

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KWALE

ELC CASE (O.S) NO. E006 OF 2021

JAPHET MALAU MUNGA

SAMITI WAZAMA JOHO

SAIDI SZOMBO MARERA

JUMAPILI BECHOMBO KALA AND 89 OTHERS.....

PLAINTIFFS

- VERSUS -

MEGJI NANJI PATEL

COLFAX HOLDINGS LIMITED

ATTORNEY GENERAL

MINISTRY OF INTERIOR

MINISTRY OF LAND AND PHYSICAL

PLANNING.....DEFENDANTS

RULING

I. Introduction

1. Before this Honourable Court for its determination is the Chamber Summons application dated 3rd July 2025 filed by the *MEGJI NANJI PATEL & COLFAX HOLDINGS LIMITED*, 1st and 2nd Defendants/Applicants herein. Essentially, the said application sought for the dismissal of the Plaintiffs' suit for want of prosecution and discharge of interim status quo orders issued herein. The application was supported by the affidavit of Mr. Brian Borona, Advocate.

2. Upon service, the Plaintiffs/Respondents opposed the application through filing of a Replying Affidavit sworn by *JAPHET MALAU MUNGA* on 23rd September 2025.
3. The Honourable Court shall be dealing with each of the issues on its own merit at a later on stage of this Ruling hereof.

II. The case by the 1st and 2nd Defendants/Applicants

4. The Application was brought under the provision of Order 17 Rule 2(3) of the Civil Procedure Rules, 2010, Sections 1A,1B & 3A of the Civil Procedure Act, Cap. 21, Section 13 of the Environment and Land Court Act, No. 19 of 2011 and all enabling Provision of Law. The Applicants sought for the following orders: -

a) Spent.

b) That this Honourable Court be pleased to order stay of all further proceedings herein pending the assessment and payment of costs by the Plaintiff to the 1st and 2nd Defendants in Mombasa High Court Civil Case No. 25 of 2022.

c) That the costs of this application be paid by the Plaintiff.

5. The application was premised on the grounds, facts and testimony on the face of the application and further supported by the 10 Paragraphed annexed affidavit of BRIAN BORONA, Advocate for the 1st and 2nd Defendants/Applicants dated the same day and the annexures therof. The Affiant averred as follows that:

- a) He was an Advocate of the High Court of Kenya, practicing in the Law firm of Messrs. Borona & Associates, which had the conduct of the matter on behalf of the 1st and 2nd Defendants/Applicants. He was duly authorized and competent to swear the affidavit on their behalf.
- b) The suit had commenced by way of Originating Summons filed on 30th November 2021. (Annexed and marked as “BB - 1” was a copy of the Originating Summons).
- c) The matter had since been mentioned in court on more than 26 occasions without any substantive progress towards hearing and determination. (Annexed and marked as “BB - 2” was a print-out from the Court’s CTS system showing the history of mentions and appearances).
- d) On 13th June, 2025, the Plaintiffs/Respondents had appointed Kituo Cha Sheria as their new advocates in place of their previous advocates. (Annexed and marked as “BB - 3” was a copy of the Notice of Change of Advocates).
- e) Despite of this change, the Plaintiffs/Respondents and their new advocates had failed to take any concrete steps to prosecute their case.

- f) When the matter recently came up for mention on 25th June 2025, the Plaintiffs/Respondents and their advocates had failed to attend court, further demonstrating their lack of interest in prosecuting the suit.
- g) The continued pendency of the suit for over three (3) years had occasioned immense prejudice and financial loss to the 1st and 2nd Defendants/Applicants, as they were unable to proceed with their intended development on the suit property due to the subsistence of status quo orders.
- h) It was in the interest of justice that the Originating Summons be dismissed for want of prosecution, as litigation had to come to an end and justice could not be delayed indefinitely.
- i) There would be no prejudice would be suffered by the Plaintiffs/Respondents if the application was allowed.

III. The responses by the 1st Plaintiff/Respondent

6. The 1st Plaintiff, Japhet Malau Munga, responded to the Application through a 12 Paragraphed replying affidavit sworn on 23rd September, 2025 wherein the Affiant averred as follows:
- a. He was the 1st Plaintiff/Respondent in the matter, fully conversant with the facts of the case, hence competent to

swear the affidavit on behalf of the other Plaintiffs/Applicants. For that reason, he was duly authorized and competent to swear the affidavit and was conversant with the facts of the matter.

