



**REPUBLIC OF KENYA**  
**THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CASE NO E058 OF 2022**

**FAITH & HOPE PROPERTIES KENYA**  
**LIMITED.....1ST PLAINTIFF**  
**KYALO**  
**KIMWERE.....2ND**  
**PLAINTIFF**  
**MICHAEL KINGA**  
**KAMAU.....3RD PLAINTIFF**  
**MARY KATANU**  
**KAMENE.....4TH PLAINTIFF**  
**MACHARIA**  
**MWANGI.....5TH**  
**PLAINTIFF**  
**LUCY WANGECHI**  
**MATHENGE.....6TH PLAINTIFF**  
**MAGDALINE WANJIRU.....7TH**  
**PLAINTIFF**  
**NANCY**  
**NJERI.....8TH**  
**PLAINTIFF**

**VERSUS**

**JAMES MUCHIRI WAWERU.....1ST  
DEFENDANT**  
**SUSAN NTHAMBI MUSEI.....2ND  
DEFENDANT**

**RULING**

1. The subject of this ruling is the plaintiffs' notice of motion dated 23 July 2025. It states that it has been filed in accordance with the provisions of **Articles 48 and 50 of the Constitution, Sections 1A and 3A of the Civil Procedure Act, Order 12 Rule 7 of the Civil Procedure Rules**, and all other enabling provisions of the Law. It seeks the following orders from this court: -

***a. Spent.***

***b. Spent.***

***c. THAT this Honourable Court be pleased to set aside and/or vacate the orders issued dismissing the suit for non-attendance.***

***d. THAT the suit be reinstated and restored for hearing and determination on merit.***

***e. THAT this Honourable Court be pleased to issue such directions as may be necessary for the expeditious hearing of the suit.***

***f. Cost be provided for.***

2. The motion is supported by the grounds therein as well as the affidavit sworn on the same date by David Kabogo. In a nutshell, he states that the plaintiff was unable to attend court due to illness and a breakdown in communication with former counsel, and was not properly served with the hearing notice. The case centres on serious issues, including allegations of fraudulent land transfer. The dismissal of the suit has caused significant prejudice to the plaintiff and has violated the right to be heard.
3. Moreover, the plaintiff has since taken corrective steps and is ready to prosecute the matter expeditiously. The defendants might unfairly benefit from a technicality despite the fraud claims. Negligence by previous counsel exposed the plaintiff to injustice. The plaintiff requests a second chance to prosecute the suit, emphasises that there was no undue delay and maintains that mistakes by counsel should not penalise the litigant, and the court's discretion should be exercised to prevent injustice due to inadvertent errors. Of significance, it states that the Notice to Show Cause (NTSC) was never served upon the plaintiff. Further and notably, the plaintiff in this application is referred to in the singular.
4. Despite defendants presenting a replying affidavit, deposed by counsel Mr. Omondi Samuel Ogutu on 20 November 2025 for assessment, and an invoice remitted to counsel for Kshs. 750/-,

the invoice was never settled. In other words, the replying affidavit is not filed, and the motion stands unopposed.

5. As directed by the court, the motion was considered through written submissions filed by the law firms of **Ms. Mungai Kivuti & Co. Advocates** for the plaintiffs, dated 2 January 2026, and **Ms. Omondi Ogutu & Associates** for the defendants, dated 9 December 2025.
  
6. 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 court should set aside its orders that dismissed the plaintiffs' suit for want of prosecution.**
  
7. Suffice it to say, the dismissal of suits for want of prosecution mainly depends on how long it takes to pursue the case. The core principle is that justice should be delivered without unnecessary delays, encapsulated in the saying that "*justice delayed is justice denied.*" The reason for dismissing suits for lack of prosecution is to ensure that litigation moves forward and concludes promptly. It is unjust to file a case and then let it remain idle, hanging over the other party like the sword of Damocles. Dismissals serve to clear court backlogs caused by

parties unwilling to pursue their cases. Pending cases that remain inactive create congestion, leading to public mistrust and diminishing confidence in the judiciary. Therefore, dismissals help reduce the growing caseloads and backlog, preventing stale suits from clogging the judicial system.

