



REPUBLIC OF KENYA



KENYA LAW
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**Choge v Choge (Environment and Land Miscellaneous Application
E011 of 2023) [2025] KEELC 1099 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2023**

LA OMOLLO, J

MARCH 6, 2025

BETWEEN

FRED KIPKIRUI CHOGE APPLICANT

AND

SAMMY CHOGE RESPONDENT

RULING

1. This ruling is in respect of the Applicant's Notice of Motion application dated 11th January, 2024. The application is expressed to be brought under Order 12 rule 7 & Order 51 Rule 1 and 4 of the Civil Procedure Rules, Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* and Article 159 of the *Constitution* of Kenya 2010.
2. The Applicant seeks the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to set aside debito justitiae the orders of this Honourable Court issued on the 25th January 2024 and more specifically the order dismissing the Applicant's application dated 14th December 2022 for want of prosecution.
 - c. That this Honourable Court be pleased to order for the reinstatement of the application dated 14th December, 2023 for the same to be heard on its merits.
 - d. That necessary directions do issue.
 - e. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit sworn by Fred Kipkirui Choge on 11th July, 2024.



Factual Background.

4. The Applicant commenced the present proceedings vide the Notice of Motion application dated 14th December, 2022. The Applicant sought the following orders;
 - a. That this matter be and is hereby certified as of utmost urgency and service be dispensed with in the first instance.
 - b. That there be an order of stay of execution of the judgement delivered on 10th August, 2022 in Kericho CMELC No. 13 2018; Fred Kipkirui Choge versus Sammy Choge and the subsequent decree and or any other order in execution thereto pending the hearing of this application inter partes.
 - c. That there be an order of stay of execution of the judgement delivered on 10th August, 2022 in Kericho CMELC No. 13 2018; Fred Kipkirui Choge versus Sammy Choge and the subsequent decree and or any other order in execution thereto pending the hearing of the intended appeal.
 - d. That the Honourable Court be pleased to extend time to allow the Applicant file his appeal out of time.
 - e. That costs of this application be provided for.
5. In response to the application, the Respondent filed a Replying Affidavit sworn on 18th April, 2023 and also filed a Preliminary Objection dated 18th April, 2023.
6. The grounds on the face of the preliminary objection are as follows;
 - a. That the Advocate for the Applicant has not complied with the mandatory requirements of Order 9 Rule 9 of the Civil Procedure Rules, which provides that an Advocate who has not appeared in a case before judgement is delivered shall not be entitled to appear for any party in the same case without first obtaining the leave of the Court.
 - b. That the Plaintiff's Advocate did not seek the Court's leave to come on record after judgement was delivered on 10th August, 2022.
 - c. That the Applicant's Advocates only filed a consent for change of advocates, however the same was not effected by Court order to allow the Advocate to come on record.
 - d. That therefore the appearance of the Advocate for the Plaintiff is irregular and unlawful and should be struck out.
7. In respect of the application and the Preliminary objection, on 25th January, 2024, the court made a ruling as follows;

“The mode of hearing of both the Application and Preliminary Objection having been accepted by the parties, and there having been no compliance to prosecute the same, I am persuaded to dismiss both the main motion dated the 14th December, 2022 and the Preliminary Objection dated the 18th April, 2023, which I now do, with no costs.”
8. The application under consideration first came up for hearing on 12th July, 2024 when the Court directed that it be served upon the Respondent.
9. On 17th September, 2024 the Court gave directions that the application be heard by way of written submissions.



10. On 17th October, 2024, the application was mentioned to confirm filing of submissions and was then reserved for ruling.

The Applicant's Contention.

