



**Islam v Theuri & 2 others (Environment & Land Case  
154 of 2018) [2025] KEELC 3788 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3788 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 154 OF 2018**

**EK MAKORI, J**

**MAY 8, 2025**

**BETWEEN**

**MOHAMED AWADH ISLAM ..... PLAINTIFF**

**AND**

**SAMUEL KIMONDO THEURI ..... 1<sup>ST</sup> DEFENDANT**

**MERCY KOKO NDUHIU ..... 2<sup>ND</sup> DEFENDANT**

**THE KILIFI LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 8<sup>th</sup> October 2024, seeks to set aside the dismissal orders made on 21<sup>st</sup> May 2024 and to reinstate the suit for hearing and determination on its merits.
2. In the affidavit deposed by the Applicant, Mohammed Awadh, on the 6th of June, 2024, the grounds upon which the application is premised are that, under Article 159 of *the Constitution* and Sections 1A, 1B, and 3A of the *Civil Procedure Act*, it would be fair, expedient, and in the best interest of justice to reinstate the suit. The suit was dismissed on the 21st of May, 2024, due to non-attendance by the Plaintiff and his Advocate. The Plaintiff was unable to appear in court due to illness. Moreover, the Plaintiff contends that he has demonstrated through the electronic portal that the matter was mentioned by the court, and because of the absence of both himself and his Advocate, it was dismissed for non-attendance. On the day of the hearing, the Plaintiff was recovering after undergoing surgery at Coast General Hospital. It should not be permissible for the Plaintiff to suffer the consequences of actions taken by counsel or as a result of his illness. It is human for an individual to fall ill, and one should not be penalized for such circumstances. The Plaintiff possesses an arguable case with a high likelihood of success, and it is in the interest of justice that this suit be reinstated, allowing it to be heard and determined on its merits. Furthermore, no inconvenience can be occasioned to the parties



involved. The Respondents can be adequately compensated by costs. It is in the interest of justice to grant the orders sought.

3. In her replying affidavit deposed on the 10th of February, 2025, the 1st Respondent, Mercy Koki Nduhiu, deposed that the record indicates a lack of seriousness on the part of the Applicant in prosecuting the matter, which has exposed her to financial expenses, and asserts that the matter ought not to be reinstated.
4. Based on the materials and submissions presented for my consideration, the issues that warrant the court's determination, which I hereby articulate, are whether the orders issued on 21st May 2024, dismissing the Plaintiff's suit, should be annulled, and the question of who should be responsible for the associated costs.
5. I concur with the Applicant that the principles related to the annulment of dismissal orders due to non-attendance were examined in the case of *Martin L Barasa v Giza Systems Smart Solutions Ltd* [2022] KEELRC 181 (KLR). The Court articulated the following:

“The Courts guidance from the holding of Judge Harris (as he then was), where he had this say on the case of *Shah vs Mbogo* [1967] EA 116 and 123B:-

“The 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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

To buttress this position, the court gathered support from the holding of the Court in *CMC Holdings Limited vs Nzioki* [2004] 1 KLR 173, thus: -

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident, or error. Such an exercise of discretion would, in our mind, be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

This determination is further fortified by the finding in the case of *Philip Chemowolo & Another vs Augustine Kubende*, [1982-88] 1 KAR 103, where Apaloo, JA (as he then was) reckoned thus:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

6. The suit was dismissed on 21<sup>st</sup> May 2024 due to the non-attendance of the Applicant and his counsel. However, the Applicant contends that his absence was not intentional but due to illness, as he was recuperating from surgery at Coast General Hospital, supported by medical reports.



7. Upon reviewing the case records, it becomes evident that the Applicant has shown a lack of interest in advancing the proceedings. The case was initiated on July 26, 2018, with an urgent request for injunctive relief. However, the injunction motion could not proceed due to the Applicant's failure to serve the involved Respondents. On October 28, 2021, this court (Odeny J) issued a status quo order pending the main suit's hearing. The parties were instructed to adhere to Order 11 of the CPRs, with a compliance mention scheduled for December 6, 2021, before the Deputy Registrar, but none attended. On June 13, 2022, during the compliance hearing, Ms. Someren and Mr. Ojwang represented the 3rd Respondent, while the Plaintiff was absent, prompting the issuance of a notice to the Applicant to explain why the suit should not be dismissed. On October 27, 2022, the court was informed of an application to consolidate this case with another, along with a response arguing against dismissal for lack of prosecution. On November 9, 2022, when the matter was called before the court, the Applicant was again absent, and Mr. Ojwang questioned the Applicant's commitment to the case. The matter was subsequently scheduled for December 8, 2022, when the pending application was granted by mutual consent.
8. On January 30, 2023, a hearing was scheduled for February 27, 2023. However, on that date, proceedings could not continue as Mr. Mwadilo, representing the Applicant, claimed that the physical file had been taken by the Applicant. On March 15, 2023, Mr. Magolo entered an appearance for the Applicant and requested a hearing for May 16, 2023. On that day, Mr. Magolo sought an adjournment, citing his client's illness. Mr. Ojwang, representing the 3rd Respondent, opposed the adjournment, referencing the case's history. The court noted that a notice for the dismissal of the matter had been issued on June 13, 2022, yet allowed the case to proceed, granting the Applicant a final adjournment and rescheduling the hearing for July 12, 2023, with a warning that the suit would be dismissed if it could not proceed on that date. On the scheduled date, the hearing was set for 10:30 AM virtually, but Mr. Magolo failed to appear, prompting the court to set a Bring Up for October 3, 2023. When no parties appeared, another date was set for November 22, 2023, but again, no parties were present. On February 5, 2024, Mr. Magolo attended court and scheduled a hearing for May 21, 2024. However, on that day, neither Mr. Magolo nor his client appeared. Mr. Ojwang raised the matter's history and requested the suit's dismissal, which the court granted, resulting in the dismissal of the suit for lack of prosecution, now the subject of this litigation.
9. Based on the history of this case, the Applicant has shown little interest in pursuing it and should not expect the exercise of discretion from this court in his favour. In my opinion, this is not one of those cases that warrants the court's discretion for reinstatement. From the very beginning, the Applicant has lacked the enthusiasm to move forward with the case. Therefore, the Application for reinstatement of the suit dated October 8, 2024, is denied, as the records indicate the Applicant's previous disinterest in prosecution. The costs will be awarded to the participating respondents.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MALINDI ON THIS 8<sup>TH</sup> DAY OF MAY 2025.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Ms. Hamid for the Applicants

Mr. Bawazir for the 1<sup>st</sup> Respondent

Ms. Ekiru for the 3<sup>rd</sup> Respondent



Court Assistant: Happy

