



**Makokha v Mukanda & another (Environment & Land Case  
28 of 2011) [2023] KEELC 17083 (KLR) (2 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17083 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 28 OF 2011**

**FO NYAGAKA, J**

**MAY 2, 2023**

**BETWEEN**

**PAUL WANJALA MAKOKHA ..... PLAINTIFF**

**AND**

**ALBERT MUKANDA ..... 1<sup>ST</sup> DEFENDANT**

**TITO KHAKINA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is an application dated 19/09/2022 which was filed on 20/09/2022. It was brought by the Plaintiff herein who cited Sections 3 and 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules*, 2010 and what he termed as “all other enabling provisions of the law.” It sought the following Orders:-
  - (1) That this Honourable Court be pleased to set aside the orders made on 17/10/2019 dismissing the Plaintiff’s suit and all other consequential orders thereto.
  - (2) That this Honourable Court be pleased to reinstate the Plaintiff’s suit.
  - (3) That costs of the application be in the cause.
2. The Application was based on a number of grounds, being that the suit was dismissed for want of prosecution on the material date; failure by the Plaintiff to prosecute it was not deliberate; by virtue of Article 159 of the *Constitution* of Kenya and Sections 1A and 2A (sic) of the *Civil Procedure Act* it would be fair, expedient and in the best interest of justice to reinstate the suit; the Plaintiff has an arguable case with high chances of success; a litigant should not suffer from the mistake of counsel; it is in the wider interest of justice that the suit herein be reinstated so that it can be heard and determined on merit; and no one shall be prejudiced by the orders if granted.



3. It was supported by the Affidavit of the Plaintiff sworn on the same date as the Application. In the Affidavit, the Applicant who started by deponing that he was a senior citizen aged 90 years repeated the contents of the grounds stated. He swore how in the year 2018 he instructed the firm of Ms. Kidiavai & Co. Advocates to take over the matter from Ms. J. M. Wafula Advocates. The former firm did so and filed an application dated 18/10/2018 to reinstate the suit, it having been dismissed earlier. The application was heard and allowed. At paragraph 7 he deponed that he visited the firm severally to inquire about the status of the case and was informed that it had been reinstated and fixed for hearing on 10/10/2019.
4. He deponed further in paragraph 8 that at the same time his health started deteriorating. He deponed against that in the year 2013 he was diagnosed with severe arthritis and was bed-ridden until sometime in August, 2020 his condition was managed and he began being “off and on.” He swore that during his period of recuperation he could not get in touch with his advocate whose phone was not going through at all.
5. His further deposition was that after visiting the registry he was informed that his case had been dismissed and the file taken to the archives. He immediately began tracing Mr. Khisa Advocate of Ms. Kidiavai & Co. Advocates who had been assigned the file, but in vain. He went on that in the month of January, 2022 he was diagnosed with severe arthritis with other medical complications due to old age and advised to rest for five months. He annexed and marked MWP 1 copies of the medical receipts (sic).
6. He deponed that he made several attempts to trace the file at the archives and finally it was traced. Upon perusal of it he learned that it was dismissed for want of prosecution, which was purely a mistake of the advocate who was held up in another court and thus did not comply with his prayer for time allocation that he sought, and was granted. He deponed that he should not be punished for the mistake of counsel.
7. The Respondents opposed the application through the Affidavit of the 1<sup>st</sup> Respondent. It was sworn on 24/11/2022 and filed on 28/11/2022. He deponed that the application was defective and an abuse of the court process. He stated that his brother Tito Khakina the 2<sup>nd</sup> Defendant deceased, having passed away on the 01/03/2019. He attached and marked as AM-I a copy of his Death Certificate. He deponed further that the two were joint administrators in Bungoma High Court P. & A. No. 61 of 2009 in which he passed on while it was pending and substitution yet done. He annexed and marked as AM-II a copy of Grant Letters of Administration.
8. The Deponent then stated on oath that from the time of institution of the suit ten (10) years earlier, the applicant never made any attempt to effect service to both Respondents and never showed any interest to prosecute it but kept taking the court in circles. Further, he deponed that the suit had not only been dismissed twice but it had since rather abated. He accused the applicant of coming to court without clean hands. He stated that the Applicant had even raised objection in the Bungoma High Court P & A matter and the Court rendered a judgment therein, dismissing it. He attached and marked as AM-IV a copy of the judgment in the P & A matter.
9. He swore that neither he nor the 2<sup>nd</sup> defendant (deceased), were the registered owners of the suit land parcel as sued (in that capacity) but rather the intended administrators since the land has not been discharged from the settlement scheme as decreed from the judgment. He annexed and marked as AM-V the copy of the certificate of Official Search of the suit land. He deponed that they had no capacity or rights to complete the alleged transaction or transfer whatsoever even if this application was allowed and the suit to proceed to full hearing.