11. The Applicant contends that sometime in April 2018, he filed Kericho CM ELC case No. 13 of 2018 seeking a permanent injunction against the Respondent who had allegedly encroached onto his land parcel No. Kericho/Cheseon/Block 11(Sitian) 19 and began developing it.
12. The Applicant also contends that the Learned Trial Magistrate before whom the matter was placed did not hear all his witnesses but he instead dismissed his claim on 10th August, 2022.
13. The Applicant further contends that he was informed that judgment in the matter had been delivered late in the day and so he filed the miscellaneous application dated 14th December, 2022 seeking for leave to file his appeal out of time.
14. It is the Applicant's contention that he has been informed by his advocates on record that on 27th April, 2023 the Court gave directions that the miscellaneous application would be heard by way of written submissions.
15. It is also the Applicant's contention that he has been informed by his advocates on record that the Court delivered a ruling on 25th January, 2024 dismissing his application dated 14th December, 2022 for want of prosecution.
16. It is further the Applicant's contention that the Court held that the application had not been prosecuted in line with the directions issued on 27th April, 2023 to the effect that it was to be canvassed by way of written submissions.
17. The Applicant contends that his former advocates on record informed him that after directions on submissions were given, they were unable to trace the Court file to enable them file submissions.
18. The Applicant also contends that neither him nor his former Advocates on record were informed of the ruling that was delivered on 14th January, 2024.
19. The Applicant further contends that he became ill and was bed ridden and he was therefore unable to follow up on the progress of the application from his previous Advocates on record.
20. It is the Applicant's contention that the miscellaneous application is not frivolous as he was seeking to be granted leave to file an appeal out of time against the judgement of the Learned trial Magistrate who had found that the Respondent was the lawful owner of land parcel No. Kericho/Cheseon/Block 11(Sitian)19 in disregard to the evidence adduced.
21. It is also the Applicant's contention that the suit parcel is his only source of livelihood as he has done substantive developments thereon including constructing a permanent fence, house and other structures. He adds that he is likely to be declared destitute as a consequence of the said orders and lose all his investments without being granted an opportunity to be heard.
22. It is further the Applicant's contention that he lives on the suit property and if the orders sought are not granted, the Respondent may evict him from the land.
23. He contends that the mistakes of his previous Advocates on record who failed to file submissions should not be visited upon him as he is an innocent litigant who does not understand the Court process.



24. He also contends that he together with his current advocates on record are ready to canvass the application in any way as the Court may direct.
25. He further contends that unless the orders sought are granted, he stands to suffer injustice and he shall be condemned unheard.
26. It is his contention that the application has been filed without unreasonable delay and that the delay in filing the application after the ruling was delivered was occasioned by his sickness and his previous Advocate who did not update him on the progress of the case.
27. It is also his contention that his application ought to be granted in the interest of equity or justice and that it would not be prejudicial in any way to the Respondent.
28. He ends his deposition by stating that the wheels of justice dictate that each party must at all times be granted an opportunity to be heard and that it is only in exceptional circumstances that party's a case can be closed.

Respondent's Response.

29. In response to the Applicant's application, the Respondent filed a Replying Affidavit sworn on 8th August, 2024.
30. He deposes that the rules that provide timelines for performance of an act are the same rules that the Court applies in exercising its discretion to extend time within which to comply.
31. He also deposes that it is more just if litigation is brought to an end after all the parties have been heard on merit and substantive justice administered.
32. He further deposes that the allegations that the file was missing in the registry are frivolous as counsel only needed to file his submissions electronically.
33. It is his deposition that the Applicant has not given a plausible or cogent reason for not filing the submissions on time and that sickness of a client cannot prevent Counsel from filing submissions.
34. It is also his deposition that the overriding objective is not aimed at giving justice to one party at the expense of the other. The ends of justice must be met for all the parties involved and for those who stand to be affected by a matter.
35. It is further his deposition that the Applicant has not demonstrated that he will suffer substantial loss should the orders sought not be granted. He adds that the Applicant has not sworn an affidavit to show what loss he will suffer.
36. He deposes that it is a principle of law that material particulars of loss be placed before the Court for it to conclude that the Applicant is at risk of suffering substantial loss.
37. He also deposes that it is not merely enough for the Applicant to state that he will suffer loss as he must prove specific details and particulars. Where no pecuniary loss is shown to the satisfaction of the Court, stay should not be granted.
38. He further deposes that the ruling was delivered on 25th January, 2024 and five months lapsed before the Applicant filed the application under consideration. No sufficient reason for the delay has been given.
39. It is his deposition that the Applicant has not shown sufficient cause and reason for the application to be reinstated.



