



Venture Holdings Limited v Kivuka (for the Estate of Grace Wanjiku Koni) (Environment & Land Case 88 of 2019) [2025] KEELC 3978 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 88 OF 2019**

CG MBOGO, J

MAY 22, 2025

BETWEEN

VENTURE HOLDINGS LIMITED PLAINTIFF

AND

FREDRICK KIVUKA DEFENDANT

FOR THE ESTATE OF GRACE WANJIKU KONI

RULING

1. Before this court for determination is the notice of motion dated 12th November 2024, filed by the plaintiff/applicant, and it is expressed to be brought under Order 50 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That the orders herein to dismiss the plaintiff's suit be set aside and the plaintiff/applicant be granted leave to ventilate his claim.
 4. That this matter be admitted for full inter-partes hearing to its final and judicious determination on merit.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is supported by the affidavit of Kwame Kariuki sworn on even date. The plaintiff/applicant deposed that this matter was coming up for hearing on 22nd October, 2024, but unfortunately, he fell ill on the eve of the said date and had to be rushed to hospital. He deposed that failure to appear in court on the said date was not inadvertent,



and that injustice ought not to be visited upon him. He deposed that he is determined to have the matter heard on merit, and that he stands to suffer great prejudice unless the orders dismissing his case are set aside. The plaintiff/applicant deposed that this court has unfettered jurisdiction to set aside any proceedings, and in this case no prejudice will be suffered beyond the scope of costs.

3. The defendant/respondent filed a notice of preliminary objection dated 21st November, 2024 challenging the application on the following grounds: -
 1. That the court lacks jurisdiction to vary or set aside the orders of dismissal granted under Order 17 Rule 4 of the Civil Procedure Rules. The court having entered judgment in court on 22nd October 2024 that the plaintiff's case be dismissed with costs as the plaintiff had been afforded the requisite opportunity to bring evidence but failed on several occasions, the issue has already been dealt with finality.
 2. The application is res judicata contrary to Section 7 of the *Civil Procedure Act*. The issue of non-attendance on grounds of sickness is already settled and the same cannot be raised again.
 3. The application appears to be a review but does not meet the threshold for review under Order 45 Rule 1 of the Civil Procedure Rules. The grounds raised by the plaintiff whatsoever do not warrant a review taking into account the age of this matter, the honourable court did not grant an adjournment on October 22, 2024. The plaintiff has not demonstrated that there were any errors in the judgment hence does not warrant a review and there is neither discovery of new and important evidence or existence of a clerical or arithmetical mistake.
 4. Lastly, the application raises issues that ought to have been raised at the court of appeal as judgment having been entered with costs; the only available remedy is an appeal.
4. The application was canvassed by way of written submissions. The plaintiff/applicant filed its written submissions dated 10th December, 2024 with regard to the defendant's/respondent's notice of preliminary objection. The defendant/respondent raised three issues for determination as follows: -
 - i. Whether this honourable court has jurisdiction to vary or set aside orders of dismissal under Order 17 rule 4 of the Civil Procedure Rules.
 - ii. Whether the application is res judicata contrary to Section 7 of the *Civil Procedure Act*.
 - iii. Whether the application meets the threshold for a review under Order 45 Rule 1 of the Civil Procedure Rules.
5. On the first and second issues, the plaintiff/applicant submitted that this court has jurisdiction to hear and determine this application. Further, that the issue of res judicata is a matter of both fact and law and hence cannot form the basis of a preliminary objection. The plaintiff/applicant relied on the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport and Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
6. On the third issue, the plaintiff/applicant submitted that there are sufficient reasons to review the orders as the witness fell ill, and neither did the advocate have the documents to show the court. That despite an application for adjournment on grounds of illness being sought, the same was declined.
7. The defendant/respondent filed his written submissions dated 22nd November, 2024, where he raised four issues for determination as listed below: -
 - i. Whether the court has jurisdiction to hear an application for setting aside orders of dismissal of a suit under Order 17 Rule 4 of the Civil Procedure Rules.