10. He discounted that fact, as sworn by the applicant, that he was 90 years old but barely 84 years as evidenced by his medical reports and that he maliciously lied to the court about his hospitalization occasionally but rather that he was only examined and discharged. He discounted the fact of the Applicant being bed ridden from the year 2013 to 2022 only for the record to disprove him by showing that he was fit in 2018 when appointed Ms. Kidiavai & Company Advocates. He deponed that the Applicant abused Order 12 Rule 1 of the Civil Procedure Rules by letting the suit be dismissed twice and reinstated. He prayed for dismissal of the application.
11. The Applicant filed a further Affidavit in response to the 1<sup>st</sup> defendant's replying affidavit. He swore that he had not malice in bringing up the application to reinstate the matter. He then deponed that the facts depend in paragraphs 4 and 5 were strange to him until they were brought out by the defendants. He deponed that contrary to averment that paragraph 6 of the application violated Rule 9 of the Civil Procedure Rules he had filed a Notice to Act in Person. He deponed further that the non-attendance of my advocate on record should not be used to cause him suffer irreparable loss. He deponed that the wider interest of justice demanded that he be heard on merit.
12. He deponed further that he served the defendants after which they appointed their advocate. He swore that he had adhered to the direction of the court as per the judgment delivered on 10<sup>th</sup> day of July 2018 in the Bungoma High Court P & A No. 61 of 2009 by filing his claim at the Environment and Land Court at Kitale. He contended that the legal administrator had capacity to execute or complete transaction or transfer of the Estate of the late as per the Rules of Probate and Administration Laws. He then deponed that he it was true that his age was 84, and that he erroneously typed it as such and was not meant to lie about it and the ill-health.

### **Submissions**

13. In his submissions, filed on 11/10/2022, the Applicant first summed up the content of the application. He stated that the court dismissed the suit when none of the parties or their advocates attended court for the hearing of the suit. He argued that being a land matter it was quite sensitive and should be heard on merit and not by condemning a party unheard. He faulted learned counsel then on record for failing to proceed with the hearing of the suit and not informing him me that the matter would proceed at 9.30 am on the material date.
14. He restated that the suit was first reinstated after it was dismissed when his then advocate a Mr. Wafula passed away without his knowledge. Then he (Plaintiff) was diagnosed with arthritis which affected his communication with the said law firm. Later he filed a notice of change and appointed the firm of Kidiavai and company advocate to act on his behalf. The latter law first applied in 2018 through an application dated 18/10/2018 to reinstate his suit again. It was heard and ruling was delivered, allowing the application.
15. It was after that that the suit was fixed for hearing 10<sup>th</sup> day of October, 2019 but the Advocate did not inform him on time or what transpired in court. He argued that due to his age and medical conditions, having been ailing for long time he cut communication with the advocate. He stated that he had been in and out of the hospital.
16. He then blamed Covid-19 which to him hindered his movement since he could not move out to go and check on his case. He argued that he was informed that the activities in courts were suspended during Covid-19 and he could not physically keep track of his case or visit my counsel as elderly people were supposed to work from or remain at home. After the Covid-19 was fairly contained he visited the firm of Kidiavai & Co. Advocates to establish the status of his case, and also the court registry to peruse the court file. He was dismayed to find his case dismissed for want of prosecution.