- b. He had perused the Chamber Summons application dated 3rd July, 2025 seeking orders that the Plaintiffs/Respondents' entire suit be dismissed for want of prosecution and that interim status quo orders issued therein be discharged or vacated.
- c. It was true the Plaintiffs/Respondents had appointed new advocates, Kituo Cha Sheria, in place of their former advocates, but it was not true that they had failed or neglected to set down the suit for hearing or comply with court directions, because the matter had already been fixed for mention on 25th June, 2025.
- d. The reason the matter had suffered delay in its prosecution was the fact that their previous Advocates had advised them to accept an out - of - court settlement. The Plaintiffs/Respondents had declined this proposal and had clearly instructed the said Advocates to ensure that the case proceeded in court.

- e. Despite those instructions, their previous advocate had informed the Court that there were ongoing negotiations between the Plaintiffs/Respondents and the 1st Defendant/Respondent. This was false and had been done without their knowledge or approval.
- f. Both their previous advocates, the Law firms of Messrs. Kamanza & Partners Advocates, and the Respondents' advocates had misled the Honourable Court by purporting that negotiations were in progress. This amounted to collusion between the said advocates, and they were jointly responsible for the delay in prosecuting the matter.
- g. Since the year 2021, their previous advocates had never given them proper feedback on the progress of the case. There had been no written communication informing them that they must meet the 1st Defendant/Respondent, a proposal which they had categorically declined when it was raised verbally.
- h. They were invited to attend court hearings despite their constant requests, they therefore humbly prayed that the Honourable Court grants the opportunity to be fully involved in all the future hearing and proceedings.

- i. The matter had been scheduled for mention on 25th June, 2025, and it was confirmed by an attendance report from Kituo Cha Sheria annexed and marked as “J.M.M.2”.
- j. He had also annexed evidence filed on 22nd June, 2025 through an affidavit dated 13th June, 2025, which was sworn in lawful process and marked as “J.M.M.3”.
- k. There had been no agreement between the parties, and for that reason, the Plaintiffs/Respondents were willing and ready to prosecute the matter to its legal conclusion.
- l. The facts deponed to herein were true and correct to the best of his knowledge, information, and belief.

IV. Submissions

7. On the 9th July, 2026, while the Parties were present in Court, they were directed to have the Notice of Motion application dated 3rd July, 2025 filed by the 1st and 2nd Defendants/Applicants, be disposed of by way of written submissions. All the parties complied with the Court’s directions. Pursuant thereto, on notice. Eventually, 27th April, 2026 a ruling was delivered by the Court accordingly.

A. The Written Submissions by the 1st and 2nd Defendants/Applicants

8. The 1st and 2nd Defendants/Applicants through the Law firm of Messrs. Borona & Associates Advocates filed their written submissions dated 1st August, 2025. Mr. Borona Advocate commenced his submissions by stating that it made in support of the Chamber Summons Application dated 3rd July, 2025 by the 1st and 2nd Defendants/Applicants. The application sought for orders that the Plaintiffs' suit be dismissed for want of prosecution pursuant to Order 17 Rule 2 of the Civil Procedure Rules, 2010, Sections 1A, 1B, and 3A of the Civil Procedure Act, Cap. 21 and Section 13 of the Environment and Land Court Act.
9. The Learned Counsel for the Applicants responded to the affidavit filed by Kituo Cha Sheria, which sought to excuse over four (4) years of inactivity on two grounds:
- a. Change of Advocates; and
 - b. Alleged and ostensible out-of-court settlement negotiations.
10. The Learned Counsel averred that neither of these reasons met the threshold of “**sufficient cause**” under the law.

11. The Learned Counsel relied on the following issues for determination by the Honourable Court which are:-

a) Whether the Plaintiffs had shown sufficient cause to excuse their delay.

b) Whether the continued pendency of the suit prejudiced the Applicants.

c) Whether the Court should exercise its discretion to dismiss the suit

12. On the relevant laws the Learned Counsel relied on the provision of Order 17 Rule 2(1) of the Civil Procedure Rules, 2010. which provides 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...”

13. The Learned Counsel argued that the Plaintiffs/Respondents had failed to take any meaningful steps to prosecute the matter for over four years, and therefore the Court was properly seized of jurisdiction to dismiss the suit.