8. Based on this, we shall examine the legal provisions governing the dismissal of a suit under **Order 17** of the **Civil Procedure Rules (CPR)**. Under **Rule 2(1)**, thereof, if a party fails to take action for a period of one year, the court may issue a written notice to the parties requiring them to justify why the suit should not be dismissed. If no satisfactory explanation is provided, the court may dismiss the suit. In the present case, the plaintiff encountered this situation when the suit, filed on 2 August 2022, remained unprosecuted and was dismissed. Following such a dismissal, an aggrieved party may petition the court in accordance with **Order 17 Rule 2 (6)** of the **CPR** to have the suit reinstated.
9. The jurisprudence that guides this court in the exercise of judicious discretion in dealing with such motions is settled, and the decision of **Shah v Mbogo and Another [1967] EA 116 Limited [2020] eKLR**, which was cited with approval in the case of **John Waweru Njenga & 5 others v Motor Botique**, detailed the guiding principles as follows: -

***“This discretion (to set aside ex parte Court decisions) is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”***

10. These criterion is also restated in the long-cited decision of **Ivita v Kyumbu [1975] KEHC 4 (KLR)**, whereby in this case, the court held that the tests to be applied are whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. In this decision, the court stated thus:

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***“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."***

11. This court has devoted considerable time to thoroughly reviewing the record, and without belabouring into a majority of the grounds posited by the plaintiffs, it emerges that on 1 October 2024, the court directed the registry to serve the NTSC upon the parties, and it was to be heard on 27 January 2025. However, due to oversight, it was not served. Thus, on this date, the court again directed the registry to extract a fresh NTSC and serve it upon the parties for hearing on 24 March 2025, but it arises the registry merely sent an email to the plaintiffs' erstwhile law firm, **Ms. Anyang** of **Ms. S.J. Nyang &**

**Co. Advocates**, and the defendants' advocates, informing them of the hearing of the NTSC without attaching the relevant NTSC.

12. In the circumstances where a proper NTSC was never extracted and served upon the parties as envisaged by **Order 17 Rule 2(1)** of the **CPR**, this court finds that no valid NTSC was ever served on the parties. It also finds that in such an absence, it was improper for this court to dismiss the suit on 24 March 2025. Further, this court finds that the motion is merited.

13. Nonetheless, before issuing the final dispositive orders, it is observed from the record that this matter was to be heard alongside a prior matter, **ELC CASE NO E054 OF 2022**. The circumstances leading to the filing of a subsequent suit (this matter), despite the existence of a prior matter involving the same parties and likely the same subject matter, are unclear. In the circumstances, this matter is probably *sub judice*. Accordingly, and to avoid issuing conflicting decisions and embarrassing the court, it is necessary that the judgment in **ELC CASE NO E054 OF 2022**, which is ripe for judgment, be rendered before further directions are issued in this matter. Consequently, and in the end, this court allows the notice of motion dated 23 July 2025 by granting the following final dispositive orders: -

***a) That the entire court orders of 24 March 2025 are hereby set aside, and this matter is reinstated for hearing on the merits.***

***b) That further directions for the hearing of this matter shall be issued after the judgment in ELC CASE NO E054 OF 2022 is rendered.***

***c) That mention date shall be issued.***

It is so ordered.

**Delivered and Dated at Machakos this 12<sup>th</sup> day of May, 2026.**

**HON. A. Y. KOROSS  
JUDGE  
12.05.2026**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant

Mr. Kivuti for applicant.

Mr. Momanyi for Mr Oguttu for 1<sup>st</sup> and 2<sup>nd</sup> respondent.

ORIGINAL