



REPUBLIC OF KENYA



**KENYA LAW**

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**Maiyo alias Hellen Jeptum Bor (Suing as the Legal Administrator of the Estate of the Late Kiptiniya Arap Maiyo - Deceased) v Ngisirei (Environment & Land Case 103 of 2021) [2025] KEELC 3999 (KLR) (20 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3999 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 103 OF 2021**

**GMA ONGONDO, J**

**MAY 20, 2025**

**BETWEEN**

**HELLEN JEPTUM MAIYO ALIAS HELLEN JEPTUM BOR (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE KIPTINIYA ARAP MAIYO - DECEASED) ..... APPLICANT**

**AND**

**EVERLYN CHEMOGON NGISIREI ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the applicant's Notice of Motion application dated 14<sup>th</sup> January 2025 and filed herein on even date (the application) originated under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 51 of the Civil Procedure Rules, 2010, through Kipkorir, Kipkorir C. K. and Company Advocates, seeking the orders infra:
  - a. Moot
  - b. That this Honourable Court be pleased to reinstate this matter and have it set for hearing.
  - c. Costs be in the cause.
  - d. That the cost of this application be borne by the respondents.
2. The application is founded on five grounds as infra:
  - a. The application dated 3<sup>rd</sup> October 2024 was dismissed for want of prosecution.
  - b. On the day the matter was to proceed, the Advocate for the applicant was attending to urgent personal matters and therefore failed to attend to this matter on the date of hearing.
  - c. That it is in the interest of justice that this application be allowed.



- d. That the respondent will not be prejudiced in any way if the orders sought are granted.
  - e. That it will serve the interest of justice if the application sought is granted.
3. Further, the application is anchored on the applicant's supporting affidavit of nine paragraphs sworn on even date. Briefly, the applicant laments that the application dated 3<sup>rd</sup> October 2024 was dismissed for want of prosecution. That Counsel on record was indisposed on the date of hearing of the said application and left no Advocate with instructions to hold his brief. That as a result of the dismissal, the respondent now intends to dispose of Land Parcel No. Nandi/Ndalat/282 (the suit land herein) and if the said disposal happens, the applicant and other beneficiaries of the Estate of Kiptinaya Arap Maiyo (Deceased) will lose their share of 4.0 acres awarded by this Honourable Court. Thus, she urged the court to allow the application.
  4. The respondent through Tum and Associates Advocates, opposed the application by way of a Replying Affidavit sworn on 28<sup>th</sup> February 2025. She deponed that the firm of Kipkorir, Kipkorir C. K and Company Advocates, who filed the present application on behalf of the applicant herein, are not properly on record. That it is not true that she is selling the suit land. That the applicant is in possession and occupation of a portion of the suit land measuring 4 acres and has been utilizing the same with her children since 1990 to date. That she is in the process of implementing the court orders granted in the judgment dated 31<sup>st</sup> January 2023. That the instant application seeks to abuse the process of the Court hence, ought to be dismissed.
  5. The applicant filed a Supplementary Affidavit sworn on 30<sup>th</sup> April 2025 and reiterated the averments in the Supporting Affidavit on record. She stated that she instructed the firm of Kipkorir Kipkorir CK and Company Advocates to come on record and act on her behalf post judgment for the purpose of citing the respondent for contempt and the firm filed the application dated 3<sup>rd</sup> October 2024, seeking leave to come on record. That however, the said application was dismissed for want of prosecution.
  6. On 2<sup>nd</sup> April 2025, the court ordered and directed that the application be heard by way of written submissions in the spirit of Article 159 (2)(b) of *the Constitution* of Kenya, 2010; see also Order 51 Rule 16 of the Civil Procedure Rules, 2010.
  7. Accordingly, the applicant's counsel filed submissions dated 30<sup>th</sup> April 2025 and identified a single issue for determination thus: whether the applicant's application ought to be reinstated. Learned Counsel submitted that the mistake of counsel ought not to be visited upon a litigant. That unless the application dated 3<sup>rd</sup> October 2024 is reinstated and the respondent herein cited for contempt, this court will continue to be exposed to ridicule and disrepute and that the said application was made in the interest of justice and for the purpose of upholding the dignity of this court. Thus, Counsel urged the court to allow the present application and reinstate the application dated 3<sup>rd</sup> October 2024, as prayed. To buttress the submissions, reliance was placed on various authoritative pronouncements including *Shah vs Mbogo & Another (1967) EA 116*, *Ivita vs Kyumbu [1984] KLR 441*.
  8. Learned counsel for the respondent filed submissions dated 2<sup>nd</sup> May 2025 and stated that the applicant's counsel herein is not properly on record since there is no court order allowing for change of counsel after judgment as provided for under Order 9 Rule 9 of the Civil Procedure Rules, 2010. That thus, the present application is incompetent and incurably defective. That the applicant's explanation for non-attendance fails to meet the threshold of sufficient cause required for reinstatement of dismissed matters. That the applicant and her counsel failed to attend court on several occasions, despite being served with hearing notices. That the respondent has no intention of selling the suit land to 3<sup>rd</sup> parties and acknowledges that the applicant is in possession and occupation of 4 acres thereof. That reinstating the application will be prejudicial to the respondent since she will incur significant



legal costs. Counsel relied on the case of James Ndonyu Njogu vs Muriuki Macharia [2020] eKLR, Laji Bhimji Shangani Builders & Contractors vs City Council of Nairobi [2012] eKLR and Julieta Marigu Njagi vs Virginia Njoki Mwangi & another [2022] eKLR, among others, to fortify the submissions.

