



**Mbaluto (Suing as the Legal Representative of the Estate of Mbaluto Illendu - Deceased)
((Suing as the Legal Representative of the Estate of Mbaluto Illendu - Deceased)) v Ngai
Adjudication Section Committee & 2 others; Mutonye & another (Interested Parties)
(Environment & Land Petition 1 of 2019) [2025] KEELC 4058 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4058 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 1 OF 2019
EO OBAGA, J
MAY 22, 2025
IN THE MATTER OF ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOM UNDER ARTICLE 40 OF
THE CONSTITUTION 2010
AND
IN THE MATTER OF ARTICLES 22&23 OF THE CONSTITUTION OF
KENYA 2010
AND
AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT
NUMBER 4 OF 2015
BETWEEN
FRANCIS MWEU MBALUTO PETITIONER
(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MBALUTO
ILLENDU - DECEASED)
AND
NGAI ADJUDICATION SECTION COMMITTEE 1ST RESPONDENT
SUB-COMMITTEE ADJUDICATION & SETTLEMENT OFFICER
MAKUENI 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT
AND
JOSEPHAT MUSYOKA MUTONYE INTERESTED PARTY



RULING

1. The Petitioner/Applicant filed the Notice of Motion dated 25th October, 2023 under the provisions of Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act in addition Order 12 Rule 7 of the Civil Procedure Rules, 2010.
2. The following orders have been sought: -
 1. That the proceedings and all consequential orders issued on 11th October, 2023 effectively dismissing the Petitioner/Applicant's application for reinstatement of suit dated 23rd June, 2023 be set aside forthwith.
 2. That the Petitioner/Applicant's application dated 23rd June, 2023 be reinstated for hearing and determination on merit.
 3. That the costs of this application be in the cause.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Onesmus Mutua Muli Advocate sworn on even date. The Applicant averred that the court dismissed the application dated 23rd June, 2023 on 11th October, 2023 for non-attendance on the part of the Petitioner/Applicant.
4. Counsel averred that the application was dismissed due to a technological hitch in the court's video link on <https://www.shorturl.at/brGNQ> which prevented him from logging into the online court session. That upon inquiry from the court assistant later on the same date, he was informed that the application had been dismissed. Counsel added that the failure to attend court was not intentional but and that the mistakes of counsel should not be visited upon an innocent litigant.
5. Counsel contended that it is only fair and just that the Applicant be granted an opportunity to prosecute his application and that no prejudice will be occasioned to the Respondents if the orders sought are granted.
6. The 1st Interested Party filed grounds of opposition on 29th January, 2024. It was contended that the Petitioner/Applicant ought to have taken judicial notice that the court conducts physical court sessions on Wednesdays and that the application was rightfully heard and dismissed.
7. The 2nd Interested Party filed a replying affidavit sworn by Isaac O. Miencha Advocate on 28th May, 2024. Counsel contended that the Applicant was shifting the blame for non-attendance to this Court and the Court Assistant. It was denied that there were technical hitches which affected proceedings on the material day. Counsel further contended that even though the matter had been cause listed as a mention, the correct position is that the application was coming up for hearing.
8. Counsel averred that the Applicant had failed to establish sufficient and plausible cause to warrant setting aside of the dismissal orders. It was contended that it is the duty of the litigant to constantly check with her advocate on the progress of her case and that the court will not set aside dismissal orders solely on the ground of mistake of counsel. It was averred that the application has no basis in law and that it lacks factual potency. Counsel urged that the court dismisses the application with costs.
9. The application was canvassed by way of written submissions.



10. In the Applicant's submissions dated 19th July, 2024, Counsel submitted that Article 50 of the Constitution guarantees every person the right to a fair hearing which includes an opportunity to present one's case without unreasonable hindrance. It was further submitted that the Applicant's counsel demonstrated diligence by contacting the Court Assistant multiple times to resolve the issue.
11. Counsel added that the decision on whether to allow an application for setting aside orders for dismissal due to non-attendance is within the wide discretion of the court. Citing the cases of A.K. Abdulgani v Geoffrey Nzioka Ndumbu [2016] eKLR and David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR, Counsel maintained that the Applicant had demonstrated merit in the application as there was no negligence on their part but for an excusable mistake on the part of counsel.
12. Counsel further submitted that the delay caused by one instance of non-attendance does not outweigh the potential injustice of denying the Applicant a fair hearing. Counsel urged the court to allow the application as prayed with costs.
13. The Respondents and the Interested Parties did not file submissions on the instant application.
14. Having considered the application, the primary issue for determination is whether the Court ought to set aside the order for dismissal of the application dated 23rd June, 2023 and subsequent thereto, order for reinstatement of the said application.
15. The record indicates that the application dated 23rd June, 2023 was listed for mention on 11th October, 2023. The record also indicates that the matter was heard in court virtually in the presence of Mr. Kipkirui together with Mr. Miencha who also held brief for Counsel for the Respondents and the 1st Interested Party. The said application was dismissed on the same day as a consequence of non-attendance on the part of the Applicant.
16. 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.”
17. The overriding objective under the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. The Applicant invoked the provisions of Order 12 Rule 7 of the Civil Procedure Rules which regulates how a matter is to be heard if only one party appears and the consequences of non-attendance by either party at such hearing. The law provides 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.”
18. In addition, under the provisions of Section 3A of the Civil Procedure Act, this Court is bound to promote the ends of justice in civil litigation.
19. For the Applicant's explanation on non-attendance on their part, the same was attributed to technological hitches on the online platform which prevented the Advocate from logging-in to the



virtual court session. The Applicant annexed Exhibits showing his attempts to access the court session as well as follow-up calls made to the Court Assistant for a resolution of the predicament.

20. The follow-up calls were made on the same court date and the application herein was made fourteen days after the dismissal order was issued. It is therefore plausible that the Applicant was hindered from attending court due to an inadvertent mistake and that being desirous and intent on carrying on this matter, filed the present application without unreasonable delay.

21. 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.”

22. 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.”

23. 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.”

24. In the end, the Applicant has 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.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MAY, 2025.

In the Presence of:

Mr. Onyonka for Mr. Kipkirui for 2nd Interested Party.

Mr. Nduva for Mr. Kitonga for 1st Interested Party.

Ms. Mwangi for Mr. Muli for Applicant.

Court assistant – Steve Musyoki

