



**Mwaura & 30 others v Waithima & 9 others (Environment &  
Land Case E029 of 2024 & 340, 35 & 54 of 2014 (Consolidated))  
[2025] KEELC 1437 (KLR) (Environment and Land) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1437 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE E029 OF 2024 & 340, 35 & 54 OF 2014 (CONSOLIDATED)  
MC OUNDO, J  
MARCH 20, 2025**

**BETWEEN**

**AYUB NJUGUNA MWAURA ..... 1<sup>ST</sup> PLAINTIFF  
HUMPHREY NDIRANGU GICHUKI ..... 2<sup>ND</sup> PLAINTIFF  
STEPHEN NJONGE KIRURI ..... 3<sup>RD</sup> PLAINTIFF  
ANN WANJIRU ..... 4<sup>TH</sup> PLAINTIFF  
JOYCE WAMBUI IRUNGU ..... 5<sup>TH</sup> PLAINTIFF  
CHARITY WANJIRU NJUGUNA ..... 6<sup>TH</sup> PLAINTIFF  
ALEXANDER KAMAWIRA ..... 7<sup>TH</sup> PLAINTIFF  
EVANSON KAMOTHO ..... 8<sup>TH</sup> PLAINTIFF  
HUMPHREY GITHENYA WAIGWA ..... 9<sup>TH</sup> PLAINTIFF  
JAMES O. AKETCH ..... 10<sup>TH</sup> PLAINTIFF  
PERMINUS NGATIA KAMOTHO ..... 11<sup>TH</sup> PLAINTIFF  
LINUS NDUNGU KINGORI ..... 12<sup>TH</sup> PLAINTIFF  
MZEE KAMOTHO MUCHEMI ..... 13<sup>TH</sup> PLAINTIFF  
THUMBI KARUU ..... 14<sup>TH</sup> PLAINTIFF  
HUMPHREY WANGOMBE MANGURU ..... 15<sup>TH</sup> PLAINTIFF  
JOSEPH KARIMONI ..... 16<sup>TH</sup> PLAINTIFF  
MARTIN MUREITHI MUTONGU ..... 17<sup>TH</sup> PLAINTIFF**



MARGGERETE WAIRIMU WANDERE .....	18 <sup>TH</sup> PLAINTIFF
BANICE WAIRIMU NGUNJIRI .....	19 <sup>TH</sup> PLAINTIFF
THUMBI KARUU .....	20 <sup>TH</sup> PLAINTIFF
P. NGATIA KAMOTHO .....	21 <sup>ST</sup> PLAINTIFF
PATRICK KOMO .....	22 <sup>ND</sup> PLAINTIFF
HENRY LENAIRISHI .....	23 <sup>RD</sup> PLAINTIFF
NYAMBURA KOMO .....	24 <sup>TH</sup> PLAINTIFF
JACK MWAURA .....	25 <sup>TH</sup> PLAINTIFF
MOSES MURAGE .....	26 <sup>TH</sup> PLAINTIFF
JAPHETH PETER OLILO .....	27 <sup>TH</sup> PLAINTIFF
JAMES O. AKETCH .....	28 <sup>TH</sup> PLAINTIFF
CHARITY WANJIRU .....	29 <sup>TH</sup> PLAINTIFF
PATRICK KAMAWIRA .....	30 <sup>TH</sup> PLAINTIFF
JAMES MAINA NGARI .....	31 <sup>ST</sup> PLAINTIFF

**AND**

PETER WAITHIMA .....	1 <sup>ST</sup> DEFENDANT
JAMES NGUGI NJUGUNA .....	2 <sup>ND</sup> DEFENDANT
JOHN TEBERE .....	3 <sup>RD</sup> DEFENDANT
NICHOLAS GACHUNGI KIHINGO .....	4 <sup>TH</sup> DEFENDANT
MATHENGE NDERITU .....	5 <sup>TH</sup> DEFENDANT
B.O.M MBEGI JUBILEE PRIMARY SCHOOL .....	6 <sup>TH</sup> DEFENDANT
NAKURU COUNTY GOVERNMENT .....	7 <sup>TH</sup> DEFENDANT
CABINET SECRETARY, MINISTRY OF EDUCATION .....	8 <sup>TH</sup> DEFENDANT
THE HON. ATTORNEY GENERAL .....	9 <sup>TH</sup> DEFENDANT
NAIVASHA, LAND REGISTRAR .....	10 <sup>TH</sup> DEFENDANT

**RULING**

1. What is before me for determination is a Notice of Motion Application dated 21<sup>st</sup> July, 2023 brought under the provisions of Article 48, 159(2) (d) of *the Constitution* of Kenya, Order 12 Rule 7, 42, 45, 51 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the Law where the Plaintiffs herein seek for the reinstatement of the instant suit for hearing and determination. That further, the Court review and set aside Honorable Justice Mwangi Njoroge's ruling and/or decision and/or orders of 14<sup>th</sup> June, 2023.