17. He recounted the court record of the material date, and argued that he had every intention to prosecute and not delay the suit. He contended that he would suffer irreparably if not allowed to be heard. He argued that the mistake of his advocate should not be visited on him as to condemn him unheard. He relied on Articles 50 and 159(2)(b) of the Constitution.
18. He submitted further that the court had discretion to set aside ex parte orders. He relied on Section 3A of the Civil Procedure Act which provides for the inherent powers of the Court. He also relied on the case of Wachira Karani v Bildad Wachira [2016] eKLR which he quoted an excerpt from, to the effect that “the fundamental duty of the court is to do justice between the parties..... Fundamental to that duty is that parties should be allowed a proper opportunity to put their cases upon the merits of the matter..... The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit”. He submits that Section 1A and 1B of the Civil Procedure Act enjoined the court to ensure the just determination of the dispute and to always opt for the lower rather than the higher risk of injustice. He urged the court to find that the overriding objective overshadowed all technicalities, precedents, rules and actions which were in conflict with it He cited the case of Stephen Boro Gitiba v Family Finance Building Society and 3 Others, Court of Appeal Nairobi C.A No.263/2009.
19. The he set forth four issues for determination, which he submitted on as follows: The first one was whether the court should set aside the order of 17/10/2019 dismissing the suit. He submitted on it on the import of Order 12 Rule 7 and asked the court do exercise its discretion by setting aside the orders. On this, he argued that the primary duty of the court was to do justice and the duty could not be fettered by procedural technicalities. He cited Article 159(2)(d) in support of this. And Section 3A Civil Procedure Act.
20. He relied on the case of Shah v Mbogo & another [1967] EA 116 and Patel v EA Cargo Handling Services Ltd [1974] EA 75. He supported his argument further about blunders of advocates and how they should be treated by Court, by the case of Philip Chemowolo & Another v Augustine Kubende [1986] KLR. Lastly, he relied on the case of D.T. Dobie and K Ltd v Joseph Mbaria Muchina CA 37 OF 1978 where the court stated that “No suit ought to be dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable.’
21. The second one was whether there was a delay and if so whether justice could be done it. On this he repeated his argument about his age, his ill-health and the onset of the Covid-19 Pandemic. The then relied on Belinda Murai and others v Amos Wainaina {1978} (sic) where the court stated:-

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or 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.”
22. He also cited the case of Ivita v Kyumbu {1984} KLR 441 wherein the court stated that “the test whether the delay is prolonged and inexcusable and if it is can justice be done despite such delay”



23. The third one was, whether the defendants would suffer any irreparable prejudice once the suit was reinstated. About this, he submitted that the respondents herein will not suffer or no prejudice will be occasioned the respondents which cannot be remedied by costs. He submitted that he is the one who will be greatly prejudiced by being driven out of the seat of justice without hearing and determination of this suit
24. The fourth on was, who meets the cost of this application. He submitted that they be in the cause, and prayed that the application be allowed.

### **Issues, Analysis and Determination**

25. I have carefully analysed the application. I have given due consideration of the facts on it, both statutory and case law on it and the submissions by the applicant. It presents a number of issues for determination, being:
  - a. Whether the application can be granted in light of abatement of suit against one party
  - b. Whether the application is merited
  - c. Who to bear the costs of the application
26. This Court starts with an observation on of preliminaries before determining the real issues identified. First, parties to any matter before the Court should be careful and keen about drafting. This goes even to a careful consideration of the law they intend to rely on before filing their pleadings and presenting them to court for determination. Making mistakes on such points that appear to be small can be costly. Courts are not and should not be in the habit of overlooking errors. For instance, herein the Applicant cited Section 3A of the *Civil Procedure Act* but in the body of the Application he relied on a provision of law, namely Section 2A, which he repeated as 2a in the supporting affidavit, which does not exist in law. When he deponed about his age, at first, he gave it at paragraph 3 of the affidavit as “ninety” years. He glossed over it. When confronted with the replying affidavit to the contrary by being informed that he was 84 years old, he swore that it was a typing error. He admitted to being 84 years and that he did not intend to lie. In my view such an important issue cannot be taken to have been an error, particularly, when the age is written in words, unless it is taken to be attributed to poor drafting or lackadaisical conduct. I could go on pointing out many discrepancies noted herein but time does not allow. But as I pen off from the preliminaries, I must say that I was greatly impressed by the well-researched and detailed submissions which contained reasoned arguments on behalf of the applicant. How I wish submissions took the place of pleadings and evidence, the applicant would have succeeded in the instant application immediately! But, alas! Submissions do not take the place of pleadings, facts and evidence: they are only a marketing language of the parties. On this I refer to the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR. Therefore, the Court will still delve into the merits or demerits of the application, good submissions on it notwithstanding. So, onto the first issue.