40. He ends his deposition by stating that the Applicant's application was made in bad faith and was meant to deny him the fruits of his judgement.

Issues for Determination.

41. The Applicant filed his submissions on 23rd September, 2024 while the Respondent filed his submissions on 25th September, 2024.

42. The Applicant in his submissions submits on the following issue; Whether the Applicant is deserving of exercise of this Honourable Court's discretion to reinstate suit. (sic)

43. The Applicant relies on Order 12 Rule 7 & Order 51 Rule 15 of the Civil Procedure Rules, the judicial decision of Mbogo &

another vs Shah (1968) 1EA 93 and submits that he is willing and ready to pursue the matter to its logical conclusion as the failure to file the submissions as directed by the Court was occasioned by his former counsel on record who failed to file the submissions on time.

44. He reiterates that he was unwell and that the mistake of his counsel should not be visited upon him. He submits that had he been in good health, he would have been in a position to actively follow up on the proceedings of his case.

45. He relies on the judicial decision of Mureithi Charles & another v Jacob Atima Nyagesuka [2022] eKLR, reiterates his averments in his supporting affidavit and urges the Court to set aside the ruling delivered on 25th January, 2024 and reinstate his application dated 14th December, 2023.

46. The Respondent submits on the following issues;

- a. Whether the Applicant has established sufficient grounds for reinstatement.
- b. Whether the Applicant has demonstrated sufficient cause for an extension of time.
- c. Whether the Applicant has provided an adequate explanation for the inordinate delay.
- d. Whether the Applicant has demonstrated substantial loss if the application is not reinstated.
- e. Whether the Applicant's application was made in bad faith and amounts to an abuse of the Court process.

47. With regard to the first issue, the Respondent relies on the judicial decision of Bilha Ngonyo Isaac v Kembu Farm Ltd & another [2018] eKLR and submits that reinstatement is not automatic as it is subject to the discretion of the Court.

48. The Respondent also relies on the judicial decision of CFC Stanbic Limited v John Maina Githaiga & another [2013] eKLR and submits that the Applicant failed to provide sufficient reasons for reinstatement.

49. The Respondent also submits that the Applicant's contention that he was unwell is not compelling as his Advocates on record had ample opportunity to comply with the orders of the Court.

50. The Respondent reiterates that the application under consideration was filed five months after the ruling was delivered which delay was inordinate and unexplained. He relies on Rajesh Rughani v Fifty Investments Ltd & another [2016] eKLR in support of his submissions.

51. It is the Respondent's submissions that reinstatement will only prolong the present litigation to his detriment and he relies on Ivita v Kyumbu [1984] KLR 441 in support of his submissions.



52. With regard to the second issue, the Respondent relies on the judicial decisions of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR, Andrew Kiplagat Chamaringo v Paul Kipkorir Kibet [2018] eKLR and submits that the Applicant has not offered a satisfactory reason as to why he failed to comply with the Court's timelines and neither has he demonstrated that the delay was beyond his control.
53. With regard to the third issue, the Respondent reiterates that the Applicant did not give a plausible reason for the delay and relies on Sections 1A & 1B of the Civil Procedure Act and the judicial decision of Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR in support of his submissions.
54. With regard to the fourth issue, the Respondent relies on the judicial decision of Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR and submits that despite the Applicant alleging loss, no particulars of loss have been provided.
55. With regard to the fifth issue, the Respondent relies on Kenya Wildlife Service v James Mutembei [2019] eKLR and submits that the Applicant's conduct has demonstrated a clear pattern of disregard for Court orders and the present application is a tactic to delay justice and prolong litigation.
56. The Respondent concludes his submissions by urging the Court to dismiss the Applicant's application dated 11th July, 2024 with costs.

Analysis and Determination.

57. I have considered the application, the response thereto and the rival submissions.
58. It is my view that the following issues arise for determination;
 - a. Whether the orders issued on 25th January, 2024 should be set aside and the application dated 14th December, 2022 reinstated.
 - b. Who should bear costs of the application.

