



**Mugo v Michael (Environment & Land Case 138 of 2018)  
[2025] KEELC 4239 (KLR) (4 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 138 OF 2018**

**JA MOGENI, J**

**JUNE 4, 2025**

**BETWEEN**

**JOYCE KANYUA MUGO ..... PLAINTIFF**

**AND**

**GEORGE MAINA MICHAEL ..... DEFENDANT**

**RULING**

1. Before me is an Application dated 24/11/2022, filed by the Plaintiff/Applicant pursuant to Section 1A, 1B, 3A and 63E of the Civil Procedure Act and Order 12 Rule 7 of the Civil Procedure Rules and all other enabling provisions of the law. The Applicant seeks for the following orders:-
  - a. Spent.
  - b. That the Order made on 25<sup>th</sup> April 2022 dismissing the Applicant's Application dated 24<sup>th</sup> August 2021 for want of prosecution and/or non- attendance be set aside and the suit be reinstated.
  - c. That upon hearing and determination of this Application ex-parte, this Honourable Court be pleased to admit ex-parte Chamber Summons dated 22.04.2022 as duly filed.
  - d. That costs be in the cause.
2. The Application is based on the following grounds and supported by the Supporting Affidavit sworn on the 24/11/2022 by Peter Njagi Advocate:
  - i. That Counsel dealing with the matter was indisposed and did not attend Court for reasons that the said Counsel, Mr. Githae Nyaga had left the firm.
  - ii. That Counsel Mr. Githae Nyaga Advocate did not do a proper hand over of files thus the breakdown in communication occasioning the dismissal.



- iii. That the Plaintiff/Applicant stands to suffer irreparable substantial loss if the orders sought are not granted.
  - iv. That the Application is brought in good faith and without undue delay.
  - v. That it is in the interest of justice that this Application be allowed.
3. The Application is unopposed the Respondent did not file any response despite even having been served by substituted service.
  4. Though the Application is unopposed, this Court must satisfy itself that the Plaintiff has established a case to warrant the grant of the orders sought for reinstatement of the dismissed Application as provided for under Order 12 Rule 7. It states that the Court has discretion to set aside, recall and or reinstate a suit or Application dismissed for non-prosecution or no-attendance.
  5. The Application was dispensed with by way of written submissions filed by the Plaintiff/Applicant.
  6. The Applicant submits the reasons for non-attendance was due to the fact that the Lawyer who was handling the matter was indisposed and that he left the law firm and did not do proper hand over leading to a communication breakdown. This led to the Counsel not attending Court.
  7. That his law firm failed to attend Court because he was not aware it was listed. It is his averment that the Application has been filed without undue delay and that it would not be fair for the Plaintiff to be condemned unheard yet the Application dated 24/11/2022 has merits.

### **Analysis and Determination**

8. What this Court needs to determine in the present Application is whether it should exercise its discretion to set aside the orders issued herein on 25/04/2022. This Court has unfettered discretion under Order 51 rule 15 of the Civil Procedure Rules to set aside any order made ex parte. Section 3A of the *Civil Procedure Act* on the other hand gives the Court inherent power to make such orders as may be necessary for the ends of justice to be met. The Court's discretionary powers must however be exercised judicially.
9. The principles that guide the Court in setting aside of an ex parte Judgment or order were laid out in the case of Shah –vs- Mbogo & Another (1967) EA 116 as follows:-
 

“... the Court’s discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”
10. In the case of Belinda Murai & Others Vs Amoi Wainaina (1978), Madan J, set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;
 

“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of appeal sometimes overrule ....”