14. The Learned Counsel also relied on the provision of Sections 1A & 1B of the Civil Procedure Act, Cap. 21 which impose a duty on the Court to ensure expeditious disposal of cases. Allowing an indolent litigant to hold the Defendants/Applicants hostage for years contradicted this overriding objective.

15. The Learned Counsel further buttressed his point with the case of ***“Ivita - Versus -Kyumbu (1984) KLR 441”***, where the Honorable Court held that:-

“The test is whether the delay is prolonged and inexcusable and whether justice can still be done despite the delay.”

16. The Learned Counsel submitted that justice could not be done because they remained restrained from enjoying proprietary rights while the Plaintiffs slumbered. Further in the case of:- ***“Eco Bank Kenya Limited - Versus - Minolta Ltd & 2 Others (2018) eKLR”***, the Court emphasized that:-

“Accordingly, although article 159(2)(d) of the Constitution was waved in the face of the court as an excuse for the omission, it bears repeating, and it is trite, that the Courts discretion under Order 10 rule 11 of the Civil Procedure Rules is not meant to assist those who, by deliberate omission or otherwise have sought to obstruct the course of justice.”

17. Lastly in the case of:- ***“Joseph Kahangara - Versus - Kenya Broadcasting Corporation & Others (2017) eKLR”***, the Court held that the Defendant must show inordinate delay, inexcusable delay, and prejudice arising from delay. The Learned Counsel argued that these authorities directly dismantled the Plaintiffs/Respondents’ excuses.

18. On the Response to Kituo cha Sheria's affidavit particularly on the Change of Advocates. The Learned Counsel asserted that the Plaintiffs/Respondents' appointment of Kituo Cha Sheria in June 2025 did not reset the litigation clock. In the case of:- "**Eco Bank Kenya Limited (Supra)**", the court emphasized that change of counsel is not a valid ground to defeat an application for dismissal. The Plaintiffs/Respondents and their former advocates had a duty to prosecute the matter. Their neglect cannot be shifted to the Applicants.

19. On the alleged and/or ostensible settlement negotiations. The Learned Counsel argued that the Plaintiffs/Respondent had attached handwritten notes, not formal letters or consents, to prove the so called "**settlement talks.**" In the case of:- "**Joseph Kahangara (Supra)**", the Court warned that further delay would result in dismissal. This case, unlike that of "**Kahangara (Supra)**", involved a delay of over four years with no concrete progress. The equities of this case demand immediate dismissal.

20. On the prejudice to the Defendants/Applicants. The Learned Counsel submitted that they had been restrained by subsisting status quo orders since the year 2021, denying them their

constitutional right under Article 40 to use and develop their property. Further the Learned Counsel argued that the Plaintiffs merely sought “a last chance” but presented no specific hearing plan or timeline. The Court could not indefinitely accommodate speculative assurances while the Applicants remained prejudiced; there was no actionable prosecution plan.

21. On the application of the overriding objective. The Learned Counsel submitted that the Overriding Objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 and Section 3 of the Environment & land Court Act, No. 19 of 2011 obligated the Court to ensure litigation was concluded in a just, proportionate, and timely manner. Prolonging the suit rewarded indolence and defeated the constitutional command under the provision Article 159(2)(b) of the Constitution that justice shall not be delayed.

22. In conclusion, the Learned Counsel submitted that the Plaintiffs’ response failed to meet the legal threshold for “sufficient cause.” Their excuses were unsubstantiated, their delay was inordinate, and the continued pendency of the matter grossly prejudiced the Defendants/Applicants.

23. The Learned Counsel submitted that the Applicants therefore urged this Honourable Court to: -

- a. Dismiss the suit for want of prosecution.**
- b. Discharge the status quo orders forthwith.**
- c. Award costs to the 1st and 2nd Defendants/Applicants.**

V. Analysis and Determination

24. I have considered the Chamber Summons application dated 3rd July, 2025 filed by the 1st and 2nd Defendants/Applicants, the Replying Affidavit sworn by the 1st Plaintiff/Respondent, and the written submissions and myriad of authorities cited and filed by both parties, the relevant provision of Constitution of Kenya, 2010 and Statutes.

