



REPUBLIC OF KENYA



**Mwangoni & 2 others v Enterprises & 7 others (Environment and Land
Case 4 of 2017) [2025] KEELC 5482 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 4 OF 2017**

YM ANGIMA, J

JULY 24, 2025

BETWEEN

**MBEYU MWANDAZA MWANGONI 1ST PLAINTIFF
ELIAS KIMBA NYALE 2ND PLAINTIFF
TUNJE MUNGA TUNJE 3RD PLAINTIFF**

AND

**SHIVA ENTERPRISES 1ST DEFENDANT
NJUWANGU HOLDINGS LIMITED 2ND DEFENDANT
KAMU AGENCIES LIMITED 3RD DEFENDANT
PATRICK NJOROGE WACHIRA 4TH DEFENDANT
LAWRENCE MWANGI WAMUGU 5TH DEFENDANT
THE LAND REGISTRAR MOMBASA 6TH DEFENDANT
NATIONAL LAND COMMISSION 7TH DEFENDANT
SEA VIEW PROPERTIES LTD 8TH DEFENDANT**

RULING

A. Introduction

1. On 04.02.2025, when the suit came up for hearing, Ms. Ariando appeared holding brief for Mr. Ratemo for the 1st plaintiff whereas the 2nd and 3rd plaintiffs were absent. Ms. Ariando sought an adjournment on the ground of lack of service. The court denied the 1st plaintiff's application for adjournment while noting that the 1st plaintiff had not complied with the court's directive made on 28.10.2024 to serve the 3rd, 7th and 8th defendants. After the call over Mr. Ratemo, counsel for the 1st



plaintiff, informed the court that the 1st plaintiff was withdrawing the suit against the 3rd, 7th, and 8th defendants as they were unable to effect service. The court proceeded to mark the suit against the 3rd, 7th and 8th defendants as withdrawn with no order as to costs. Mr. Ratemo informed the court that he had no further evidence to tender since the 1st plaintiff was absent. The court proceeded to give the following orders:

- a. In view of the fact that the 1st plaintiff had not been cross-examined by the 2nd & 4th defendants, and she is not available for cross-examination today the 1st plaintiff's suit is hereby dismissed with costs to the 1st, 2nd and 4th defendants for want of prosecution under the inherent power of the court.
- b. The 2nd and 3rd plaintiffs' suit is similarly dismissed for want of prosecution with costs to the 1st, 2nd and 4th defendants.

B. 1st Plaintiff's Application

2. By a notice of motion dated 14.02.2025 brought pursuant to Order 12 Rule 7 of the Civil Procedure Rules (Rules), Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the 1st plaintiff sought to review, set aside or vary the orders made on 04.02.2025 dismissing the suit.
3. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Mbeyu Mwandaza Mwangoni on 14.02.2025. The 1st plaintiff contended that her counsel had advised her not to attend court as they had not yet effected service and intended to seek an adjournment due to the trial judge's transfer. She maintained that all counsels had been informed of the intention to seek an adjournment through a letter dated 31.01.2025. The court was urged not to penalize the 1st plaintiff for the mistake of the advocate and reinstate the suit.

C. 2nd and 3rd Plaintiffs' Application

4. By a notice of motion dated 11.04.2025 brought pursuant to Order 12 Rule 7 of the Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law, the 2nd and 3rd plaintiffs sought to review, set aside or vary the orders made on 04.02.2025 dismissing their suit.
5. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Martin Tindi the counsel for the plaintiffs on 11.04.2025. He stated that he informed the plaintiffs that the matter would not proceed after the 1st plaintiff's counsel called and informed him that he would seek an adjournment. He urged the court to reinstate the suit since the plaintiffs were still interested in pursuing their cases.

D. 1st Defendant's Response

6. The 1st defendant opposed the application vide a replying affidavit sworn by Bhupesh Harshadray Popatal Rana on 05.05.2025. He stated that several adjournments had previously been granted at the request of the plaintiffs thereby causing inordinate delay and prejudice to the defendants. He maintained that on 28.10.2024, the court halted the hearing after it emerged the plaintiffs had not served the 7th and 8th defendants, and directed them to effect service by 04.02.2025. The 1st defendant maintained that the 1st plaintiff had neither explained the failure to serve the 7th and 8th defendants nor their absence in court. Further it was contended that the non-attendance of the 2nd and 3rd plaintiffs together with their counsel was a demonstration of laxity in prosecuting the case.