#### **a. Whether the application can be granted in light of abatement of suit against one party**

27. The Plaintiff/Applicant brought the instant suit against the two defendants named in it on 5/11/2011. It appears that the ‘he went to sleep’, and on 4/10/2017 the suit was dismissed for want of prosecution. He applied to have the suit reinstated and it was so on 31/01/2019, as the record shows, and he deponed to it at paragraph 6 of the supporting affidavit. Soon afterwards, he went to quietness again but his advocate diligently did what was required of him: he fixed the suit for hearing, on 18/04/2019 when nothing happened. For five months from the date the suit should have come for hearing, nothing



happened. On 3/09/2019 the Court moved the matter for mention on 24/09/2019 and the Deputy Registrar had to serve the notice. On 24/09/2019 the Plaintiff's advocate attended Court and fixed the matter for hearing on 17/10/2019. It was on the latter date that the suit was dismissed for non-attendance to prosecute it.

28. When the instant application was filed and served, the 1<sup>st</sup> Defendant raised the issue, in paragraph 4 of the Replying Affidavit, that the 2<sup>nd</sup> Defendant had died on 1/03/2019 and the suit against him had since abated. To this, the Applicant responded that it was strange knowledge to him that the party had died. Surprisingly, he also replied that he was not aware of the 1<sup>st</sup> Defendant's deposition that the deceased was one of the administrators for the estate of the late Mukanda Wasike alias Mukanda Manyali in Bungoma High Court Succession Cause No. 61 of 2009 and he died before the grant could be issued. From the annexure filed as AM-II it is shown that the grant was issued on 28/10/2020.
29. While I find it puzzling that the Plaintiff purports not to know that the 2<sup>nd</sup> Defendant (now deceased) was one of the petitioners in Bungoma High Court Succession Cause No. 61 of 2009 where he himself was the sole Objector and in which a judgment was rendered on 11/06/2018, and to which he has deponed herein to the effect that he was aware of and in paragraph 9 of the Further Affidavit thereof he swore on 27/02/2023 that he had adhered to, I find it extremely imprudent and abusive of the process of the Court for the Applicant to depone to lies. There is no way the Applicant could not know that the two defendants were petitioners to for the grant of letters of administration of the estate of their deceased father when he applied to the grant of letters being issued to them in the Bungoma High Court proceedings. The applicant ought to know that it is criminal to lie on oath.
30. Be that as it may, the document annexed to the Replying Affidavit as AM-I shows that the 2<sup>nd</sup> Defendant died on 01/03/2019. In terms of Order 24 Rule 3(2) of the Civil Procedure Rules, the Plaintiff's knowledge of the same notwithstanding, the suit against the said party abated a year later. Abatement is an automatic process that kicks in immediately the death of a party occurs if the suit does not survive him/her or if it does, substitution of the party is not made within one year of his death. It does not require the Court to minute it or mark it as such. It goes without saying that by operation of the law, the suit abates.
31. The effect of abatement is clear, under Order 24 Rule 7(1) of the Civil Procedure Rules: no fresh suit shall be brought against the same cause of action. It is also clear that no proceedings can be maintained against a party whose matter is abated as long as the abatement subsists. But under Sub-Rule 2 of Rule 7 a party may apply for revival of the suit which has abated. Even then, he has to satisfy the Court that he was prevented for good cause not to move the Court within the year period window for action.
32. In the instant case, the suit against the 2<sup>nd</sup> Defendant abated on 1/03/2020. From then on, no proceedings could be legally maintained against him, as a deceased party. The Plaintiff in this present instance filed the application in the present instance on 20/09/2022 he prayed for setting aside of the orders which were made in favour of the then 2<sup>nd</sup> Defendant but against whom there no longer is a suit as a result of abatement. In those circumstances, I find that the application could not be urged as against the said party. It is puzzling that even when the issue was raised by the other defendant, the applicant did not bother to withdraw it but purported to feign ignorance of the fact of death, yet the law still stood clear once that issue came to his knowledge.