25. From the pleadings and arguments placed before this Honourable Court, and in order to reach a Just, reasonable and Equitable decision, the following five (5) issues fall for determination in relation to the instant application: -

- a) Whether the Plaintiffs/Respondents have shown sufficient cause to excuse the delay in prosecuting the suit.***
- b) Whether the continued pendency of the suit prejudices the Defendants/Applicants.***
- c) Whether this Honourable Court has jurisdiction and discretion to dismiss the suit for want of prosecution.***

d) Whether the prejudice alleged by the Defendants/Applicants outweighs the prejudice that would be occasioned to the Plaintiffs/Respondents if the suit is dismissed.

e) What orders should issue as to costs of the application.

ISSUE No. a). Whether the Plaintiffs/Respondents have shown sufficient cause to excuse the delay in prosecuting the suit

26. Under this sub-heading the Honourable Court will decipher whether the Plaintiffs/Respondents' explanations for the prolonged, unreasonable and inordinate delay in prosecuting the matter meet the threshold of "**sufficient cause**". Legally speaking, the starting point is the provision of Order 17 Rule 2 of the Civil Procedure Rules which provides:

"2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]

(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.

(5) A suit stands dismissed after two years where no step has been undertaken.

(6) A party may apply to court after dismissal of a suit under this Order.”

27. From the above, it will be seen that a suit is liable for dismissal, by the court on its own motion, or a party can apply for its dismissal, if the case remains idle for more than one year. Under sub-rule (5) a suit stands dismissed after two years if no step is taken. This provision imposes a duty upon litigants to actively prosecute their cases, and empowers the Court to dismiss suits where indolence is evident. The Plaintiffs/Respondents herein attribute delay to alleged collusion and misrepresentation by their former advocates, as well as purported settlement negotiations.

28. In the cases of **“Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium - Versus - M.D. Popat and others & another [2016] eKLR”** as cited in the case of:- **“Invesco Assurance Company Limited - Versus - Oyange Barrack [2018] eKLR”**, the court stated as follows:

“11. Nonetheless, Article 159 of the Constitution and Order 17 Rule 2(3) gives the court the discretion to dismiss the suit

where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it, or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable, and is likely to cause serious prejudice to the defendant on account of that delay.”

29. The dismissal of a suit for want of prosecution is meant to prevent an abuse of the court process. Further, it assists immensely in clearing of the menace of back - log of cases which continue bedeviling the Judiciary in particular and the public generally. The test in an application for dismissal of suit for want of prosecution was laid out in the case of ***“Ivita - Versus - Kyumbu (supra)”***, where Chesoni, J. (as he then was) held that:

“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 the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

30. Further in the case of:- ***"E. T. Monks and Co Limited - Versus - Evans (1985) KLR 584"*** the court stated as follows:-

"The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable. Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances..... If the Plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself..... It is the duty of the plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position."

31. Further in the case of ***"Argan Wekesa Okumu - Versus - Dima College Limited & 2 others [2015] eKLR"***, the court considered the principles for dismissal of a suit for want of prosecution and stated as follows:-

"The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The Applicant must show that the delay complained of is inordinate, that the inordinate delay is

inexcusable and that the Defendant is likely to be prejudiced by such delay. As such the 3rd Defendant in this case must meet the burden of proof in seeking the dismissal of the Plaintiff's case for want of prosecution see the case of Ivita - Versus - Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this Court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

32. It is clear from the above that for an Applicant to be successful in an application for dismissal of suit for want of prosecution, he must satisfy the one year threshold required by the law. He must also show that there was inordinate and inexcusable delay in the circumstances of the case. Thirdly, he must satisfy the Court that he will be prejudiced by the delay if the suit were to be allowed to proceed to trial.

33. Applying this test, the delay of over four years is clearly prolonged. Whether not this application should be allowed is a matter for the discretion of the Court which Court will be guided by the reasons advanced by the Plaintiffs/Respondents as to why they did not set down the suit for hearing. The Plaintiffs/Respondents' explanation, while raising serious concerns about professional misconduct, does not absolve them

of responsibility. Kenyan courts have consistently held that litigants cannot indefinitely hide behind the mistakes of counsel. See **“Rinya Hospital Limited - Versus - Cooperative Bank of Kenya Limited & another (Civil Suit 23 of 2008) [2023] KEELC 21178 (KLR) (1 November 2023) (Ruling)”**, where the Court emphasized that:-

“In this matter, more than five years have lapsed from the date the matter was last in court. The Plaintiff clearly no longer has any interest in this case. If she still had any interest, she would certainly have taken some steps to proceed with the case. I have no reason to decline the prayers sought herein. I proceed to dismiss this suit for want of prosecution pursuant to Order 17 Rule 2(3) of the Civil Procedure Rules, 2010. The costs of this dismissed suit will be to the defendants. For the avoidance of doubt any interlocutory orders are hereby vacated with the dismissal of the suit.”

