



**Mwangi (Suing on Behalf of the Estate of Mbuthia Mwangi alias Gachiri Mbuthia) v Gachiri
(Environment & Land Case E035'B' of 2023) [2025] KEELC 4903 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E035'B' OF 2023**

**JA MOGENI, J
JUNE 30, 2025**

BETWEEN

**MBUTHIA MWANGI PLAINTIFF
SUING ON BEHALF OF THE ESTATE OF MBUTHIA MWANGI ALIAS
GACHIRI MBUTHIA**

AND

PETER MBUTHIA GACHIRI DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated 13/03/2025 brought pursuant to Section 1A, 13A, of the *Civil Procedure Act*, Order 21 Rule 22 (1), Order 10 Rule 6 of the Civil Procedure Rules and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law for Orders that:
 1. Spent.
 2. That the Honorable Court be pleased to set aside the Ruling and Orders entered on 22nd October 2024 by Lady Justice Kemei.
 3. Spent.
 4. That this Honorable Court be pleased to make and/or issue orders as it may deem fit to grant.
 5. That the costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Alex Kubo Mwakichako where he deposes that on 22/10/2024 when the Plaintiff/Applicant suit was dismissed for want of prosecution the Advocate on record was not aware of the Ruling until recently when he perused the Court file.



3. That the Court heard the Defendant/Respondent's Counterclaim ex parte and served a Judgment date for 30/04/2025
4. That the dismissal of the Plaintiff's suit will greatly prejudice the Plaintiff and will be unjust to the estate of the Plaintiff's late father and his beneficiaries since they reside on the suit property. That the suit instituted by the Plaintiff was not frivolous.
5. That reinstating the suit will allow the Plaintiff/Applicant to respond to the Counter-claim filed by the Defendant/Respondent. Further that the Defendant/Respondent will not suffer prejudice and or injustice if the Court reinstates the Plaintiff/Applicant's suit.
6. The Respondent opposed the application and filed a Replying Affidavit sworn by Peter Mbutia Gachiri, where he deposes that the Plaintiff's suit was dismissed for want of prosecution for failure to attend Court despite service and knowledge that the matter was in Court. That the Notice of Change of Advocates is superficial since the Advocate who handled the matter previously namely Alex Kubo is the same one handling the matter now.
7. That on 5/10/2023 the Respondent's Counsel and Plaintiff's Counsel appeared before the Court for pretrial and the Court directed that parties do comply with Pre trial directions and filed their respective trial bundles and the suit was set down for hearing on 6/02/2024 by Consent and later on 3/06/2024.
8. The Respondent avers that to-date the Plaintiff's Counsel has not filed any pre-trial bundle and that this shows that the Plaintiff is not ready to prosecute his case. He further states that on the morning when the matter was scheduled for hearing on 3/06/2024 the Plaintiff's Advocate informed the Respondent's Advocate that he was unwell and would have someone hold his brief but when the matter was called out, no one answered but the Respondent's Counsel accommodated him and the matter was set down for hearing on 22/10/2024.
9. Again on 22/10/2024 the Respondent's Advocate out of Courtesy called upon the Plaintiff's Advocate and requested him to log in but he wrote a short text message stating the he had other private issues to attend to hence he would not be in Court and the Plaintiff's case was dismissed for want of prosecution and the Defendant/Respondent's Counter claim was set down for hearing on 28/01/2025.
10. The Plaintiff's Counsel failed to attend the hearing on 28/01/2025 despite having been served with the hearing notice twice. The Counsel wrote a short text message to the Respondent's Counsel stating that he had a family matter to attend to as evidenced via annexure PMG-1.
11. It is the Defendant/Respondent's contention that the Counsel for the Plaintiff/Applicant cannot come to Court to seek reprieve while all along he has been aware of the hearing of the matter but deliberately failed to attend Court and his client has also failed to attend Court.
12. That both the Plaintiff and his Counsel failed to prosecute the Plaintiff's case and also chose not to attend the hearing of the Court while continuing to occupy the suit property while enjoying status quo orders.
13. The Respondent avers that the Advocate and his clients cannot be allowed to hold the other parties and the Court at ransom or at will and then move Court to their convenience to set aside the dismissal orders when the matter is at Judgment of the Counter Claim stage. He further avers that the Counsel for the Plaintiff is guilty of professional misconduct and does not explain in his Affidavit why his clients have not sworn the Affidavit but himself and he also has not divulged where the Plaintiff is.
14. The Respondent prays that the application lacking merit is an abuse of due process and should be dismissed and the Court should proceed and deliver the Judgment.