2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by Wangari Mwangi Advocate who deponed that pursuant to a ruling of 12<sup>th</sup> April, 2023, where the court had ordered that a Further Amended Plaintiff be filed within 60 days failure to which the entire suit stood dismissed for want of prosecution, she had prepared the said Further Amended Plaintiff which was not completed and filed within the 60 days' period as she had experienced health issues related to her 7 months pregnancy.
3. That on 14<sup>th</sup> June, 2023 when the matter came up for mention or further directions, she was not in court because she was in the hospital delivering her baby. That subsequently, she had instructed a Counsel, Ms. Moturi to hold her brief and seek more time and that she had also communicated her predicament to the 1<sup>st</sup> Plaintiff's Counsel Ms Kimoriot.
4. That it had also come to her attention that the 1<sup>st</sup> Plaintiff had since suffered illness and had been hospitalized since May, 2023 where his health had continued to deteriorate hence he was unable to give her and Ms. Kimoriot instructions on his position in the matter especially on representation.
5. That due to these unavoidable circumstances she had not intentionally refused to comply with court's directions. That indeed, whereas it had only been a month since she delivered her baby, that she had filed the instant application in an effort to safeguard her clients' interest.
6. That the matter had proceeded at great strides since she took it over on the 18<sup>th</sup> October, 2022 as compared to the progress since its onset in the year 2014. That further, the court to consider the complexity of the matter considering the state of pleadings that had been drafted before and all the corrections that needed to be done in the amendments. That it was in the interest of justice that the appeal (sic) be reinstated and the time within which to hear the same be fixed.
7. That it was also in the interest of justice that the party and party bill of costs be stayed for taxation until the instant matter is heard to its logical conclusion. That allowing the application would not prejudice the Defendants in any way or cause them any damage that could not be compensated by way of costs. That the Application herein had been made without unreasonable/inordinate delay hence the same ought to be granted in the interest of equity and justice.
8. In response to the Plaintiffs' Application, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents filed a Replying Affidavit dated 8<sup>th</sup> October, 2024 sworn by Nicholas Gachungi Kihingo, the 4<sup>th</sup> Defendant/respondent herein who deponed that he was aware that the 1<sup>st</sup> Defendant/Respondent who was his village mate had passed on sometime after the dismissal of the present suit on 14<sup>th</sup> June, 2023. That the Plaintiffs' Application was an abuse of the process of court and totally lacking in merit.
9. That after some 13 acres had been set aside by the land buying company for the construction of communal primary school and secondary school, in the year 2007, the 1<sup>st</sup> Plaintiff had corruptly used his influence to sub-divide the Community land into 90 plots which he had sold to unsuspecting buyers. That the Mbegi Community had resisted illegal grabbers as they had built a primary and secondary schools that had been operational to date.
10. That nonetheless, instead of suing the school, Board of Management and the Primary School Committee, the Plaintiffs had sued the 1<sup>st</sup> to 4<sup>th</sup> Defendants who had no personal interest in the school community land. That after numerous adjournments, the court had ordered that the Board of Management of Mbegi Secondary School, the school committee Mbegi primary school and the Hon. Attorney General on behalf of the Ministry of Education be joined to the suit wherein after the Plaintiff had been indulged on several occasions to amend their pleadings.



11. The amendment of the Plaint stalled from the year 2022 up to the 14<sup>th</sup> June, 2024 when the court had found it necessary and right to dismiss the matter with costs for none compliance after which the Defendants had filed the Party to Party bill of costs dated 19<sup>th</sup> June, 2023 for taxation wherein a date had been set for 27<sup>th</sup> July, 2023. That it was the said bill of costs that had awoken the Plaintiffs from their slumber causing them to file the instant Application. That the reason that had been given for failure to comply could not hold water in lieu of a well-planned diary. That further, the 1<sup>st</sup> Plaintiff had never complied even though his advocate was not M/s Wangari but M/s Kimoriot.
12. That the indulgence that had been given to the Plaintiff in the instant matter had been abused and the court treated with contempt by the Plaintiffs who were not to expect any further indulgence of the court. That he had been forced to carry a community burden for schools he had no personal interest in except as a community leader in Begi Area of Gilgil. He thus prayed that the application dated 21<sup>st</sup> July, 2023 be dismissed with costs. That since there had been no prayer to extend the time within which to comply, reinstating a dead suit would serve no useful purpose.
13. The 5<sup>th</sup> to 10<sup>th</sup> Defendants did not participate in the instant Application.
14. The Application dated 21<sup>st</sup> July, 2023 was canvassed by way of written submissions, wherein the Plaintiffs' submissions dated 21<sup>st</sup> January, 2025 were hinged on the decided case of Bilha Nyonyo Isaac v Kembu Farm Ltd & another [2018] eKLR where the court cited the case of Shah v Mbogo & Another [1967] EA 116 to the effect that a court could reinstate a dismissed suit at its discretion which was to be exercised judiciously and fairly to avoid injustice or hardship.
15. That a court could reinstate a suit if the Applicant had reasonable grounds to do so for which they had showed that they had tried to prosecute the case as best as they could despite the challenges. That further, the Applicant had also showed that reinstating the suit would not prejudice the Defendants in as much as how not reinstating it would prejudice the Plaintiffs.
16. They placed reliance in the decided case of Mobile Kitale Service Station v Mobil Oil Kenya Limited & another [2004] eKLR to submit that whereas it was expected that suits should be heard on time and expeditiously, they left it to the court to make a determination on the application dated 21<sup>st</sup> July, 2023 and reinstate the suit by varying the orders it had issued on 14<sup>th</sup> June, 2023.