34. Comparative jurisprudence from East Africa reinforces this principle. In the case of:- **“Sebei District Administration - Versus - Gasyali [1968] EA 300”**, the East African Court of Appeal held that courts must balance the right to be heard with the need to prevent abuse of process, and that prolonged delay without sufficient cause undermines justice. Similarly, Nigerian courts have adopted a strict approach. In case of:- **“Nwankwo - Versus - Yar’Adua (2010) 12 NWLR (Pt.1209) 518”**, the Supreme Court of

Nigeria underscored that **“justice delayed is justice denied,”** and that litigants must not use procedural excuses to perpetuate indolence.

35. The Plaintiffs/Respondents’ reliance on change of advocates is insufficient. In the case of:-**“Eco Bank Kenya Ltd - Versus - Minolta Ltd & 2 Others (Supra)”**, the Court held that change of counsel does not reset the litigation clock, and parties remain bound to prosecute their matters diligently.

36. The Plaintiffs/Respondents’ claim of settlement negotiations is equally unconvincing. In the case:- **“Joseph Kahangara - Versus - Kenya Broadcasting Corporation & Others [Supra]”**, the Court granted conditional reprieve but warned that further delay would result in dismissal. Unlike that case, here the delay has already exceeded four years, with no concrete progress.

37. The statutory framework under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 further imposes a duty on both the Court and parties to ensure expeditious disposal of cases. Section 1A(3) specifically provides that:

“A party to civil proceedings or an advocate for such a party shall assist the court to further the overriding objective of the Act and, to that effect, shall participate in the processes of

the court and comply with the directions and orders of the court.”

38. The Plaintiffs/Respondents’ conduct, marked by absence from court and lack of a prosecution plan, falls short of this statutory duty.

39. Under this sub title, the Honourable Court therefore finds that the Plaintiffs have not demonstrated sufficient cause to excuse the delay. The explanations advanced—change of advocates and alleged settlement negotiations—do not meet the threshold under Order 17 Rule 2, nor do they satisfy the test in the case:- **“Ivita -Versus - Kyumbu (Supra)”**. Hence, there is no doubt that indeed, the delay is not only unreasonable, inordinate, inexcusable but also prejudicial to the Defendants/Applicants. Thus, the application must succeed.

ISSUE No. b). Whether the continued pendency of the suit prejudices the Defendants/Applicants.

40. Under this sub-heading the Honourable Court will decipher whether the prolonged pendency of the suit, coupled with subsisting status quo orders, has occasioned prejudice to the Defendants, and whether such prejudice outweighs the Plaintiffs’ right to be heard.

41. The Defendants/Applicants argued that since the year 2021 they have been restrained from utilizing or developing the suit property due to subsisting status quo orders. They submitted that this restraint has led to immense financial loss, frustration, and denial of their constitutional right to property under the provision of Article 40 of the Constitution of Kenya, 2010.
42. The principle that litigation must not be allowed to continue indefinitely to the detriment of one party is well established. In ***“Ivita -Versus - Kyumbu (Supra)”***, Chesoni J held that the test is whether the delay is prolonged and inexcusable, and whether justice can still be done despite the delay. Where one party suffers ongoing prejudice, justice cannot be said to be done.
43. Similarly, in the case of:- ***“Utalii Transport Company Limited & 3 Others - Versus - NIC Bank Limited & Another [2014] eKLR”***, the Court emphasized that prolonged delay undermines the Overriding Objective of the Civil Procedure Act, Cap. 21 which under Sections 1A and 1B and Section 3 of the Environment & Land Court Act, No. 19 of 2011 obligates the Court to ensure and facilitate just expeditious, proportionate disposal of cases; and accessible resolution of disputes. The Court observed that indolence by one party should not hold the other hostage.

Comparative jurisprudence from East Africa reinforces this principle. In case of:- **“Sebei District Administration - Versus - Gasyali [Supra]”**, the East African Court of Appeal held that courts must balance the right to be heard with the need to prevent abuse of process, and that prolonged delay without sufficient cause amounts to injustice.