A. Whether the orders issued on 25th January, 2024 should be set aside and the application dated 14th December, 2022 reinstated.

59. The Applicant contends that he filed the application dated 14th December, 2022 seeking extension of time to file an appeal.
60. The Applicant also contends that when the said application came up for hearing the Court issued directions that it be heard by way of written submissions.
61. It is the Applicant's contention that his former Advocates on record were unable to trace the file in order to file the submissions as the file was missing in the Court registry.
62. It is also the Applicant's contention that he was unwell and was not able to follow up on the progress of the said application.
63. He contends that he was later informed that his application was dismissed for want of prosecution for failure to file written submissions and he now seeks that the said order be set aside and his application reinstated.
64. In response the Respondent contends that the allegations that the file was missing in the registry are frivolous as the submissions were to be filed electronically.



65. The Respondent also contends that sickness of a client does not prevent counsel from filing submissions and therefore the Applicant has not shown sufficient cause for the application to be reinstated.
66. A perusal of the Court record shows that on 27th April, 2023 the Court issued the following directions;
- “Leave is granted to the Applicant to file and serve their supplementary affidavit in response to the Replying Affidavit and the Preliminary Objection within seven days as prayed. It is directed that the application dated 14th December, 2022 as well as the Preliminary Objection therein after shall be canvassed by way of written submissions which shall be filed within twenty-one days upon service of the supplementary affidavit. The matter shall now be mentioned to confirm compliance and to fix a date for ruling on the 19th July, 2023.”
67. On 19th July, 2023 Counsel for the Applicant addressed the Court as follows;
- “The matter is for mention to confirm whether the Applicant has responded to the Preliminary Objection dated 18th July, 2023. We filed a response dated 19th July, 2023. We have not filed submissions. We shall not file submissions as we have stated everything. We can now take a date for ruling”
68. The Court then stated as follows;
- “Ruling to be delivered on the 21st December, 2023.”
69. There are no proceedings on the Court record for 21st December, 2023. The Court in its ruling delivered on 25th January, 2024 held as follows;
- “14. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the Court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the Court are deemed as parties who have failed to prosecute their application and therefore that application is liable for dismissal. The filing of submissions having been ordered, the failure by the parties herein as Applicants (both in the main application and Grounds of Opposition herein) to exercise the leave granted to file written submissions clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on their part in the prosecution of the matter...
- The mode of hearing of both the Application and Preliminary Objection having been accepted by the parties, and there having been no compliance to prosecute the same, I am persuaded to dismiss both the main motion dated the 14th December, 2022 and the Preliminary Objection dated the 18th April, 2023, which I now do, with no costs.”

70. From the Court record it is evident that directions were issued on 27th April, 2023 that the application dated 14th December, 2022 was to be heard by way of written submissions.

71. The Court record also shows that on 26th October, 2023 Counsel for the Applicant informed the Court that that he would not be filing any submissions. This might have escaped the attention of the Court.



72. The Applicant’s argument that his previous Counsel on record was unable to file submissions because the file was missing is far from the truth. It is evident that he opted not to file submissions.
73. Nevertheless, I invoke the provision of Section 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of the *Constitution* of Kenya to cure this oversight on the part of the Court.
74. Section 1A of the *Civil Procedure Act* provides as follows;
- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”
75. Section 1B of the *Civil Procedure Act* provides as follows;
- “For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”
76. Section 3A of the *Civil Procedure Act* provides as follows;
- “Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”
77. Having addressed the lapse on the part of this Court, I must now deal with the merits of this application.
78. Order 12 Rule 1 of the Civil Procedure Rules provides as follows;
- “1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”



79. Order 12 Rule 7 of the Civil Procedure Rules provides as follows on setting aside dismissal orders issued under Order 12 of the Civil Procedure Rules;

“7. 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.”

