



Namu (Suing as the Personal Representative of the Estate of David Namu) v Ngoroi (Environment and Land Case 175 of 2014) [2025] KEELC 6001 (KLR) (11 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE 175 OF 2014
AK BOR, J
SEPTEMBER 11, 2025**

BETWEEN

MARY ROSE NAMU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID NAMU) PLAINTIFF

AND

JANE MUTHONI NGOROI DEFENDANT

RULING

1. The Plaintiff filed the application dated 7/5/2025 seeking to have the orders issued on 5/5/2025 dismissing her suit reviewed and set aside and for the suit to be re-opened for hearing on merit. The Plaintiff also sought to have the directions on filing of submissions set aside pending the hearing of the Plaintiff's suit on merit and for the costs of the application be in the cause.
2. The application was made on grounds that the court dismissed the Plaintiff's suit for want of prosecution on 5/5/2025 because she was absent when the matter was called out for hearing. She averred that she was in court at 9.00 am and followed the court proceedings virtually in open court and heard the court state that matters listed for hearing would be handled later. She stated that her advocate had requested her to remain in court and inform the court that he was ready for hearing once the matter was called out. That while she was still waiting for the court to conclude the virtual session, she developed a severe headache and dizziness and left the court premises to take her drugs at home which is not far from court.
3. She stated that she is elderly and unwell and had left home early and forgot to take her hypertension medication. That due to the sudden illness, she forgot to notify her advocate that she had left the courtroom and her matter was called out in her absence. That she later joined the proceedings and proceeded with the hearing of the Defendant's counterclaim and the court gave directions for the filing of submissions on the counterclaim after her suit had been dismissed for want of prosecution. She urged that the mistake was not intentional and that the court ought to give her a chance to prosecute



her case on merit. The Plaintiff, Mary Rose Namu swore the affidavit in support of the application and attached a doctor's letter confirming that she is hypertensive.

4. The Defendant, Jane Muthoni Ngoroi opposed the application through her replying affidavit in which she deponed that the Plaintiff and her advocate were absent throughout the proceedings and her advocate only appeared while she was on the dock testifying on the counterclaim at about 1.00pm. That the advocate could not give a satisfactory explanation for their absence from court that morning when the court inquired. Further, that upon the advocate being given an opportunity to make an application to set aside the order dismissing the Plaintiff's suit, the reasons for their absence were wanting and the issue of ill health or the need for urgent medication did not come up. She contended that the contents of the formal application are an afterthought and based on incorrect and untruthful information.
5. The Defendant averred that the application is res judicata as it was heard and disallowed on 25/5/2025. She added that it will serve no purpose except to delay the conclusion of the counterclaim. She contended that the only recourse available to the Plaintiff was an appeal and not to seek the setting aside of the orders of 5/5/2025 as prayed.
6. The court directed the parties to file and exchange written submissions, which it has read and considered. Only the Plaintiff filed her submissions. The Plaintiff submitted that she had demonstrated sufficient cause to warrant the setting aside of the order dismissing her suit. She submitted that the orders sought are discretionary and the court has the power to set aside the order for dismissal where sufficient cause has been demonstrated subject to Order 12 Rule 6 and 7 of the Civil Procedure Rules which provides that subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this Order, the Plaintiff may bring a fresh suit or apply to the court to reinstate the suit. She stated that her conduct, including her earlier presence in court and her subsequent participation all point to a genuine intention to prosecute her case and not delay or obstruct proceedings.
7. The Plaintiff further submitted that she is constitutionally and legally entitled to have her case heard and determined on its merits. That the dismissal of her suit in her absence which was due to excusable circumstances should not be used to bar her from accessing substantive justice. She submitted that no prejudice would be occasioned to the Defendant that cannot be cured by an award of costs. The court was urged to allow the application and administer justice in a just, expeditious and proportionate manner guided by section 1A, 1B and 3A of the *Civil Procedure Act*.
8. The court has considered the application dated 7/5/2025, the supporting affidavit, the replying affidavit, and the submissions on record. The issue for determination is whether the Plaintiff has shown sufficient cause to warrant the setting aside of the orders made on 5/5/2025 dismissing her suit for want of prosecution, and the reinstatement of the suit for hearing on merit.
9. The court record shows that on 5/5/2025, the Plaintiff's counsel made an oral application seeking similar orders, which the court considered and declined. The Plaintiff now urges the court to exercise its discretion under Order 12 Rules 6 and 7 of Civil Procedure Rules to set aside the dismissal. However, the court has already pronounced itself on the very same issue. To entertain the issue afresh would in effect, require this court to sit on appeal over its own decision, which is not permissible in law. Such a challenge can only be taken up on appeal.
10. If the Plaintiff was aggrieved by the orders of 5/5/2025, the appropriate recourse would have been to seek review under the applicable provisions of the law, not to reintroduce the same question in a fresh application for setting aside. Having rendered its determination on 5/5/2025, the Plaintiff's application is res judicata under Section 7 of the *Civil Procedure Act*.



11. The court declines to grant the orders sought in the application dated 7/5/2025.

DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF SEPTEMBER 2025.

K. BOR

JUDGE

In the presence of: -

Mr. Fundi Kimanzi for the Plaintiff

Ms. Jane Muthoni Ngoroi- the Defendant