#### **2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant's Submissions.**

17. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, vide their submissions dated 29<sup>th</sup> January 2025 reiterated the content of their Replying Affidavit while maintaining that the excuses offered by the Applicant were unreasonable and could not hold water. That the main reason adduced by the Plaintiff that the counsel had been on maternity leave could not hold since the 1<sup>st</sup> Plaintiff had changed her advocate from Wangari & Co. Advocates to Kimoriot Jemator & Co. Advocates on 13<sup>th</sup> June, 2023. On the reason that the 1<sup>st</sup> Plaintiff had been unwell, their submission was that were 30 other Plaintiffs' on record and any of them could have given instructions.
18. It was thus their submission that the Application dated 21<sup>st</sup> July, 2023 was incompetent since even if the suits were to be reinstated, the timeline within which directions were to be complied with by the Plaintiffs had expired yet there was no prayer for extension of time. They placed reliance in a combination of decisions in the case of Tana Teachers' Co-operative and Credit Society Limited v Andriano Muchiri [2018] eKLR, Benard Mwiti Rintari v Isaiah Mbaabu Ruchika [2019] eKLR and Otundo (suing on his own behalf and in his personal capacity as the personal representative of the Estate of the late Agnes Ogola (Deceased) v Otundo & 2 Others [2024] KEELC 4376 (KLR) as well as



the ELC Practice Direction No. 43 contained in Kenya Gazette No. 5178 to pray that the Application dated 21<sup>st</sup> July, 2023 should be dismissed with costs.

**Determination.**

19. I have carefully perused and considered the pleadings, and the written submissions filed. I find the issue for determination herein as being whether the Plaintiff/ Applicant's suit should be reinstated.
20. I have considered the affidavit filed in support of the application and considered whether the reasons presented before me by the Applicant's Counsel for their failure to comply with the court's direction to prosecute their matter constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice.
21. I have also considered the Respondents' response and written submissions against allowing the said application to wit that the excuses offered by the Applicant were unreasonable and could not hold water.
22. It is not in dispute that the suit herein being ELC Case No. 4 of 2014 was instituted vide a Plaint dated 16<sup>th</sup> January, 2014 wherein the Plaintiffs therein had sought for a permanent order of injunction restraining the Defendants by themselves, their agents, their servants and their employees from entering into or in any way dealing with parcel of land known as Gilgil/Karunga Block 9/2040.
23. Subsequently, on the 9<sup>th</sup> February 2018 after there had been a consolidation of ELC 35/2014, ELC 54/2014 and ELC 4/2014, parties were directed to comply with Order 11 of the Civil Procedure Rules within 30 days and a hearing scheduled for the 20<sup>th</sup> June 2018 on which date, the matter did not proceed for hearing as the Defendants had introduced new documents at the last minute. The hearing was rescheduled for the 15<sup>th</sup> November 2018, on which day the Defendant sought for an adjournment as counsel was unwell. The hearing was rescheduled again for the 6<sup>th</sup> of June 2019 on which day the court did not sit and the matter was rescheduled for a mention for the 25<sup>th</sup> November 2019 since the court diary was full. On the said date, the matter was scheduled for hearing for the 25<sup>th</sup> May 2020.
24. There were no proceedings on the said day but on the 4<sup>th</sup> of November 2020 when the matter came up for mention, a hearing was scheduled for the 16<sup>th</sup> March 2021 on which day, Counsel for the Plaintiffs sought that the matter be mentioned for a possible consolidation with file No. ELC 340 of 2014. The application was allowed and a mention was scheduled for the 26<sup>th</sup> April 2021. Again no proceedings were recorded on that date but on the 12<sup>th</sup> May 2021, the Plaintiff's Counsel sought for a mention date to consolidate this matter with file No. ELC 340 of 2014 where the matter was set for mention for the 8<sup>th</sup> of June 2021 on which day, the Plaintiffs' Counsel abandoned the idea of consolidation and sought for hearing date, for which the matter was set for hearing for the 19<sup>th</sup> January 2022. Come the 19<sup>th</sup> January 2022, The court was informed of the illness of the lead witness in the Plaintiff's case wherein an adjournment was sought and granted and the matter was rescheduled for hearing for the 11<sup>th</sup> May 2022. The proceedings indicate that on the 10<sup>th</sup> of February 2022, the matter was mentioned where Counsel for the Plaintiff sought that it be consolidated with file No. ELC 340 of 2014 and the Court obliged him but on the day scheduled for hearing, Counsel for the Plaintiff informed the court that he was ready to proceed with only the Plaintiff in ELC 35/2014, the defence Counsel raised an objection as to the locus of the Defendants sued wherein directions were taken that the Plaint be amended to join new Defendants and thereafter it be served on all the Defendants within 30 days. The new Defendants were granted leave to file their defenses if need be within 60 days. The matter was then rescheduled for mention to confirm compliance and for further directions for the 28<sup>th</sup> September 2020 (sic)