#### **b. Whether the application is merited**

33. The Plaintiff brought the instant application with the aim of setting aside the order made on 17/10/2019. As see from the record as summarized above, on the material date his former advocate attended Court in absence of the Defendants, having fixed the suit for hearing earlier, stated that he



was ready to proceed, took time allocation for 9.30 am before my brother judge, but never turned up afterwards. The Plaintiff himself did not attend Court then. Therefore, the suit was dismissed for non-attendance or want of prosecution on the date of hearing. From then, nothing happened until the instant application was made.

34. The Applicant moved the Court under Sections 3 and 3A of the *Civil Procedure Act* and Order 12 Rule 7 of the *Civil Procedure Rules*. He cited the usual meaningless phrase “all other enabling provisions of the law.” Since he did not specify what the said provisions were, and I find none, I consider the phrase hollow and a gimmick to waste the Court’s time to consider what the provisions might be. With regard to the relevance of Sections 3 and 3A of the *Civil Procedure Act*, I would sum it up that where there are specific provisions of law regarding the issue before the Court, there is no need to cite other provisions as those. Again, once a party decides to cite provisions of law it is imperative that he/she submits on their relevance to or import on the issue be/she presented before Court.

35. With that, I now examine the import of Order 12 Rule 7 of the *Civil Procedure Rules*. The provision is reproduced hereunder 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.”

36. Under it, the court has unfettered discretion to set aside an order it has made, if sufficient cause is shown by an Applicant. But I must bear in mind that I have to exercise the discretion judiciously, and the principles governing setting aside such orders are now well settled, and they are the ones I will apply. They were postulated in *Shah v Mbogo & another* [1967] EA 116 where the Court held thus:

“I have carefully considered, in relation to the present Application, the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex-parte. 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 a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

37. Again, the case of *Racheal Njango Mwangi (Suing as Personal Representative of the Estate of Mwangi Kabaiku) v Hannah Wanjiru Kiniti & another* [2021] eKLR explains the point even further. But in order to have the discretion exercised in his/her favour, the Applicant has given sufficient cause or reason to the satisfaction of the Court. Sufficient cause was defined by the Supreme Court of India in *Parimal v Veena* which was cited with approval in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR. In the case, the said Supreme Court stated that:-

“sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”



The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgment impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