44. Nigerian courts have also adopted a strict approach. In the case of **“Nwankwo - Versus - Yar’Adua (Supra)”**, the Supreme Court of Nigeria underscored that justice delayed is justice denied, and that courts must guard against situations where delay results in one party being unfairly prejudiced.

45. The Defendants/Applicants’ prejudice is not speculative. Indeed, it is ongoing and tangible. They remain restrained from developing their property, incurring financial losses, and suffering frustration of proprietary rights. In contrast, the Plaintiffs/Respondents have not demonstrated specific prejudice they would suffer if the suit were dismissed, beyond the general right to be heard.

46. The Court notes that the provision of Article 159(2)(b) of the Constitution provides that **“justice shall not be delayed.”**

Prolonged pendency of suits, particularly where interim orders subsist, undermines this constitutional command.

47. Therefore, the Honourable Court strongly finds that the continued pendency of the suit has occasioned substantial prejudice to the Defendants/Applicants. The subsistence of status quo orders has denied them enjoyment of their constitutional rights under the provision Article 40, caused financial loss, and undermined the overriding objective of expeditious disposal of cases. Certainly, based on the foregoing inferences, the prejudice to the Defendants/Respondents outweighs the Plaintiffs/Respondents' speculative assurances of future prosecution. Thus, the application must succeed.

ISSUE No. c). Whether this Honourable Court has jurisdiction and discretion to dismiss the suit for want of prosecution

48. Under this sub-heading the Honourable Court will decipher whether it possesses jurisdiction and discretion to dismiss the Plaintiffs/Respondents' suit for want of prosecution, and the principles guiding the exercise of such discretion. The jurisdiction of this Court is firmly anchored in the provision Order 17 Rule 2(1) of the Civil Procedure Rules (Kenya), 2010 which provides:

“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.”

49. This provision clearly empowers the Court to dismiss suits where parties fail to take steps for over one year. The Plaintiffs/Respondents herein have not prosecuted their matter for over four years, thereby squarely inviting the Court’s jurisdiction under this rule.

50. Further, the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 impose a duty on the Court to ensure the expeditious disposal of cases. The provision of Section 1A(1) provides:

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.”

51. The provision of Section 1B(1) further obligates the Court to achieve this objective by ensuring timely disposal of proceedings, discouraging delay, and ensuring that parties comply with directions of the Court.

52. The Court also retains inherent jurisdiction under the provision Sections 3A of the Civil Procedure Act, Cap. 21 to make orders necessary to prevent abuse of process and to ensure the ends

of justice are met. This inherent jurisdiction is a safeguard against litigants who attempt to manipulate procedure to perpetuate delay.

53. Kenyan jurisprudence has consistently affirmed this discretion.

In case of:- **“Ivita - Versus - Kyumbu (Supra)”**, Chesoni J held that the test is whether the delay is prolonged and inexcusable, and whether justice can still be done despite the delay. Where delay is inordinate and prejudicial, the Court is entitled to dismiss the suit.

54. In the case of:- **“Utalii Transport Company Limited & 3 Others - Versus - NIC Bank Limited & Another [Supra]”**, the Court emphasized that dismissal for want of prosecution is a judicial tool to prevent abuse of process and to protect defendants from perpetual litigation. The Court observed that litigation is not meant to be a **“sword of Damocles”** hanging indefinitely over the head of a Defendant. Comparative jurisprudence from East Africa is instructive. In the case of:- **“Sebei District Administration - Versus - Gasyali [Supra]”**, the East African Court of Appeal held that courts must balance the right to be heard with the need to prevent abuse of process, and that prolonged delay without sufficient cause undermines justice. The Court

stressed that while the right to be heard is fundamental, it is not absolute and must be exercised within the bounds of procedural fairness.

55. Nigerian courts have similarly underscored the discretionary power of courts to dismiss suits for want of prosecution. In the case of:- **“Nwankwo - Versus - Yar’Adua (Supra)”**, the Supreme Court of Nigeria held that courts must guard against situations where delay results in injustice, and that dismissal is a necessary tool to ensure fairness and efficiency. The Court emphasized that the judicial process must not be abused by litigants who seek to perpetuate delay to the detriment of their opponents.

