



**Ngoma & 2 others (Suing as Chairman, Secretary & Treasury of
Vinya wa Ng'ele Self Help Group) v Mutw'iwa (Environment & Land
Case 2 of 2018) [2025] KEELC 3623 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 2 OF 2018**

**EO OBAGA, J
MAY 8, 2025**

BETWEEN

**KINYILI NGOMA 1ST PLAINTIFF
MUTIA MUTUNGWA 2ND PLAINTIFF
KALUNDU MBAI 3RD PLAINTIFF
SUING AS CHAIRMAN, SECRETARY & TREASURY OF VINYA WA NG'ELE
SELF HELP GROUP**

AND

**BONFACE KITHEKA MUTW'IWA ALIAS KITHEKA MUTW'IWA
MUNG'ELA DEFENDANT**

RULING

1. The Plaintiffs/Applicants filed the Notice of Motion dated October 16, 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:
 - a. That an order do issue setting aside the proceedings of 23/09/2019 dismissing this case and all further orders and the suit be reinstated for hearing.
 - b. Costs of this application be provided for.
2. The application is premised on the grounds appearing on its face and the supporting affidavit sworn by Kinyili Ngoma in his capacity as the Chairman of Vinya Wa Ng'ele Self Help Group. The Applicant averred that they filed this suit on 19/03/2018. He added that they have been keenly following on the proceedings and complying with the set timelines. That upon being given a hearing date on 23/09/2019, the Applicants inadvertently captured the hearing date as 13/10/2019.



3. The Applicant averred that their advocates on record discovered that the matter had come up for hearing on 23/09/2019 and that there was no appearance on the part of the Plaintiffs and consequently, the matter was dismissed for want of prosecution. He further averred that the Plaintiffs are willing to prosecute the suit till full trial and that the court should exercise its discretion by granting the orders as prayed.
4. The Defendant/Respondent filed a response to the Plaintiff's affidavit dated 28/11/2024. He stated that the date taken by the Plaintiffs of 13/10/2019 was on a Sunday and a non-working day for courts in Kenya. He urged the court to uphold the determination of 23/09/2019.
5. The Applicant filed a supplementary affidavit sworn by himself on 6th December, 2024. He averred that the Plaintiffs have been faithfully attending court on all the dates they were required to attend save for 23/09/2019 when the matter was set down for hearing. The Applicant stated that they attended court on 14/10/2019 and not 13/10/2019 as indicated in the supporting affidavit adding that the same was a human mistake.
6. It was averred that the Plaintiffs will be highly prejudiced if the matter is not reinstated because the Defendant would be benefiting from the disposal of the Self-help group's property. That it is fair and just that the matter be reinstated in order for the court to determine the issues to full conclusion.
7. The application was canvassed by way of written submissions.
8. The Applicants' submissions were filed on 9th December, 2024. Counsel identified one issue for determination as follows: -
 - a. Whether the proceedings of 23/09/2019 and all consequential orders thereto should be set aside and suit reinstated?
9. Counsel reiterated the contents of the Applicant's supporting affidavit and supplementary affidavit to underpin his submissions. Counsel contended that Article 50 (1) of *the Constitution* provides the Applicants with the right to fair hearing and unlimited access to justice. Counsel submitted that the Plaintiffs were acting in person and that they have been keen on prosecuting the matter. That the Defendant has been absent on several occasions when the matter has been in court.
10. Counsel submitted that it is in the discretion of the court to reinstate the suit under the provisions of Order 17 Rule 2 (2) of the Civil Procedure Rules, 2010. Counsel further submitted that the court ought to be guided by the overriding objective of the court which is to render substantive justice to the parties. Reliance was placed on the following cases: -
 - i. Catherine Kigasia Kivai v Ernest Ogesi Kivai & 4 others [2021] eKLR
 - ii. Hezekiah Macharia Mwangi & another v Joseph Nganga Kihonge & others [2004] eKLR
11. 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 23/9/2019 and for reinstatement of the suit herein.
12. It is not in dispute that the suit herein was filed on 19th March, 2018 by the Plaintiffs who were acting in person. The Defendant subsequently filed a defence on 4th April, 2018. When the suit came up for hearing on 23/9/2019, the Defendant freely admitted that he had previously not been attending court and the court made a note of the said assertions. The court also noted that the hearing date had been taken by consent on 10/6/2019.



13. The record indeed confirms the averments in paragraph 4 of the Applicant's supplementary affidavit that before the suit was dismissed for non-attendance on the part of the Plaintiff, the Defendant was not attending court on previous occasions.
14. This court is vested with authority to dismiss a suit for non-attendance on the part of the Plaintiff under the provisions of Order 12 Rule 4 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.’
15. 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.”
16. 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.
17. In his explanation for non-attendance on 23/09/2019 when the matter was set down for hearing, the Applicant attributed it to his mistake in diarization when inadvertently indicated the hearing date as 14/10/2019. It is therefore plausible that the Plaintiffs were unaware of the proceedings on 23/09/2019 since they had been faithfully attending court on previous occasions. The Applicant also expressed his desire and willingness to prosecute this matter to its logical conclusion in paragraph 12 of his supporting affidavit.
18. 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.”
19. 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.”



20. 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.”

21. In the end, the Applicant’s explanation for non-attendance on their part when the matter was dismissed is reasonable. They have therefore demonstrated merit in the application. It ought to be allowed as prayed save for costs which should abide the outcome of the main suit.

It is so ordered.

HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH MAY, 2025

In the presence of:

Ms. Nyabisi for Plaintiff.

Defendant in person.

Court assistant – Steve Musyoki