E. 2nd and 4th Defendants' Response

7. The 2nd and 4th defendants opposed the application vide grounds of opposition dated 03.05.2025. It was contended that on the hearing date, none of the plaintiffs' witnesses attended court, including the counsel for the 2nd and 3rd plaintiffs and that there was no explanation for their absence on a date which had been taken by consent.

F. Directions on Submissions

8. When the applications were listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The 1st plaintiff filed submissions in support of her application on 17.05.2025. The 1st defendant filed submissions on 29.05.2025, while the 2nd and 3rd defendants filed their submissions on 10.06.2025.

G. Issues for Determination

9. The court has perused both applications, the response thereto and the material on record as well as the submissions made by all counsel. The court is of the view that the following key issues arise for determination herein:
- a. Whether the court should set aside orders of 04.02.2025 dismissing the plaintiffs' case.
 - b. Who shall bear the costs of the applications.

H. Analysis and Determination

a. Whether the court should set aside the orders of 04.02.2025 dismissing the plaintiffs' case

10. Order 12 Rule 7 of the Rules gives the court discretionary powers to reinstate a suit that has been dismissed upon such terms as may be just. The exercise of this judicial discretion is based on evidence and sound legal principles, with the burden of establishing evidence falling on the plaintiffs seeking reinstatement. In *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] KEHC 6789 (KLR) the court held,

“The decision of the court is purely a matter of discretion which as it has been said time and again should be exercised judicially on defined principles of law. The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Dancles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the



defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

11. From the court proceedings of 28.10.2024 it is evident that the 1st plaintiff requested the court to stand down their witness since they had not served the 3rd, 7th and 8th defendants. The court adjourned to 04.02.2025, ordered the plaintiffs to pay court adjournment fees, the defendants' costs of the day and directed the 1st plaintiff to serve the 3rd, 7th and 8th defendants. However, on 04.02.2025 it became apparent that no service had been effected. As a result, the 1st plaintiff sought an adjournment while the 2nd and 3rd plaintiffs were absent. The court denied the application for adjournment and dismissed the plaintiffs' suit for want of prosecution.
12. It is clear to the court that the 1st defendant's letter dated 31.01.2025, was intended to seek adjournment of the defence hearing and not the plaintiffs' case. Additionally, the 1st plaintiff's letter dated 03.02.2025, communicating the intention to adjourn the plaintiffs' case based on non-compliance with the directives of the court, is not justification for reinstating the suit. The court takes the view that Section 1A of the *Civil Procedure Act* obligates litigants and their counsel to assist the court to further the overriding objective of the Act, which is to facilitate the just expeditious, proportionate and affordable resolution of court disputes. The plaintiffs and their counsels were obliged to comply with the directions and orders of the court. They failed to comply with the orders and directives of this court that were issued on 28.10.2024.
13. The reinstatement of this suit will prejudice the defendants, especially due to the fact that the suit has been pending for 8 years now. From the court's record, the plaintiffs have been indulged by the court several times and adjournments granted at their request. In fact, the record shows that the plaintiffs were granted a last adjournment on 28.10.2024 by Hon. Justice Matheka. The court is of the view that any further indulgence of the plaintiffs will cause injustice and hardship to the defendants. In light of the foregoing circumstances, it would not be just and reasonable for the court to set aside the orders made on 04.02.2025.

b. Who shall bear the costs of the applications

14. Although the costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded the costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from this position. Accordingly, the 2nd and 4th defendants shall be awarded costs of the applications.

I. Conclusion and Disposal Order

15. The upshot of the foregoing is that the court finds and holds that 1st plaintiff's application dated 14.02.2025 and the 2nd and 3rd plaintiff's application dated 11.04.2025 are not merited. As a consequence, the court makes the following orders for the disposal thereof:
 - a. That the 1st plaintiff's application dated 14.02.2025 is hereby dismissed.
 - b. That the 2nd and 3rd plaintiffs' application dated 11.04.2025 is hereby dismissed.
 - c. The 2nd and 4th defendants are awarded costs of both applications.

Orders accordingly



RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 24TH DAY OF JULY, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

N/A for the 1st plaintiff

Mr. Tindi for the 2nd and 3rd plaintiffs

Mr. Nyaanda for the 2nd and 4th defendants

N/A for the rest of the parties.