56. The Plaintiffs/Respondents’ explanations—change of advocates and alleged settlement negotiations—do not reset the litigation clock nor constitute sufficient cause. As held in the case:- **“Eco Bank Kenya Limited - Versus - Minolta Ltd & 2 Others (Supra)”**, change of counsel is not a valid ground to defeat an application for dismissal. Similarly, vague references to settlement negotiations without documentary proof cannot justify prolonged inactivity.

57. The Honourable Court therefore finds that it has jurisdiction under the provision of Order 17 Rule 2, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap. 21 and Section 13 of the Environment and Land Court Act, No. 19 of 2011 to dismiss the suit for want of prosecution. The discretion to dismiss must be exercised judiciously, balancing the right to be heard against the need to prevent abuse of process. In this case, the prolonged delay, lack of sufficient cause, and demonstrable prejudice to the Defendants/Applicants justify dismissal.

ISSUE No. d). Whether the prejudice alleged by the Defendants/Applicants outweighs the prejudice that would be occasioned to the Plaintiffs/Respondents if the suit is dismissed.

58. Under this sub-heading the Honourable Court will decipher the competing claims of prejudice advanced by the parties, and determine which side would suffer greater injustice should the Court dismiss or allow the suit to proceed.

59. The Defendants/Applicants submitted that the subsistence of status quo orders since 2021 had restrained them from utilizing or developing the suit property, thereby occasioning immense financial loss and frustration. They argued that this amounted

to a denial of their constitutional right to property under the provision Article 40 of the Constitution of Kenya, 2010, which guarantees every person the right to acquire and own property of any description and in any part of Kenya. They contended that continued pendency of the suit rewarded indolence, perpetuated injustice, and undermined the principle that litigation must come to an end.

60. The Plaintiffs/Respondents, on the other hand, argued that dismissal of the suit would deny them their fundamental right to be heard under the provision of Article 50(1) of the Constitution, which guarantees every person the right to have disputes resolved in a fair and public hearing before a court or tribunal. They emphasized that the delay was attributable to their former advocates' misconduct and alleged collusion, and that they were now ready to prosecute the matter. They urged the Court to consider that litigants should not be punished for the mistakes of counsel, and that substantive justice should prevail over procedural technicalities, as enshrined in Article 159(2)(d) of the Constitution.

61. Kenyan jurisprudence has consistently emphasized the need to balance prejudice. In the case of:- ***Ivita - Versus - Kyumbu***

(Supra)”, Chesoni J held that the test is whether justice can still be done despite the delay. Where one party suffers ongoing prejudice, justice cannot be said to be done. Similarly, in the case of:- **“Utalii Transport Company Limited & 3 Others - Versus - NIC Bank Limited & Another (supra)”**, the Court observed that litigation is not meant to be a perpetual threat hanging over defendants, and that indolence by one party should not hold the other hostage.

62. Comparative jurisprudence from East Africa reinforces this principle. In the case of:- **“Sebei District Administration - Versus - Gasyali (supra)”**, the East African Court of Appeal held that courts must balance the right to be heard with the need to prevent abuse of process, and that prolonged delay without sufficient cause amounts to injustice. The Court stressed that while the right to be heard is fundamental, it must be exercised responsibly and within reasonable timeframes.

63. Nigerian courts have also adopted a strict approach. In the case of: **“Nwankwo - Versus - Yar’Adua (“Supra)”**, the Supreme Court of Nigeria emphasized that justice delayed is justice denied, and that courts must guard against situations where delay results in one party being unfairly prejudiced. The Court

underscored that litigation is not meant to be an endless process, and that judicial discretion must be exercised to prevent abuse of the court process.

64. The Honourable Court notes that while the Plaintiffs/Respondent's right to be heard is fundamental, it is not absolute. It must be exercised within the bounds of procedural fairness and diligence. The prejudice to the Defendants/Applicants is tangible, ongoing, and constitutional in nature, whereas the Plaintiffs/Respondents' prejudice is largely speculative, premised on assurances of future prosecution without a concrete plan or timeline. The Plaintiffs/Respondents have not demonstrated a clear strategy for expeditious disposal of the matter, and their conduct has undermined the overriding objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 which obligates the Court to ensure just, proportionate, and timely resolution of disputes.

65. Therefore, the Honourable Court finds that the prejudice alleged by the Defendants/Applicants outweighs the prejudice that would be occasioned to the Plaintiffs/Respondents if the suit is dismissed. The continued pendency of the suit has denied the

Defendants/Applicants enjoyment of their proprietary rights under the provision of Article 40 of the Constitution, caused financial loss, and undermined the constitutional command under Article 159(2)(b) that justice shall not be delayed. Thus, the balance of convenience and fairness tilts in favour of the Defendants/Applicants herein.

