



REPUBLIC OF KENYA



KENYA LAW

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**Wekesa (As Legal Representative of the Estate of George E. Wekesa)
& another v Taib; Wekesa (Objector) (Environment and Land Case
262 of 2018) [2025] KEELC 5015 (KLR) (4 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5015 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 262 OF 2018**

JO OLOLA, J

JULY 4, 2025

BETWEEN

**KENNEDY ELLAM WEKESA (AS LEGAL REPRESENTATIVE OF THE ESTATE
OF GEORGE E. WEKESA) 1ST PLAINTIFF**

GEORGE ELLAM WEKESA 2ND PLAINTIFF

AND

ABDULLA ALI TAIB DEFENDANT

AND

CATHERINE NEMALI WEKESA OBJECTOR

RULING

1. By the Notice of Motion dated 22nd October, 2024, Catherine Nemali Wekesa (the Objector) prays for orders-
 - 1 That this Honorable Court be pleased to set aside and vary the orders made herein on 14.5.2024 and that the application dated 16.3.2024 be reinstated.
 - 2 That pending the hearing and determination of the substantive application dated 6.3.2024 there be a stay of execution of the decree herein; and
 - 3 That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn by the Plaintiff's Counsel on record William O. Wameyo and is premised on the grounds:
 - i. That the application dated 6.3.2024 was dismissed for non-attendance on 14.5.2024;



- ii. That the Applicants herein had been granted interim orders of stay of execution pending the hearing and determination of the said application;
 - iii. That when the matter came up for hearing of the application dated 6.3.2024, the Applicants' advocate failed to log in and consequently the court dismissed the same;
 - iv. That the failure to attend court was occasioned by the fact that the Advocate had mis-diarized the matter as coming up on 15.6.2024 instead of 14.5.2024;
 - v. That it was not until 16.10.2024 when the Counsel for the Applicants learnt of the dismissal of the application;
 - vi. That this application has been made without delay from the date of the discovery;
 - vii. That the Plaintiffs stand to suffer great prejudice if the orders sought are not granted; and
 - viii. That the Defendant has proceeded and obtained warrants against the Plaintiff in his individual capacity yet the execution should be in relation to the estate.
3. Abdalla Taib (the Defendant) is opposed to the application. In a Replying Affidavit filed on his behalf by his Counsel on record Aisha Taib, the Defendant asserts that the Objector's Advocates having filed the application dated 6th March, 2024 *ex-parte*, did obtain directions from the court that the matter was to be heard on 14th May, 2024.
 4. The Defendant accused the Objector of being indolent and giving excuses on failing to attend court on 14th May, 2024 when they were fully aware of the hearing date. Counsel for the Defendant avers that the Objector attended Court on 19th June, 2024 when they were informed that their application dated 6th March, 2024 was dismissed on 14th May, 2024 and asserts that it is not the duty of this court to salvage a litigant who sleeps on their rights.
 5. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Advocates representing the parties herein.
 6. The application before me dated 22nd October, 2024 is expressed to have been filed by the Objector – one Catherine Nemali Wekesa. A proper perusal thereof however reveals that the same is brought on behalf of the Plaintiff – Kennedy Ellam Wekesa in his capacity as the Legal Representative of the Estate of George Ellam Wekesa.
 7. By the said application, the Applicant has urged the Court to be pleased to set aside and vary the orders made herein on 14th May, 2024 and that a previous application dated 6th March, 2024 be reinstated for hearing and determination. It is further the Applicant's case that pending the hearing and determination of the said previous application, there be an order of stay of execution herein.
 8. The basis for this application is the contention by Counsel for the Applicant that he did misdiarize the date that had been issued to him by the Court and therefore failed to log in on 14th May, 2024 when the application dated 6th March, 2024 came up for hearing inter partes. It is further his case that he only came to learn that the application had been dismissed on 16th October, 2024 and that hence this present application had been brought without delay.



9. As it were, reinstatement of a suit or an application such a this is at the discretion of the Court. That discretion ought to be exercised in a just manner as was stated in *Shah – v- Mbogo & Another* (1967) EA 116 where the court held as follows:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from 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.”

10. In the matter before me, it is apparent that the Applicant had filed the Notice of Motion dated 6th March, 2024 *ex-parte* under Certificate of Urgency seeking for orders of stay of execution and to be allowed to settle the decretal sum in instalments. On 7th March, 2024, the Honorable Justice L. Naikuni having considered the matter granted orders of stay of execution until the 14th day of May, 2024 when the application was scheduled for inter partes hearing.
11. It is apparent that the Applicants did serve the Respondents herein for hearing on the said date and that the Respondent filed a Replying Affidavit in readiness for the inter-partes hearing. It is also apparent that when the matter came up on 14th May, 2024 as scheduled, the Applicant and his Counsel were absent and the Motion dated 6th March, 2024 was dismissed for want of prosecution at the instance of the Respondent.
12. According to Counsel for the Applicant, his failure to attend court arose out of the fact that he had mis-driazed the matter and indicated in his diary that the matter was coming up instead on 15th July, 2024. It was difficult to believe this contention given that the Respondent was served with an application stating the correct date for hearing.
13. However, even if the court were to believe the Applicant on the issue of confusion regarding the date, the Applicant has failed to comment on the assertion by Ms. Aisha Taib Advocate regarding the fact that the issue of the dismissal of the suit was brought to the attention of the Applicant much earlier on 19th June, 2024 and not on 16th October, 2024 as he would want the court to believe.
14. From a perusal of the record herein, it is evident that this file was placed before the Honorable Justice Naikuni in the presence of both Mr. Wameyo and Ms. Taib, the Learned Counsels for the parties herein whereupon the court noted that the Motion dated 6th March, 2024 was dismissed on 14th May, 2024 and that there was nothing else pending in the matter for the court’s consideration.
15. That being the case, I was unable to find any basis for the claim by the Applicant that they were unaware of the dismissal. In my considered view, a party seeking to set aside such orders bears the burden of demonstrating not only sufficient cause for non-appearance and failure to prosecute but also the fact that the application for reinstatement was made without undue delay.
16. It follows that in the circumstances herein I did not find any basis upon which to exercise my discretion in favour of the Applicant. Accordingly, the Motion dated 22nd October, 2024 is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 4TH DAY OF JULY, 2025

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J.O. OLOLA
JUDGE



In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Wameyo Advocate for the Plaintiffs
- c. Mr. Taib SC. Advocate for the Defendant