- ii. Whether the application is res judicata contrary to Section 7 of the *Civil Procedure Act*.
 - iii. Whether the application meets the threshold for review under Order 45 Rule 1 of the Civil Procedure Rules.
 - iv. Whether the application raises issues that ought to have been raised at the appellate court.
8. On the first issue, the defendant/respondent submitted that on various occasions when the matter came up for hearing, the plaintiff's witness gave the same excuse of illness, and that on 23rd July, 2024, the court ordered the evidence of illness to be produced, and as of 22nd October, 2024, the same had not been complied with. The defendant/respondent submitted that pursuant to Order 17 Rule 4 of the Civil Procedure Rules, the court determined the matter and the same cannot be raised again as it has been dealt with finality. The defendant/respondent submitted that this court has no jurisdiction to entertain the instant application.
 9. On the second issue, the defendant/respondent submitted that the reasons for non-attendance were advanced and the court made a judgment. While relying on the cases of Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, and Musankishay Kalala Paulin v Director Criminal Investigations & 4 Others [2022] eKLR, the defendant/respondent submitted that the matter is res judicata, and the court cannot entertain the same issue over and again.
 10. On the third issue, the defendant/respondent submitted that the application does not meet the threshold for review under the provisions of Order 45 Rule 1 of the Civil Procedure Rules. He submitted that there is no error in the judgment, no mistake and no sufficient reason to warrant the said review. To buttress on this submission, the defendant/respondent relied on the cases of Karanja (Suing as the Representative of the Estate of David Karanja Ng'ang'a) v Kibonet t/a Sweetland Consultant Limited & 2 others (Environment & Land Case 45B of 2021) [2024] KEELC 3654 (KLR) (30 April 2024) (Ruling), and Jackson Mutua Kavila v Government of Makueni County & 2 others [2022] eKLR. He submitted that unlike Order 12 Rule 7 where the court has discretion to vary its orders, the same cannot be done under Order 17 Rule 4.
 11. The defendant/respondent further submitted that the issues raised in this application ought to be raised before the court of appeal, and that this court cannot sit on an appeal of its own decision. Reliance was placed in the case of Homeboyz Entertainment Limited v Secretary National Building Inspectorate & 2 others [2022] eKLR.
 12. The plaintiff/applicant filed its written submissions dated 5th March, 2025 in support of its application. The plaintiff/applicant raised three issues for determination as listed below: -
 - a. Whether the plaintiff/applicant is entitled to the reliefs sought in the application to set aside judgment and reinstate the suit.
 - b. Whether the defendant/respondent will suffer any prejudice if the suit is reinstated.
 - c. Who bears the costs of the application.
 13. On the first issue, the plaintiff/applicant submitted that the medical results annexed to the application is sufficient evidence that its sole witness was unable to attend court on the date of the hearing. While relying on the cases of Rajesh Rughani v Fifty Investments Limited & another [2016] KECA 829 (KLR), and Richard Ncharpi Leiyagu v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR, the plaintiff/applicant submitted that reinstating this suit aligns with the objective of this court, in ensuring that substantive justice prevails over technicalities.



14. On the second issue, the plaintiff/applicant submitted that the defendant/respondent will not suffer prejudice if the suit is reinstated, and on the other hand, he will suffer irreparable harm if he is denied the right to be heard. Further reliance was placed in the case of Philip Keiptoo Chemwolo & Another v Augustine Kubende [1986] eKLR.
15. In conclusion, the plaintiff/applicant submitted that the application arose due to its witness failure to attend court, and they pray that costs be in the cause to avoid unnecessary financial burden on either party.
16. I have considered the application, the notice of preliminary objection and the written submissions filed by the parties. I am of the view, that the issue for determination is whether this court can set aside the orders made on 22nd October, 2024.
17. On 22nd October 2024, while the matter was coming for hearing, the plaintiff's witness failed to attend court on this date. The reasons advanced for non-attendance was that the plaintiff's witness fell ill on the eve of the hearing resulting into a medical emergency. In support of his arguments, the witness annexed a copy of laboratory results, and a letter confirming that he was in hospital on the material day. Looking at these documents, it appears that the witness visited the hospital in the afternoon of the date of the hearing, and not on the eve as alleged.
18. As a result of the non- attendance the court was prompted to make the following determination;
 1. That taking into account the age of the matter and coupled with the provisions of Section 1A and 1B of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the court declines to grant the adjournment and hereby directs that the hearing shall proceed.
 2. That the plaintiff having been afforded the requisite opportunity to bring evidence but the same has failed, the plaintiff's case be and is hereby dismissed with costs in terms of Order 17 Rule 4 of the Civil Procedure Rules.
 3. That the defendant's case be and is hereby closed.
 4. That the defendant/counter claimer be and is hereby granted 14 days to file and serve written submissions from the date hereof.
 5. That the plaintiff/defendant to the counter-claim shall thereafter be at liberty to file and serve written submissions and the same to be filed and served within 14 days from the date of service.
 6. That the defendant/ counter-claimer shall be at liberty to file and serve rejoinder written submissions and the same to be filed and served within 7 days from the date of service by the plaintiff/defendant to the counter-claim.
 7. That the matter herein shall be mentioned on the 10th December, 2024 to confirm compliance and to fix a date for judgment.
 8. That costs shall be in the cause.
19. Order 17 Rule 4 of the Civil Procedure Rules provides:

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”



20. Owing to the absence of the plaintiff/applicant's witness to attend court, and from the orders made by the court as seen above, the court dismissed its case with costs, and proceeded to deal with the case as it did by giving further directions as to the disposal of the case. What elements of the orders make the decision final in nature? I find none for the reason that judgment is yet to be pronounced in this case. It is my view that if at all there was a genuine claim of sickness, then the same can be considered as sufficient reason to warrant this court to review its orders.
21. This court's aim is to do substantive justice and this includes that parties are fully heard and the cases determined on merit. However, and in a bid to ensure that there is a fair balance of justice, this court finds that awarding costs would be proper in the circumstances of this case, and also afford the plaintiff/applicant's a chance to present its case.
22. From the above, this court exercises its discretion and allows the notice of motion dated 12th November, 2024 by granting the following orders:-
- i. That the orders granted by this court on 22nd October, 2024 are hereby set aside, and the plaintiff/ applicant is granted leave to ventilate his claim.
 - ii. Costs is assessed at Kshs. 300,000/- to be paid within 45 days from the date hereof.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 22ND DAY OF MAY, 2025.

HON. MBOGO C.G.

JUDGE

22/05/2025.

In the presence of:

Ms. Betty Cheronno - Court assistant

Ms. Kado for the Plaintiff/Applicant – present

Mr. Morara Omoke for the Defendant/Respondent – present

