notice for pre-trial directions. Yet, there is no record indicating that this was ever executed. On 3 March 2025, Miss Misiati informed the court of the 1st respondent's intention to file an application to strike out the petition, which gave rise to the instant application. Counsel was also directed to serve the petitioners with a mention notice, but she failed to do so.

19. The petitioners contend that they first became aware of the instant application upon reviewing the court record in September 2025. The court accepts their statement, noting

that it was during this period that their current on-record law firm filed an application dated 9 September 2025. There is no demonstration showing that the current motion was served upon the petitioners to warrant the perusal of the court file other than diligence, albeit late. As for grounds of attempts at negotiation, there is correspondence demonstrating that the petitioners pursued settlement discussions; however, the 1st respondent and other government entities were unresponsive. The reasons posited are excusable.

20. However, the petitioners have to grapple with the outcome of this court's decision in **Numerical Machining Complex Limited v Nzwili & 3 others (Sued as Members and Office Bearers of Athi Mlolongo Development Company Limited) & 8 others; Boniface Kiiio Mutune & 4 others (Plaintiff) ((Suing as members representatives of Mavemba Members Association)) [2026] KEELC 64 (KLR)**, which it rendered on 20 January, 2026 and is mentioned in these proceedings.
21. Be that as it may, for the stated reasons, this court finds that the threshold for striking out or for dismissal of the petition has not been met. In the upshot, the notice of motion dated 28 April 2025 is dismissed, with costs in the cause. A mention date shall be set for purposes of pre-trial directions.

It is so ordered.

Delivered and Dated at Machakos this 21st day of April, 2026.

**HON. A. Y. KOROSS
JUDGE
21.04.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

Miss Misiati for Prof. Ojienda Senior Counsel for 1st respondent.

No appearance for other parties.