25. On the 28<sup>th</sup> September 2022, the Plaintiff's Counsel sought for 14 days to file an application to cease acting wherein the matter was slated for mention for the 18<sup>th</sup> October 2022 on which day a new Counsel came on record for the Plaintiffs and sought for 14 days to amend the Plaint having received new documents. The matter was slated for mention for the 9<sup>th</sup> November 2022 on which day, the Plaintiff's Counsel sought for more time to file a comprehensive list of documents and they had been granted 14 days to do so and a mention date was slated for the 28<sup>th</sup> (sic) November 2022.
26. On the 24<sup>th</sup> November 2022 the court noted that the amended Plaint was not filed wherein it fixed the matter for a further mentioned for the 26<sup>th</sup> January 2023 for directions on which day, directions had been issued that the amended Plaint be served within 7 days. The matter was then slated for mention for the 15<sup>th</sup> February 2023. On the side date the court had been informed that there had been a preliminary objection raised in regard to the amended Plaint. Directions were subsequently taken in regard to the disposal of the said application wherein vide a ruling dated the 12<sup>th</sup> April 2023, the court declined to uphold the preliminary objection raised and the matter was set for mention for the 14<sup>th</sup> June 2023. When the matter came up for mention on 14<sup>th</sup> June, 2023 for further directions, the Plaintiffs had not complied hence the suit was dismissed for non-compliance with the court's orders of 12<sup>th</sup> April, 2023.
27. From the chronology of the matter it is clear that since 2014 when the suit was filed up to the year 2023 when the same was dismissed for non-compliance with the court's orders, it has taken roughly nine years without prosecution of the matter.
28. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide as follows;
 

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
29. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of *Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd* [2014] eKLR where the court citing relevant cases on the issue held inter alia: -
 

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd.*) the discretion 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs. Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.”
30. The Court of Appeal for Eastern Africa in the case of *Mbogo vs. Shah* [1968] EA 93, held that for the court to set aside a judgment/order, it must be satisfied about one of the two things namely: -
  - a. either that the Defendant was not properly served with summons; or
  - b. that the Defendant failed to appear in court at the hearing due to sufficient cause.
31. The Supreme Court of India in the case of *Parimal vs Veena* 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed that: -
 

“Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary



to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

32. In the instant case, did the failure by the Applicant to prosecute their suit constitute sufficient cause or was it meant to deliberately delay the cause of justice?
33. In this case, the court has been informed that counsel did not intentionally refuse to comply with court's directions but that it had been due to health issues that she had been unable to comply in time. That indeed, it had only been one month after the suit had been dismissed within which period of time after she had delivered her baby, that she had filed the instant application in an effort to safeguard her clients' interest.
34. Whereas the right to a hearing, has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law and that the overriding objective for the courts in dispensing justice must be to ensure expeditious, fair, and just proportionate and economic disposal of cases, in this matter, the record reveals that it was not the first time that the Applicants were guilty of indolence, I find that the present Application is an afterthought, a waste of judicial time and an abuse of the court process and is also intended to vex the Respondents and put them to expense. The Respondents are being gravely prejudiced by the Applicant and therefore there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice for it is not powerless to grant relief, when the ends of justice and equity so demand.
35. The Applicants' application seeking to set aside the orders of the court that had dismissed their suit so that the same could be reinstated for hearing fails there having been no sufficient cause demonstrated by the Applicants. In the end, I find that the Application dated 21<sup>st</sup> July, 2023 has no merit and the same is dismissed with costs.

**DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 20<sup>TH</sup> DAY OF MARCH 2025**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

