



Cubi & 3 others v Hon Attorney General on Behalf of the Resident Magistrate Senior Resident Magistrate Court at Wang’uru; Kariuki & another (Interested Parties) (Judicial Review 4 of 2023) [2025] KEELC 5498 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW 4 OF 2023**

JM MUTUNGI, J

JULY 24, 2025

**(FORMERLY EMBU MISC. APPLICATION NUMBER 53 OF
2011)**

**IN THE MATTER OF AN APPLICATION BY JOHN MWAI CUBI,
BENSON WANJOHI CUBI, PETER RUGIO CUBI FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI**

AND

**IN THE MATTER OF THE DECISION BY THE RESIDENT
MAGISTRATE IN THE SENIOR RESIDENT MAGISTRATE’S
COURT AT WANG’URU IN MISC. APPLICATION NO. 6 OF
2021**

BETWEEN

**JOHN MWAI CUBI 1ST APPLICANT
PETER RUGIO CUBI 2ND APPLICANT
BENSON WANJOHI CUBI 3RD APPLICANT
GEOFFREY CUBI 4TH APPLICANT**

AND

**HON ATTORNEY GENERAL ON BEHALF OF THE RESIDENT MAGISTRATE
SENIOR RESIDENT MAGISTRATE COURT AT WANG’URU ... RESPONDENT**

AND

MORRIS GIKURU KARIUKI INTERESTED PARTY



RULING

1. Before this Court is a Notice of Motion dated 28th September 2021 brought pursuant to Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules. The 2nd, 3rd and 4th Applicants seek the following substantive orders:
 1. That the orders of this Honourable Court made on 16th December 2016 dismissing the suit be set aside and/or varied.
 2. That the suit be reinstated for hearing on merits.
 3. That costs of the application be provided for.
2. The application is supported by the Affidavit of Geoffrey Cubi Rugio, the 4th Applicant, sworn on 28th September 2021. He avers that the suit was initially filed in Embu as Misc. Civil Application No. 53 of 2011, but was later transferred to Kerugoya without the Applicants' knowledge. He blames the delay in prosecuting the matter on the disappearance of the Court file, which he claims was only located following his complaint to the then Acting Chief Justice.
3. He further alleges that he has faced harassment from the 1st Applicant, including arrest and prosecution in Baricho Criminal Case No. 225 of 2021, and that such harassment has hampered their ability to progress with the case.
4. The application was opposed by both the Respondent and the 1st Interested Party. The Respondent filed Grounds of Opposition dated 12th September 2021, asserting, firstly, that there had been inordinate and unexplained delay in both the prosecution of the suit and the filing of the present application. It was contended that such delay was deliberate and aimed at frustrating or delaying the course of justice, contrary to the principles espoused under Article 159[2][b] of the Constitution, which demands that justice shall not be delayed.
5. The Respondent further averred that the Applicants, although they aver that they were not aware of the date the matter had been set for hearing, they took no steps to ascertain the status of the case. According to the Respondent, reinstatement of the suit under such circumstances would be prejudicial as no valid or reasonable grounds had been presented to justify the exercise of this Court's discretion in favour of the Applicants.
6. Similarly, the 1st Interested Party filed Grounds of Opposition dated 6th February 2023, reiterating that the application lacked merit due to the Applicants' failure to offer a credible or sufficient explanation for the prolonged delay in moving the Court. He observed that the suit had been dismissed on 16th December 2016, yet the application seeking reinstatement was filed nearly five years later, in September 2021, without any compelling justification.
7. The 1st Interested Party emphasized the need for finality in litigation and stated that the application was brought under the wrong provisions of the law and further averred that the suit was dismissed over half a decade ago and no reasonable explanation had been given for the delay.
8. The 1st Applicant, John Mwai Cubi, filed an affidavit dated 8th July 2024 expressing his intention to withdraw from the proceedings. He deponed that the rice holding known as Unit H19, No. 2165,



Thiba Section within the Mwea Irrigation Settlement Scheme, measuring 4.0 acres, was originally allocated to his late father, Cubi Rugio, in 1975. He stated that he was nominated as the lawful successor to the holding, though initially under the guardianship of his elder brother, Peter Rugio Cubi, as he was a minor at the time. Upon attaining the age of majority, the guardianship arrangement was terminated and the land was formally transferred and registered in his name.