15. The application was canvassed by way of written submissions. At the time of writing this Ruling only the Plaintiff had filed submissions which I have considered in writing this Ruling.

Analysis and Determination

16. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and submissions, the issue for determination is whether the Orders issued on 22/10/2024 should be set aside and the Plaintiff's suit reinstated for hearing.

17. This Court has the discretion to set aside an order dismissing a suit or an application for non-attendance. The Court's discretionary power must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained in *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR as follows:

“It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in a suit.”

18. The principles applied by the Court in applications for setting aside ex parte Judgments were set out in *Shah v Mbogo* [1967] EA 116 as follows:

“... the Court's discretion to set aside an ex parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

19. In *Nchapi Leiyagu v IEBC & 2 Others*, Civil Appeal No 18 of 2013, [2013] eKLR, the Court stated that:

“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the Courts have inherent power to dismiss suits this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

20. In *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 1033 at 1040, Apaloo JA stated as follows:-

“Blunder will always 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. I think the broad equity approach to this matter is that unless there is a fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court is as often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

21. The Plaintiff/Applicant's Counsel has given an explanation for his failure to attend Court on 22/10/2024 and 28/01/2025 during the hearing of the Counter claim. The explanation given is not reasonable to me and does not look genuine. First, no evidence has been placed before the



- Court showing that the Plaintiff was not aware about the hearing on both days. The Defendant through his Counsel has provided very credible information on service of hearing notices and also the communication between himself and the Counsel for the Defendant.
22. The evidence provided by the Defendant has not been opposed in any way meaning it is uncontroverted. The Counsel for the Plaintiff chose to do private personal matters instead of attending Court to represent his client. Worse still the Plaintiff chose to not show up in Court also on both occasions when the parties were supposed to be in Court.
 23. On 5/10/2023, the Plaintiff's Counsel even gave an undertaking in Court after the Defendant's Counsel moved to have the application dated 6/12/2021 compromised through issuance of status quo order, that he would file and serve a paginated and well indexed trial bundle. The Court directed that parties comply with Order 11. On 3/06/2024 when the matter was listed for hearing the Plaintiff/Applicant did not attend Court.
 24. I have perused the Court file and noted that the law firm of Muga Maxwell & Co Advocates were diligently served and Affidavits of Service duly filed in Court. This fact is not disputed. So it is not clear from the application why the Plaintiff's Counsel failed to attend the hearing of the Plaintiff's case on two occasions and failed to defend the claim of the Respondent against the Plaintiff after the Counter-claim was listed for hearing.
 25. That said, the application raises critical issues of concern this being a land matter and due to the nature of the dispute between the parties, I am inclined to give the Plaintiff a chance to prosecute their case against the Defendant and to defend their cause against the Defendant's claim. It appears that the Defendants would not suffer any prejudice if the application is allowed.
 26. Ultimately in view of the foregoing detailed and expansive analysis, this Court arrives at the following decision and makes the below Orders:-
 - a. The Honorable Court sets aside the Ruling and Orders entered on 22nd October 2024 by Lady Justice Kemei on the following conditions:-
 - i. The Plaintiff is granted leave to fully comply with Orders 6, 7 and 11 of the Civil Procedure Rules, 2010 by filing his Defence to the Counter-claim; and other relevant documents within 14 days of this Ruling;
 - ii. That the Plaintiff shall pay to the Defendant a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) being thrown away costs within the next 14 days of this Ruling;
 - iii. The Defendant/Respondent is granted corresponding 14 days leave thereafter to file Replies to Defence if any and/or any other relevant documents arising from the filed ones by the Plaintiff/Applicant who will respond to the Counter-claim as a Defendant.
 - b. That in default of compliance with orders given in (i) and (ii) then the order vacating the Ruling by Justice Kemei issued on 22/10/2024 dismissing the Plaintiff's suit shall automatically lapse without further reference to the Court.
 - c. That being that this is a fairly old matter, it should be set down for case management Pre-Trial Conference on priority basis on 28th July, 2025. That the matter to be and concluded within 90 days of this Ruling.



- d. This matter shall now be heard in the new term on 6th October, 2025. The earlier scheduled date for delivery of Judgment is hereby vacated. An no further orders of adjournment shall be entertained by this Court.
- e. Costs of the application shall be in the Cause.
- f. It is so ordered accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JUNE 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Plaintiff – Absent

Ms. Muhuhu for the Defendant/Respondent

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