11. The Applicant avers that it was an oversight on the Counsel who failed to attend Court due to the fact the Counsel who was handling the matter left the law firm and did not do a proper hand over and this led to a miscommunication leading to failure of the Counsel to attend Court.
12. The Applicant submits that the failure to attend Court was not an intentional action and the circumstances that made Court attendance impossible were caused by the action of a Lawyer. Which action were not deliberate and therefore this should be enough to persuade the Court that non-attendance was not a deliberate attempt to obstruct or delay justice.
13. That the Court has powers to dismiss a suit or an Application for non-prosecution/non-attendance is not in dispute as provided under Order 12 of the Civil Procedure Rules.
14. The Applicant was aware of the hearing date. The cause list had been published at least 7 days before the hearing date and the Applicant was aware about her matter. The Court has no obligation to make enquiries why a party has not appeared in Court on time or at all. See Solomon Ouko Onyango –vs- Amedo Centre (K) Ltd. [2019] eKLR.
15. Yet the Court as already stated has under Order 12 Rule 7, discretion to set aside, recall and or reinstate a suit or Application dismissed for non-prosecution or no-attendance.
16. In John Nahashon Mwangi –vs- Kenya Finance Bank Limited (in Liquidation) [2015]eKLR, the Court held the tests to apply in an Application to reinstate a suit are whether there are reasonable grounds to reinstate, considering the prejudice that the Defendant would suffer if reinstatement of the suit was made against the prejudice the Plaintiff would suffer if the suit is not reinstated.
17. So, the question herein is whether the Applicant has demonstrated reasonable grounds for the reinstatement of the Application and whether the Respondents will suffer prejudice if the Application is reinstated.
18. Over time the Courts have come up with applicable principles and standards to consider in exercising judicial discretion.
19. I will just but refer to a few judicial precedents to guide my decision. Now the Court seized with a similar situation on whether or not to reinstate a suit it discussed the legal test to be met in the case of: Wanjiku Kamau Versus Tabitha Kamau & 3 Others 2014 EKR and stated thus;
 

“The Court has the discretion to set aside Judgement or order and there are no limitations and restrictions on the discretion of the judge except of the Judgement or order is raised. It must be done on terms that are just.”
20. Further, in the case of Lochab Bros Ltd Versus Peter Karuma T/A as Lumumba, Lumumba Advocates 203 EKLR the Court observed that:
 

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to filter the wide discretion given to it by rules.”
21. In the case of Esther Wamaitha Versus Safaricom the Court fortified the legal threshold to determine the rights of the parties on issues like the ones at hand. The Court held as follows:
 

“The discretion is free and the main concern of the Courts is to do justice to the parties before it (See Patel Versus EA 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 Versus 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. (See *Sebei District Administration Versus Gasyali*). It also goes without saying that the reason for failure to attend should be considered.”

22. It is also true parties to a litigation are bound to make mistakes including failure to keep time lines set by the Statute to ventilate the dispute on the merits. Sometimes it is a mistake or omission on the part of Legal Counsel retained by a party to a suit who is guilty of failing to attend Court without the knowledge of his client. In all these scenarios the duty of the Court to determine the proceedings efficiently and effectively is impaired. This may have been the situation that the Court was faced with in the case of *Philip & Another Versus Augustine Kibede 1982-88 KLR 103* where the Court held:-

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. In mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The Court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline.”

23. In my view, the overriding objective of our constitutional and statutory framework on civil procedure is to achieve substantive justice for the Litigants. This view is informed by Article 50 of *the Constitution* of Kenya which secures the right to a hearing before the Court. This Court is obligated to safeguard that right.

24. In discharge of their legal duty, Legal Counsels may find themselves in the mix of balancing the competing interest of the parties and legal standard set to comply with time lines in Procedural Law. That is why in the holding of *Majune J.* in the case *Muwanga Estates and Another Versus N. PART CA 49/2001* is stated as follows:-

“It is how an established principle of the law that original litigant who is not guilty of dilatory conduct should not be debarred from pursuing his rights in Court because of the negligence of his Counsel.”

25. As it stands the Application is unopposed and so the Defendant/Respondent stands to suffer no prejudice.

26. The Court’s main mandate is to do justice to parties and must exercise the discretion judiciously to avoid injustice resulting from accident, inadvertence or excusable mistake. It is trite law the discretion is to be exercised not in a design of assisting a person who has deliberately sought to obstruct the Court of justice.

27. In light of this, I am of the view that there is no inconvenience to be suffered by the Respondent as a result of setting aside the orders and proceedings of 25/04/2022 and if need arises then the Respondent can be adequately remedied through an award of costs.

28. Consequently, it is this Court’s finding that the Applicant herein has established that he had a reasonable excuse for non-attendance on the 25/04/2022 when this matter came up for hearing.

29. In the light of the aforesaid, the Notice of Motion Application dated 24/11/2022, is allowed in the following terms:



- a. Prayer 2 is allowed as prayed.
- b. Prayer 3 is allowed on condition that the Applicant pays the requisite fees and the Application set down for hearing on priority basis.
- c. Mention on 30/06/2025 for directions on the Notice of Motion Application dated 24/08/2021.
- d. Cost in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 4<sup>TH</sup> DAY OF JUNE, 2025  
VIA MICROSOFT TEAMS.**

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**MOGENI J**

**JUDGE**

In the presence of:

Mr. Mwangi holding brief for Mr. Njagi for the Plaintiff/Applicant

Defendant/Respondent – Absent

Mr. Melita – Court Assistant

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**MOGENI J**

**JUDGE**