9. He further averred that he subsequently subdivided the land, transferring 2.0 acres to his brother, Patrick Githaka Cubi, and that both of them have since sold their respective portions to third parties. Consequently, the 1st Applicant stated unequivocally that he has no continuing interest in the subject parcel and does not wish to pursue the present Judicial Review proceedings.
10. On 11th July 2024 the Court directed that the application dated 28th September 2021 be canvassed by way of written submissions.
11. The Applicants filed written submissions dated 23rd September 2024. They submitted that the Court has discretion under Order 12 Rule 7 of the Civil Procedure Rules to set aside a dismissal order and reinstate a suit dismissed for non-attendance or want of prosecution. They relied on the decision in the case of *John Nabashon Mwangi v Kenya Finance Limited Bank* [2015] eKLR, where the Court set out the guiding principles for reinstatement applications namely, that reasonable grounds must be demonstrated, and that the Court must balance the prejudice to both the Plaintiff and the Defendant.
12. The Applicants placed reliance on the case of *Investment Limited v G4S Security Services Limited* [2015] eKLR, in support of the proposition that Judicial discretion should be exercised to do justice, particularly where the default is not entirely attributable to a party.
13. On the facts, the Applicants argued that the suit was originally filed in Embu but was transferred to Kerugoya without their knowledge or notification. They maintained that they continued to follow up on the matter at the High Court in Embu, unaware that the file had been moved. Upon learning of the transfer, they aver the file could not be traced, and it was only after persistent inquiry including a formal complaint to the Acting Chief Justice that the file resurfaced.
14. The Applicants further submitted that their former Advocates failed to communicate developments in the case, including hearing dates, and that the matter proceeded and was dismissed in their absence due to this lack of representation. They emphasized that their absence was not deliberate, but occasioned by systemic mishandling of the file and breakdown in communication with their counsel. They urged the Court to consider that no party would suffer prejudice if the suit were reinstated, whereas they, the Applicants, stood to suffer irreparably if denied an opportunity to be heard on the merits.
15. The Respondent filed submissions dated 16th October 2024 and it was their submission that the Applicants had not met the threshold for reinstating a suit dismissed for want of prosecution. Citing Order 17 Rule 2[3] of the *Civil Procedure Rules*, the Respondent argued that it is the responsibility of the party who files a suit to ensure that it is prosecuted diligently and without undue delay.
16. The Respondent pointed out that the Applicants had not shown any steps taken between 2012 and 2016 to prosecute the matter or inquire into its status. Specifically, the record shows that after the matter was adjourned on 30th July 2012 at the request of the Applicants' advocate, it was set for hearing on 16th December 2016. On that date, neither the Applicants nor their Counsel appeared, prompting the Court to dismiss the suit for want of prosecution.
17. It was submitted that even after the file was located and a letter from the Deputy Registrar dated 5th March 2021 addressed to the Applicants confirmed this they still delayed in filing the present application until September 2021, a further lapse of six months. The Respondent urged the Court



to take note of this continued indolence and submitted that such delay was not only inordinate but entirely unexplained.

18. In support of its position, the Respondent relied on the Case of *Thatbini Development Co. Ltd v Mombasa Water & Sewerage Co.* [2022] eKLR, *James Ayanga Yeswa v Bob Morgan Services Ltd* [2019] eKLR, *Anna Kamorinjithi v David Munene & Others* [2021] eKLR, and *Tirth Construction Ltd v Orion Hotels Ltd* [2020] eKLR, all emphasizing the importance of diligence by litigants and the principle that Courts should not aid the indolent.
19. The 1st Interested Party filed submissions dated 7th November 2024. He argued that the Applicants cannot escape the consequences of their inaction by blaming their former Advocates. He submitted that a suit belongs to the litigant, not the Advocate, and the Applicants had an obligation to follow up on their matter with due diligence.
20. The 1st Interested Party emphasized that there was no credible explanation for the delay of over five years between the dismissal of the suit and the filing of the present application. He noted that the Applicants were aware as early as March 2021, upon being contacted by the Registry that the file had been located, yet waited until September 2021 to move the Court. This further delay, in his view, was deliberate and unjustified.
21. The 1st Interested Party further submitted that prejudice would be occasioned to him as the registered and lawful proprietor of rice holding No. 2165B, Thiba Section, within the Mwea Irrigation Scheme. The introduction of new facts by the 1st Applicant in his Affidavit of withdrawal indicating that the parcels have since been sold raised factual questions that were outside his knowledge and control, thus expanding the scope of the dispute unfairly.
22. In support of his arguments, he relied on *Shah v Mbogo* [1979] EA 116, *Ruga Distributors Ltd v Nairobi Bottlers Ltd* [2015] eKLR, *Utalii Transport Co. Ltd & 3 Others v NIC Bank & Another* [2014] eKLR, and *Julius Kibiwott Tuwei v Reuben Argut & 7 Others* [2022] eKLR, emphasizing that litigation must come to an end and that Courts should guard against the resurrection of stale claims to the prejudice of parties who have acquired lawful proprietary rights.
23. I have considered the Notice of Motion Application, the Grounds of Opposition, and the parties' Written Submissions. The only issue for determination in this application is:

1. Whether the Applicants have established sufficient cause to warrant the setting aside of the dismissal order issued on 16th December 2016 and the reinstatement of the suit.