38. It should not be lost sight of that this is the second application the Plaintiff has brought in this suit to set aside an order of dismissal of the suit. While each of the applications has to be considered on its own merits, it is worth considering whether or not the applicant might be abusing the process of the Court by being indolent and then moving the Court when things do not seem to go his way. As noted above, the applicant failed to move this Court soon after the institution of the suit until it was dismissed for want of prosecution on 4/10/2017. Vide an application dated 18/10/2018, he moved the Court to set aside the dismissal. He gave the reasons in that application, among others, that he had been diagnosed of severe arthritis and had been bed-ridden for a while, tried to look for his then advocate after his condition improved but in vain, that he sought for him severally in his offices but could not find him only to learn that he had since died, that after that he could not trace the Court file since it was in the archives, until it was then traced and he moved the Court. The learned judge considered the issues and granted the application.
39. What the applicant failed to disclose to the Court then was that he had been busy battling the Petition for the Grant of Letters of Administration by the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant (now deceased) in Bungoma High Court Succession Cause No. 61 of 2009 whose judgment the 1<sup>st</sup> Respondent herein annexed to his replying affidavit and marked it as AM-Iv The judgment was delivered on 10<sup>th</sup> July, 2018, and since it directed the Applicant to file suit in the Environment and Land Court within 30 days he applied to reinstate the suit. If that was not the case, then the decision to move the Court after seven (7) years of a lull to reinstate the suit was too coincidental to be true that there was progress in terms of ‘recovery’ from the alleged illness and at the same time tracing and instruction of the subsequent advocate, and the delivery of the ruling just three months of the application. Nevertheless, the judge allowed the application on the merits given then.
40. I am not supposed to reconsider the merits of the same. However, the Applicant herein has indirectly invited me to reconsider the same facts by raising them again. In actual sense, the instant application, save for a few paragraphs in the depositions made in the Affidavit in support thereof and the further affidavit, is on all fours the same as the one dated 18/10/2018. This is because, the previous application the citation of the provisions words under the title, Notice of Motion, is exactly the same. Then the prayers in the application are exactly the same as the one in sequence except the date of 04/10/2017 when the orders impugned then were given. In the previous application the prayers were:
1. That this Honourable Court be pleased to set aside the orders made on 4<sup>th</sup> October, 2017 dismissing the Plaintiff’s suit and all other consequential orders thereto.
  2. That this Hounourable Court be pleased to reinstate the Plaintiff’s suit.
  3. That costs of the application be in the cause.



41. What is the difference in the said prayers and the ones sought herein? None. After making the same prayers except the date of dismissal of the suit, the Applicant gave exactly the same grounds in support of the instant application as those of the previous. They were reproduced in sequence and verbatim all through except the date of the applications which were 18/10/2018 and 19/09/2022 respectively, so much so that the errors which were in the previous application were reproduced in the instant application. Even the numbering followed the pattern of the previous one. This party must have learnt copying from Moses of the Bible who was informed by God to make a sanctuary on earth which had to be the exact same pattern and copy as the one he was shown on the mountain which is in heaven (for those who believe in the Bible, see, Exodus 25: 8-9; and it was confirmed in Hebrews 8:5 that he did so).
42. For instance, in the previous application, the grounds were (a) That the suit herein was dismissed on 4<sup>th</sup> October, 2014 for want of prosecution; (b) that failure by the applicant to prosecute the matter was not deliberate; (c) That pursuant to Article 159 of the *Constitution* of Kenya and Section 1A and 2A of the *Civil Procedure Act*, it would be fair, expedient and in the interest of justice to reinstate the suit herein; (d) the Plaintiff has an arguable case with high chances of success; (e) that it is trite law that a litigant should not suffer from the mistake of the counsel; (f) that it is in the wider interest of justice that the suit herein be reinstated so that it can be heard and determined on merit; (g) that no one shall be prejudiced if the orders sought are granted; And Which application is... etc. In the instant application, only paragraph (a) of the grounds as those above is changed to read 17<sup>th</sup> October, 2019.
43. In regard to the supporting Affidavit, paragraphs 1-3 are the same as the ones in support of the instant application, including the error of the age of the applicant being “ninety years”. Only paragraph 4 of the previous Affidavit has been changed to include the contents that the applicant, besides instruction the earlier advocates Ms. J.M. Wafula & Co. Advocates he subsequently instructed Ms. Kidiavai & Company Advocates to take over the matter from the former. Paragraph 5 is the same. In the instant application a new paragraph is added as 6 to include the fact of the previous advocates filing an application to set aside the dismissal of the suit and it being allowed. Paragraphs 7, 8, 9 and 10 are exactly the same. Paragraph 11 of the supporting affidavit of previous application which read “it is only after visiting my former advocate office situate at KFA building sometimes in the year 2017 that I learnt ...” is only changed to read that “it was only after visiting the registry of Environment and Land that I was told that my file has been taken to the archives...”
44. Paragraph 12 of the affidavit in support of the previous application read that the applicant immediately started tracing the employees of the former advocate manually but in vain. Paragraph 12 of the instant application read that the applicant immediately began tracing a Mr. Khisa advocate who had been assigned the file in the immediate former advocates’ office but in vain. The contents of paragraph 13 of both affidavits are the same to the effect that he was diagnosed of severe arthritis accompanied with complications of old age, only that for the instant application, the time was January, 2022 but for the previous one the diagnosis was made in March, 2013. After omitting paragraphs 14 and 15 of the supporting affidavit to the previous application the applicant reproduced in the same words and sequence paragraphs 15-16 and skipped 17-19 only to continue reproducing paragraphs 20-26 as paragraphs 14-22 of the instant application.
45. As to whether parties often want to tempt judges to see whether they read facts placed before them or they know the law, only God knows. Why a party can reproduce a previous application and urge it for determination I do not know. But this reminds me the famous words Justice J. R. Midha of Delhi High Court in his farewell speech of that “In Court of justice, both the parties know the truth, it is the Judge who is on trial”. In the instant case, it was expected of the Respondent to have known the copying and pasting of the issues brought before me while the Applicant knew very well that he subtly copied the same. I have been on trial to confirm whether or not I could tell the difference between the



