



**Republic v Deputy County Commissioner, Kilungu Sub-County & another; Joseph (Exparte Applicant); Musau (Interested Party) (Environment and Land Miscellaneous Application E006 of 2023) [2025] KEELC 4119 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4119 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2023**  
**EO OBAGA, J**  
**MAY 30, 2025**  
**IN THE MATTER OF THE LAND ADJUDICATION ACT**  
**-AND-**  
**IN THE MATTER OF KYAMUOSO ADJUDICATION SECTION**  
**-AND-**  
**IN THE MATTER OF AN APPLICATION FOR ORDERS OF**  
**MANDAMUS, CERTIORARI AND PROHIBITION**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DEPUTY COUNTY COMMISSIONER, KILUNGU SUB-COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**KYAMUOSO ADJUDICATION SECTION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**STEPHEN KIOKO JOSEPH ..... EXPARTE APPLICANT**

**AND**

**EZEKIEL MWAKA MUSAU ..... INTERESTED PARTY**



## RULING

1. The Plaintiffs/Applicants filed the Notice of Motion dated 16<sup>th</sup> October, 2022 under the provisions of Article 159 of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Order 51 Rule 1 of the Civil Procedure Rules. The following orders have been sought:
  1. [spent]
  2. That the Honourable Court be pleased to vary and/or review and/or set aside the orders issued on 13<sup>th</sup> June, 2024 in this matter and do unconditionally reinstate the Notice of Motion application dated 27<sup>th</sup> February, 2024 for hearing and determination on merit.
  3. That costs of this application be in the cause.
2. The application is premised on the supporting affidavit sworn by Stephen Kioko Joseph. The Applicant averred that he filed the Notice of Motion dated 27<sup>th</sup> February, 2024 seeking leave to commence judicial review proceedings and that the same was scheduled for hearing on 13<sup>th</sup> June, 2024. The Applicant averred that he was acting in person at the time and was advised to access the online court session vide the link <https://www.shorturl.at/brGNQ> at least 15 minutes before 9.00 am.
3. The Applicant averred that he was not admitted onto the online court session until at around 2.00 pm when his mobile phone power was exhausted and that there was no electricity in Kilungu due to bad weather. He further averred that he travelled to court on 10<sup>th</sup> July, 2024 only to be informed that the matter was dismissed on 13<sup>th</sup> June, 2024.
4. The Applicant contended that he will be gravely prejudiced as a result of the court order as he and his family stand to lose their ancestral land. He added that the Respondents will not be prejudiced as they will have an opportunity to defend the application in court. He went on to state that the application had been brought timeously and that it is meritorious since his non-attendance was caused by factors beyond his control.
5. Opposing the application, the Interested Party filed a replying affidavit sworn by himself on 28<sup>th</sup> August, 2024. He contended that he had never been served with the dismissed application dated 27<sup>th</sup> February, 2024 and only learnt about it after being served with the instant application. He averred that the Ex-parte Applicant had filed a similar suit to the instant one vide Makueni ELC No. E022 of 2021 where similar prayers have been sought.
6. The Interested Party contended that reinstating the application will lead to parallel litigation which might lead to conflicting orders. Adding that it would be prejudicial to him to defend multiple proceedings over a similar claim, the Interested Party averred that it would also be financially frustrating. He urged the court to dismiss the application with costs.
7. The application was canvassed by way of written submissions.
8. In the Applicant's submissions dated 7<sup>th</sup> February, 2025, Counsel identified the following issues for determination: -
  - a. Whether there was reasonable reason for the delay;
  - b. Whether prejudice will be suffered by the Respondent if the application is granted; and
  - c. Whether there was a delay in bringing the application.



9. Counsel reiterated the contents of the Applicant's supporting affidavit to underpin his submission that the reason for non-attendance had been explained. Submitting on the next issue, Counsel contended that the Applicant will suffer great prejudice on being denied a chance to be heard and their claim determined on the merits. That the Applicant will also lose the land which is their inheritance if the application is disallowed. It was submitted that if the suit is determined on the merits, then both parties will have a chance to argue their respective cases.
10. Submitting on the third issue, Counsel contended that the application herein was brought within a reasonable time after dismissal of the suit. Counsel added that the Applicant is willing to abide by the conditions that may be set by this court so that their case may be heard on the merits. It was urged that the application ought to be allowed as prayed. Reliance was placed on the following cases: -
  - i. Esther Wamaitha Njihia & 2 others v Safaricom Limited [2014] eKLR
  - ii. Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR
11. In the Interested Party's submissions dated 17<sup>th</sup> February, 2025, Counsel reiterated that the Ex-parte Applicant failed to serve the Interested Party with the application dated 27<sup>th</sup> February, 2024. That the failure to serve violated the principles of natural justice as enshrined in Article 50(1) of *the Constitution*.
12. Counsel contended that reinstating the dismissed application would subject the Interested Party to unnecessary and costly litigation as the subject matter herein is similar to that in Makueni ELC E022 of 2021 filed by the Applicant's father and brother. Counsel submitted that Sections 6 of the *Civil Procedure Act* prohibits multiple proceedings where the issues raised therein and the parties are similar.
13. Urging the court to dismiss the application with costs, Counsel submitted that it is devoid of merit and an abuse of the court process.
14. Having considered the application, the primary issues for determination are whether the Applicants have demonstrated merit in the application for setting aside of the order of 13<sup>th</sup> June, 2024 and subsequent thereto, issue an order for reinstatement of the said application.
15. It is not in dispute that the chamber summons seeking leave to institute judicial review proceedings was filed by the Ex-parte Applicant on 14<sup>th</sup> April, 2023. The Ex-parte Applicant then went ahead and filed the Notice of Motion dated 27<sup>th</sup> February, 2024 seeking inter alia leave to commence judicial review proceedings. When the matter came up for hearing on 13<sup>th</sup> June, 2024, none of the parties was present and the proceedings herein were dismissed.
16. This court is vested with authority to dismiss a suit for non-attendance on the part of either party under the provisions of Order 12 Rule 1 of the Civil Procedure Rules. Additionally, this court has the discretion to set aside such an order for dismissal in accordance with the provisions of Order 12 Rule 7 of the Civil Procedure Rules which outlines 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.'
17. Being a discretionary power, the Court of Appeal observed as follows in CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR with regard to the setting aside of ex-parte orders: -
 

'Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer



injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”

18. The overriding objective under the *Civil Procedure Act* is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The Applicant has invoked the discretion of this Court under Section 3A which binds this Court to promote the ends of justice in civil litigation.
19. In his explanation for non-attendance on 13/06/2024 when the matter was set down for hearing, the Applicant attributed it to technical challenges in logging in to the online platform of the court. The Applicant also expressed his desire and willingness to prosecute this matter to its logical conclusion in his supporting affidavit.
20. In the case of *Ivita v Kyumbu* [1975] eKLR, Z.R. Chesoni J. held as follows: -

“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... 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.”
21. In *Essanji & Another v Solanki* [1968] EA 218 it was observed as follows: -

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that error and lapses should not necessarily debar a litigant from the pursuit of his rights.”
22. In *Shah v Mbogo* [1967] EA 116 at 123B Harris J, judiciously held as follows:-

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
23. In the end, the Applicant’s explanation for non-attendance on his part when the matter was dismissed is reasonable. He has therefore demonstrated merit in the application. Consequently, I allow the application as prayed.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MAY, 2025.**

**HON. E. O. OBAGA**

**JUDGE**

In The Presence Of:

Ms. Mwikali for Mr. Mulongo for Interested Party.



Mr. Hassan for exparte Applicant.

Court assistant – Steve Musyoki