24. The power of this Court to reinstate a suit dismissed for want of prosecution or non-attendance is not in doubt. It is rooted in Order 12 Rule 7 and Order 17 Rule 2[3] of the *Civil Procedure Rules*, and in the Court's inherent discretion under Sections 1A, 1B and 3A of the *Civil Procedure Act*. However, that discretion is not open-ended; it must be exercised judiciously, on the basis of established principles, and in a manner that promotes the ends of justice while avoiding abuse of the court process. In the case of *Ivita v Kyumbu* [1984] KLR 441, the Court laid down the governing test as follows:

“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 the 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.”

Whether the Delay is Prolonged and Inexcusable.

25. In this case, the record shows that the suit was last mentioned on 30th July 2012, when the Applicant's Advocate sought an adjournment. Thereafter, the matter was fixed for hearing on 16th December 2016, but neither the Applicants nor their Advocate appeared. The Court consequently dismissed the suit for want of prosecution. The present application was not filed until 29th September 2021, almost five years after the dismissal order.
26. The Applicants attributed the delay to two main factors:
- i. that the Court file was transferred from Embu to Kerugoya without their knowledge; and
 - ii. that their Advocate on record failed to communicate or prosecute the matter, and later ceased acting. They also alleged that the file went missing and was only traced after the intervention of the Chief Justice.
27. This explanation is far from sufficient. The former Advocate filed no Affidavit to support the claim of inadvertence or professional lapse. More importantly, there is no evidence that the Applicants took any proactive steps to follow up on the status of the matter between 2012 and 2016. No letters, Registry inquiries, or correspondence with their Advocate were annexed to the application. Even if the file went missing at some point as alleged, the Applicants have not demonstrated that they exercised any diligence in tracking its progress before the dismissal, or acted with reasonable dispatch even after it was traced in March 2021. Instead, they waited a further six months before applying. Such conduct points to indolence, not mistake.
28. In the case of *Savings and Loan [K] Ltd v Susan Wanjiru Muritu* [Milimani HCCC No. 397 of 2002], Kimaru J. stated:
- “Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the Defendant had been diligent litigant, she would have been aware of the dismissal of her previous application for want of Prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the Prosecution of the application to set aside the default Judgment that was dismissed by the Court, it would be a travesty of Justice for the Court to exercise its discretion in favour of such a litigant.”
29. This principle is applicable here. The Applicants cannot hide behind their former Advocate. The duty to prosecute the suit with vigilance rests ultimately on the litigants. I find that the delay is not only prolonged but also inexcusable.



Whether the Respondents and Interested Parties Will Suffer Prejudice

30. The Applicants submitted that no prejudice would be suffered if the suit is reinstated, and that they stand to be denied substantive justice if not heard on the merits. However, this is not supported by the evidence on record.
31. The 1st Interested Party has shown that he is the registered and lawful occupant of the disputed rice holding, Unit H19 No. 2165B, Thiba Section. He has been in peaceful and vacant possession, and any revival of the suit would expose him to uncertainty, costs, and disruption to settled proprietary interests.
32. Moreover, the 1st Applicant, John Mwai Cubi, filed an Affidavit dated 8th July 2024, withdrawing from the proceedings and stating unequivocally that he no longer has any interest in the land, having sold his portion to third parties. These averments were not disputed by the other Applicants. They point to a situation where ownership and occupation of the land has changed, and the subject matter of the original dispute is no longer as it was when the suit was commenced. This Court cannot ignore the practical realities. Reinstatement of the suit at this stage would be tantamount to reopening a matter where the substratum has materially shifted, and the resulting litigation would likely drag third parties into protracted proceedings on stale claims.
33. That reasoning applies aptly in the present case. In the totality of circumstances, the prejudice to the Respondent and Interested Party outweighs any speculative prejudice to the Applicants who no longer even appear to be in possession or beneficial occupation of the land.

On the Interest of Justice

34. The *Constitution*, under Article 159[2][b], requires that justice be dispensed without any undue delay. It also provides under Article 159[2][d] that Justice shall be administered without undue regard to procedural technicalities. While procedural rules exist to foster fair hearing, certainty, and Judicial efficiency, Courts must draw a line between excusable oversight and systemic neglect. The Applicants have failed to demonstrate good faith, diligence, or any meaningful engagement with the Court process over a span of nearly nine years. Reinstatement of the dismissed suit would not serve the ends of Justice but would instead undermine the finality and efficiency of Court processes.

Conclusion

35. The Applicants have not met the threshold for reinstatement of the suit dismissed for want of Prosecution. The delay was prolonged, inordinate and inexcusable and it would be prejudicial to the Respondent and the Interested Parties to set aside the dismissal order. The Notice of Motion application dated 28th September 2021 lacks merit and is hereby dismissed with costs to the Respondent and the 1st Interested Party.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 24TH DAY OF JULY 2025.

J. M. MUTUNGI

ELC JUDGE