two applications. I have come to be reminded through the instant application that “there is nothing new under the sun...” (Ecclesiastes 1:9).

46. But, this sickening practice of parties picking previously filed documents and presenting them for consideration in subsequent proceedings or matters ought to stop, for God’s sake. It is shameful that it can be done, worse, in the same file. I do not refute the fact that parties rely on precedents to draft pleadings and other documents. But there needs to be some ‘little’ or the semblance of a brain put into action in the drafting of documents!
47. This case reminds me of the case of ruling this court made in the case of *James Ndung’u Kero v Chief Land Registrar, Director Of Survey & Attorney General* (Environment & Land Case E046 of 2021) [2022] KEELC 1446 (KLR) (16 February 2022) (Ruling) where it stated as follows:

“Some pleadings and actions of some parties were so bad that it pained the court when going through them and it wished that they were never filed or done respectively. They depressed the court and that was not healthy at all. The instant pleadings, the supporting affidavit, and the grounds of opposition were so poorly drawn that they did not pass for those drawn by a qualified lawyer. If it were possible all law schools in Kenya should take hold of and use them as teaching aids in civil procedure classes so as to remind students of what they should not do in drafting of pleadings.”
48. While it is left of parties to decide how they move courts, it is not open for a developing society to live on copying and pasting anything and everything. Law schools should remind their students that it behooves them show that they read law and that is why they are called learned friends: friends of both each other and books. This is one of those other decisions our Law Schools should always use in their Civil Procedure and the (legal) Drafting classes to guide students to be careful in how they apply their minds to drafting of documents. It is not all about copying and pasting!
49. I have stated much. With it, is the application before me merited? I stated above that all the issues that my brother judge who was before me dealt with in the application dated 18/01/2019 I will not reconsider. And to the extent that only dates have been changed but the content remains the same, then I am unable to see anything new in the instant application. The applicant claims that he was diagnosed of severe arthritis in 2022 but which same issues, except that for the instant application he only annexed to the supporting affidavit and marked as MWP 1 (in the text but on the annexure as WMP 1) a page of a “Patient File” dated 01/02/2022 which does not show any hospitalization or even any history of prior illness and treatment, and to it were some copies of receipts of 24/09/2017, 12/08/2017 and 17/02/2017 for medicines purported to have been bought then, seem to have been presented before my brother judge in the previous application.
50. Moreover, the applicant was expected to satisfy the Court as to why he did not attend Court on the material date, being 19/10/2019. He did not avail any evidence to demonstrate that he was not aware of the date or that he was bed-ridden then. His advocate cannot be blamed for the dismissal of the case because he diligently attended Court on the material date, placed the matter aside since he was ready but for reasons known only to him and the plaintiff neither he nor his client attended Court at the appointed time. There was no way the advocate could have prosecuted the case if the Plaintiff was absent, so as to agree with the argument by the Plaintiff that the advocate made a mistake of being in another court while the dismissal was made. Again, there is no evidence that the said advocate was indeed before another court at the material time. If the advocate was absent and ought to be blamed for the dismissal, neither the Plaintiff nor a representative was in Court to inform the Court that indeed the lawyer was engaged elsewhere at the time.