ISSUE No. e). What orders should issue as to costs of the application.

66. Under this sub-heading the Honourable Court will decipher the appropriate orders on costs in light of the application and the responses thereto. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 provides that: -

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

67. This statutory provision establishes that costs ordinarily follow the event, meaning that the successful party is entitled to costs unless the Court directs otherwise for good reason.

68. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of **“Harun Mutwiri - Versus - Nairobi City County Government [2018] eKLR”** and **“Kenya Union of Commercial, Food and Allied Workers - Versus - Bidco Africa Limited & Another [2015] eKLR”**, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of **“Hussein Muhumed Sirat - Versus - Attorney General & Another [2017] eKLR”**, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

69. The Defendants/Applicants prayed that costs of the Chamber Summons application dated 3rd July, 2025 be borne by the Plaintiffs/Respondent, arguing that they had occasioned unnecessary expense by failing to prosecute their suit and by holding the Defendants/Applicants hostage under subsisting status quo orders. The Plaintiffs/Respondents, however, submitted that the application was misconceived, premature, and intended merely to delay the hearing of their substantive claim.

70. The Honourable Court notes that costs are discretionary, but the discretion must be exercised judicially and not capriciously. I reiterate that the Overriding Objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 obligates the Court to ensure fairness, proportionality, and efficiency in litigation. Where one party has occasioned unnecessary delay and prejudice, costs must be awarded to the other party to compensate for the expense incurred.

71. Therefore, the Honourable Court finds that the Defendants/Applicants, having succeeded in demonstrating inordinate delay and prejudice, are entitled to costs of the application. The Plaintiffs' explanations do not amount to sufficient cause, and their conduct has occasioned unnecessary expense to the Defendants/Applicants. Accordingly, costs of the Chamber Summons application dated 3rd July, 2025 shall be borne by the Plaintiffs/Respondents.

VI. Conclusion and Disposition.

72. Having carefully considered the Chamber Summons application dated 3rd July, 2025, the Replying Affidavit sworn by the 1st Plaintiffs/Respondents, and the written submissions filed by both parties, together with the applicable statutory provisions

and case law cited, the Honourable Court arrives at the following conclusions:-

- a) **THAT** the Chamber Summons application dated 3rd July, 2025 filed by the 1st and 2nd Defendants/Applicants seeking dismissal of the Plaintiffs' suit for want of prosecution and discharge of interim status quo orders is found to be merited and is hereby allowed.
- b) **THAT** the Honourable Court holds that the Plaintiffs/Respondent have failed to demonstrate sufficient cause to excuse the prolonged delay in prosecuting the suit, and the explanations advanced do not meet the threshold under Order 17 Rule 2 of the Civil Procedure Rules, 2010 and the test in "*Ivita - Versus - Kyumbu (supra)*".
- c) **THAT** the Honourable Court further finds that the continued pendency of the suit has occasioned substantial prejudice to the Defendants/Applicants, denying them enjoyment of their proprietary rights under *Article 40 of the Constitution of Kenya, 2010*, causing financial loss, and undermining the overriding objective under the provision of Sections 1A and 1B of the Civil Procedure Act, Cap. 21.
- d) **THAT** the entire suit through the Originating Summons dated 12th November 2021 be and is hereby dismissed for want of prosecution, and the interim status quo orders issued herein are discharged forthwith.
- e) **THAT** the costs of the Originating summons dated 12th November, 2021 and the Chamber Summons application

dated 3rd July 2025 shall be borne by the Plaintiffs/Respondents in accordance with Section 27(1) of the Civil Procedure Act, Cap. 21 to be paid to the 1st and 2nd Defendants/Applicants.

IT IS SO ORDERED ACCORDINGLY.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS.....27THDAY OFAPRIL.....2026.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT
AT
KWALE**

Ruling delivered in the presence of:

- (a) Mr. Daniel Disi, the Court Assistant.
- (b) Mr. Atiang Advocate for the Plaintiffs/Respondents;
- (c) Mr. Borona Advocate for the 1st and 2nd Defendants.
- (d) M/s. Kiti Advocate for the 3rd, 4th & 5th Defendants/Applicants.