



**Stephen v Warima & 2 others (Environment & Land Case  
E051 of 2006) [2025] KEELC 930 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 930 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E051 OF 2006  
EC CHERONO, J  
FEBRUARY 20, 2025**

**BETWEEN**

**DAVID SISIMWO STEPHEN ..... PLAINTIFF**

**AND**

**JOHN MWAURA WARIMA ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling arises from the application dated 25/11/2024 which seeks the following orders;
  - a. That this application be certified urgent and service thereof be dispensed with in the first instance.
  - b. That this Honourable Court be pleased to set aside this honourable court made on 17/10/2008 dismissing the Plaintiff/Applicants suit and all other consequential orders thereto.
  - c. That this Honourable Court be pleased to reinstate the plaintiff/applicants suit.
  - d. That the costs of the application be in cause.
2. The application is premised on the grounds on the face of the application supported by the affidavit of the Applicant sworn on 25/11/2024.
3. The gist of the application is that Applicant commenced this suit on against the Respondent on 29/08/2006 seeking for cancellation of Land parcel No. Kimilili/kimilili/1264 and for the same to be registered in the name of one Stephen Sisimwo Baron-dcd. That the advocate in conduct of the matter failed to follow up on the case by an inadvertent error leading to a dismissal on 17/10/2008. That he had lost touch with his advocate because he was bedridden, suffering from a long-term illness. That the



suit raises weighty issues which ought to be ventilated at a full hearing. That it would be in the interest of justice if the orders sought are allowed.

4. Despite being served with the said application, the Respondents did not file any response.
5. The sole issue for determination in this application is whether there are sufficient reasons to reinstate this suit. From the record, this suit was dismissed on 17/10/2008 for want of prosecution pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, which provides as follows:
  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 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.
6. It is trite law that the power to dismiss a suit for want of prosecution is at the discretion of the court. In *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D. Popat and others & another* [2016] 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. This is what the case of *Ivita vs Kyumba* [1984] KLR 441 espoused that:

“The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the 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, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court.”
7. As to what constitutes notice under Order 17 rule 2, the court in *Kestem Company Ltd v Ndala Shop Limited & 2 others* [2018] eKLR was of the view that it did not require service of notice:

“ Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word “may give notice”.
8. From my perusal of the file, I note that on the day the suit was dismissed the court in its coram noted; 17/10/2008.  
Call over.  
Coram  
Before S.Shitubi DR



CC: Harun

N/A for the plaintiff

N/A for the Defendant

Ct Order: Dismissed for want of prosecution

\*Signed\*

Judge 26.1.09

9. From the above, it is clear to me that there was a cause-list that was published notifying the parties of the intended dismissal. Further and looking at the date of the dismissal, the same was about 2 years and 2 months from the date the suit was filed. From the record, it seems the plaint was never even served upon the defendants as there is no affidavit of service to that effect.
10. 16 years after the said dismissal, the Plaintiff/Applicant now wants to reinstate the suit on grounds that he has been unwell. It is a basic principle in law that he who alleges must prove. However, nothing has been placed before the court to show that the Plaintiff/Applicant was indeed unwell. He faults his counsel for lack of attention in prosecuting the suit. The plaintiff/Applicant having not provided any proof of illness, the allegation that he was sick remains a mere unsubstantiated allegation that cannot be a reason for failing to follow up on his case. He was simply indolent in prosecuting his case. See *Habo Agencies Limited Vs. Wilfred Odhiambo Musiingo (2020) eKLR*. Further, courts have held for the umpteenth time that cases belong to litigants and not advocates as was held by Kimaru J in *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi HCCC 397/2002* and further that the plaintiff/applicants should have followed up with their advocate.
11. I am not persuaded by the arguments by the plaintiff/applicant for his non-attendance and his failure to have this suit prosecuted since 2006 when it was filed or to file the current application sooner. A delay of 16 years without explanation in my view is inordinate and inexcusable.
12. Consequently, the said notice of motion application dated 25/11/2024, is without merit and the same is hereby dismissed in its entirety with no orders as to costs.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr Shikhu for the Plaintiff/Applicant.

Defendant/Respondent-absent.

Bett C/A.