80. In the judicial decision of *Dennis Odhiambo v Elius Njoka & another* [2021] eKLR, the Court while considering whether to reinstate an application that had been dismissed for want of prosecution observed as follows;

“17. The general principles governing applications like the one at hand are anchored in the realm of judicial discretion. However, I find it relevant to invoke the provisions of Section 1A(1) of the *Civil Procedure Act* which provides for the overriding objective of the court so as to facilitate the just, expeditious, proportionate and affordable resolution of disputes in court. A party in civil proceedings or an advocate for such a party is under a duty in accordance to the Act, to assist the court to further the overriding objective by participating in the processes of the court and to complying with the directions and orders of the court as directed. The foregoing discussion is in tandem with the spirit under Article 159 of the *Constitution*, which guides the courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.” (Emphasis mine)

81. In *HAM v SOS* [2021] eKLR the Court observed as follows;

“9. In an application for reinstatement of a dismissed suit or application, an Applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice.” (Emphasis mine)

82. Also, in *Joswa Kenyatta v Civicon Limited* [2020] eKLR, the Learned Judge observed as follows:

17. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.” (emphasis added)

18. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot



be a straight-jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

19. The Supreme Court of India in Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011) observed that:

“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fides 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...(Emphasis mine)”
83. It is therefore my view that the Applicant has shown sufficient cause to warrant the exercise of this court’s discretion in his favour, and the orders of this court issued on 25th January, 2024 are hereby set aside. This Court has also acknowledged that a mistake was made in penalizing the Applicant for not filing submissions and consequently dismissing his application dated 14th December, 2022 while the record shows that he elected not to file any submissions.
84. The other limb of the Respondent’s opposition to the Application is that the Applicant has not shown that he will suffer substantial loss and further that there was delay in filing the Application.
85. The Applicant, on the other hand, submits that his previous Advocates on record did not inform him that the ruling had been delivered and that at that time he was unwell.
86. The ruling the Applicant seeks to set aside was delivered on 25th January, 2024 while the application under consideration was filed on 11th July, 2024 five months after the ruling was delivered.
87. From the Court record, it is clear that on 26th October, 2023 the Court gave the date 21st December, 2023 as the date for the ruling on the application.
88. A perusal of the Court record shows that the ruling was delivered on 25th January, 2024. There are no proceedings for 21st December, 2023.
89. A further perusal of the Court record shows that the change in dates for the delivery of the ruling was not communicated to the parties even though counsel for the Respondent was present when the ruling was delivered on 25th January, 2024.
90. It is therefore plausible that the Applicant was not aware that the ruling had been delivered. Further, the Applicant has attached to his affidavit in support of the application copies of medical documents issued on various dates in the years 2019, 2021 and 2023 that show that he was unwell.
91. In Wachira Karani -vs- Bildad Wachira Civil Suit No. 101 of 2011 (2016) eKLR as was cited in Robert Kimani Ndungú v Kenya Deposit Insurane (sic) Corporation (Being sued in its capacity as the receiver manager of Chase Bank Limited (In Receivership) [2022] eKLR held as follows;

“Court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of natural justice.” (Emphasis mine)
92. I also note that the Respondent has extensively submitted on whether the Applicant has demonstrated that he will suffer loss if this application is not allowed. The application under consideration only seeks setting aside of the orders issued on 25th January, 2024 and the reinstatement of the application dated 14th December, 2022. The application of 14th December, 2022 seeks orders of extension of time to file



an appeal. The question of proof of loss likely to be suffered is material in determining an application for stay pending appeal.

Disposition.

93. Taking the above into consideration, it is in the interest of justice that the orders issued on 25th January, 2024 be set aside. Consequently, the application dated 11th January, 2024, is hereby allowed in the following terms:

- a. The orders of this Honourable Court issued on the 25th January 2024 are hereby set aside.
- b. The application dated 14th December, 2023 is hereby reinstated for hearing.
- c. The Applicant shall forthwith set down the application dated 14th December, 2023 for hearing.
- d. Each party shall bear own cost of the application.

94. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6TH DAY OF MARCH, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Mwita for the Applicant.

Mr. Kiletyen for the Respondent.

Court Assistant; Mr. Joseph Makori.