51. Again, it is curious that the Plaintiff would be diagnosed of severe arthritis as to prevent him from attending Court yet the doctor does not indicate so anywhere in the treatment summary or patient file presented to the Court. In any event, the diagnosing was made in January, 2022 and not in October, 2019. Granted that the applicant suffers from severe arthritis and from the year 2013, the fact that he was active in October, 2018 when he instructed Ms. Kidiavai & Co. Advocates to come on record and act for him and indeed they ably did so to the extent of setting aside the earlier dismissal is testament that the Plaintiff was not bed-ridden. He was able to move about and the reproduced facts about failure to contact his erstwhile lawyers is a concocted story aimed at attracting sympathy from this Court. The documents marked as MWP1 which the applicant attached to the supporting affidavit to demonstrate illness are a contrivance directed at making this Court to believe the concocted story. And to the extent that they relate to a period almost three years after the dismissal of the suit they are neither here nor there for the purpose of satisfying this Court that there is sufficient cause to make this Court grant the orders sought.
52. Furthermore, the argument that the Corona virus-19 Pandemic prevented the applicant from moving to check on the progress of his case or contact the advocate is a farfetched imagination of the Applicant still designed to mislead the Court. The Covid-19 issues came up in March, 2020, almost five months after the dismissal of the suit. It has nothing to do with the facts surrounding the 17/10/2019. In any event the limitation of movements as a result of age and the Covid-19 Pandemic could only have counted in the consideration of the application herein if it was merited, and only the issue of whether or not there was delay in the application arose. But that is not the case. In any event there is no explanation of the delay between 17/10/2019 and 12/03/2020 when the first case of Covid-19 Pandemic was reported in Kenya.
53. To sum up, I have considered the application in totality. I have also given due regard to the very impressive submissions by the applicant. While the authorities relied on by the applicant were good in terms of supporting the points often raised in setting aside an order of the nature of the one impugned, I find them distinguishable. In the instant case there was not mistake of advocate. The case of Wachira Karani (*supra*) cited by the applicant contains the holding about the duty of the Court to do justice. Indeed, this Court is minded about doing justice. Justice is not for the applicant only but for the respondents. There has to be a balance struck out between the two sides, and for the instant case, I find it to be in favour of the respondents. Regarding the case of Stephen Boro Githia (*supra*), this Court has not placed technicalities above substance, otherwise it could have determined the matter on the irrelevant provisions cited or that indeed the application was a mere replica of the previous one, and resorted to determining whether or not it was *res judicata* even though it referred to an order made on a different date. As for the case of *Patel v EA Cargo (supra)* this Court has judiciously considered whether or not to exercise discretion to set aside the order impugned and has arrived at the conclusion that it cannot. About the Philip Chemwolo case or the one of Belinda Murai (*supra*) or that one of Ivita (*supra*), I see no blunder or mistake of law or fact made by the Advocate who is sought to be blamed. And as to whether the order should be set aside if it discloses a reasonable cause of action, I find and hold that, if the judgment of the Bungoma High Court Succession Cause No. 61 of 2009 is anything to go by, and also that the Defendants were sued as legal representatives of the estate of the late Mukanda Wasike when they were not, and also that the suit against the 2<sup>nd</sup> Defendant has since abated, there is not much in terms of a cause of action against the Defendants to make me hold along the guidance of the binding authority of D.T. Dobie (*supra*) so as to make me exercise discretion herein in favour of the Applicant.



**c. Who to bear the costs of the application**

54. I have come to the conclusion that the application before me is not only unmerited but an abuse of the process of the Court. I hereby dismiss it with costs to the Respondents.

55. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 2<sup>ND</sup> DAY OF MAY, 2023.**

**HON. DR. *IUR* FRED NYAGAKA,  
JUDGE, ELC, KITALE**