9. I have duly considered the application, the response thereto and the parties' respective submissions. The principal issues for determination boil down to:
  - a. Whether the applicant's counsel is properly on record.
  - b. Depending on the outcome in (i) above, is the instant application merited?
10. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides that:

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

  - a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”
11. The Court of Appeal in *Gituro v Maki & 3 others (Civil Appeal (Application) E050 of 2023)* [2024] KECA 1204 (KLR) stated the following with respect to Order 9 Rule 9 (supra):

“...It is true that courts, and, in particular, this Court has a policy preference for determining matters on their merits where possible. It is also true, however, that that policy preference is not licence writ-large for litigants to ignore well-established rules of the game – especially where those rules serve substantive policy goals. As this Court has recently stated, the rule stipulated in Order 9 Rule 9 of the Civil Procedure Rules has substantive and sound policy rationale: to protect an advocate from a litigant who may choose to avoid paying legal fees by instructing another advocate. It also has an inbuilt protection for the litigant against an unreasonable advocate by allowing the court to give leave – of course, subject to the conditions that the court places. (See *Municipal Council of Kisumu v Gulf Fabricators Limited & Another (Kisumu Civ. Application No. E103 of 2023)*)... Indeed, as we have shown, the rule they failed to comply with serves a substantive goal and is not merely formalistic...”
12. The respondent contends that the applicant's counsel herein is not properly on record since there is no court order allowing for change of counsel after judgment as provided for under Order 9 Rule 9 of the Civil Procedure Rules, 2010. I note from the record that the applicant was initially represented by the firm of Isiaho Sawe and Company Advocates in this matter. Judgment was entered by this court on 31<sup>st</sup> January 2023 and a decree issued on 11<sup>th</sup> September 2024. Vide the application dated 3<sup>rd</sup> October 2024, the firm of Kipkorir Kipkorir CK and Company Advocates sought leave to come on record for the applicant post judgment, for the purpose of citing the respondent for contempt. However, the said application was dismissed for non-attendance and want of prosecution.
13. In the instant application, the applicant is represented by the firm of Kipkorir, Kipkorir C. K. and Company Advocates and is seeking a reinstatement of the application dated 3<sup>rd</sup> October 2024. Indeed, Order 9 Rule 9 of the Civil Procedure Rules, 2010 is coached in mandatory terms thus, the firm of Kipkorir, Kipkorir C. K. and Company Advocates require the leave of this court to properly come on record for the applicant herein.



14. Regarding reinstatement of suits, this court is cognizant of the provisions under Article 159 (2)(b) (supra) that:

“Justice shall not be delayed”

15. So, it is the duty of the court, litigants, as well as advocates, to ensure that matters are concluded expeditiously without inexcusable delay; see also Section 3 of the *Environment and Land Court Act* and Sections 1A and 1B, of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

16. Further, Section 3A of the *Civil Procedure Act* (supra) gives the court wide discretion over matters and issues that are before it, including the question as to whether it should or should not reinstate a suit dismissed on account of want of prosecution and non-attendance.

17. In *Ivita -vs- Kyumbu* (supra), the court laid down the factors taken into account for the purpose of reinstatement of suits. The court stated thus:

“...So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay....

...The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced...”

18. In the present case, it is notable that the application dated 3<sup>rd</sup> October 2024 was dismissed on 18<sup>th</sup> November 2024 for non-attendance and want of prosecution. The instant application was lodged on 14<sup>th</sup> January 2025, nearly two months later. Undoubtedly, this is a prolonged delay.

19. Further, I bear in mind that the applicant’s assertion that her Counsel on record was the attending to urgent personal matters and/or indisposed on the date of hearing of the application dated 3<sup>rd</sup> October 2024 is not supported by way of evidence in form of correspondence or otherwise. Indeed, it is not enough to make mere averments devoid of supporting evidence. Therefore, I am persuaded by the submissions of the respondent’s counsel that the applicant’s explanation for non-attendance fails to meet the threshold of sufficient cause required for reinstatement of dismissed matters.

20. In the foregone, it is my considered view that the instant application is devoid of merit.

21. Wherefore, the application originated by way of Notice of Motion application dated 14<sup>th</sup> January 2025 and filed herein on even date, is hereby dismissed.

22. Costs to be borne by the applicant.

23. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KAPSABET THIS 20<sup>TH</sup> DAY OF MAY 2025.**

**G.M.A ONG’ONDO**

**JUDGE**

Present

Ms. Sielei, Learned Counsel for the respondent

Walter Kipkorir, Court Assistant

