Honey Creepers Investments Limited v Attorney General & 3 others; Ethics and Anti-Corruption Commission (Interested Party) (Environment & Land Petition E049 of 2021) [2025] KEELC 4491 (KLR) (16 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4491 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E049 OF 2021

OA ANGOTE, J

JUNE 16, 2025

BETWEEN

HONEY CREEPERS INVESTMENTS LIMITED ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 4TH RESPONDENT

AND

ETHICS AND ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

RULING

1. Vide a Motion dated 14th February, 2025, brought pursuant to the provisions of Articles 50 and 159(2)(d) of the *Constitution* of Kenya, Sections 3(1) and 19(1), (2) of the *Environment and Land Court Act*, 2011, Rule 1 and 20 of the Environment and Land Court Rules, 2014, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, the Petitioner/Applicant seeks the following reliefs:

    i. That this Honourable Court be pleased to review, set aside and vacate its order of 29th January, 2025 dismissing the Petition dated 26th November, 2021 with costs for want of prosecution.

    ii. That this Honourable Court be pleased to reinstate the Petition for hearing on its merits.

    iii. That, in order to save on this Honourable Court's time and costs, that this Honourable Court adopts its previous proceedings and directs that the Petitioners witnesses give further evidence

to respond to the issues raised by the Interested Party in its Replying Affidavit sworn by Margaret Wambeti Ngari on the 24th June, 2024.

iv. That the costs of this application be in the cause.

2. The Motion is based on the grounds set out on its face and is supported by the Affidavit of Alnoor Jiwan, the Petitioner's Director of an even date, who deponed that the Petitioner filed the Petition on 26th November, 2021 and served the same on all the Respondents between the 30th November, 2021 and 9th December, 2021.

3. The Petitioner's Director deposed that as advised by Counsel, the Petition was first mentioned before the Deputy Registrar on the 21st March, 2022 to confirm compliance with the filing of responses but the 2nd and 3rd Respondents indicated that they had not yet filed the responses as they were experiencing difficulties with the judiciary e-filing portal, and that they were granted 3 days to file the same and the matter was scheduled to be mentioned on 20th April, 2022.

4. It was deposed that on 11th May, 2022, the matter was before the court for directions wherein Counsel for the 1st and 4th Respondents again sought and were granted 7 days to file their responses and a mention date to confirm compliance set for the 8th June, 2022, and that on this date, the Respondents sought and were granted 14 days to file and serve their responses and the matter was scheduled for hearing on the 4th October, 2022.

5. The Petitioner's Director stated that he was ready to proceed on this date and had procured the attendance of himself and Ms Nyuttu. However, it was deposed, the 2nd and 4th Respondents, through their Counsel, sought for an adjournment and leave to file responses which was granted; that the matter scheduled for hearing on the 27th and 28th March, 2023 and that court also directed the Respondents to reimburse his and Ms Nyuttu's tickets.

6. According to the Petitioner, the matter proceeded for hearing on the 28th March, 2023 and the 3rd October, 2023 on which dates its Director, its Legal Officer Ms Irene Nyuttu, and the valuer, Mr. Edwin Mutusiri testified on its behalf and that it closed its case. It was deposed that further hearing was scheduled for the 4th October, 2023 but the court was unable to reach the matter on the said date and as such, it was scheduled for 14th and 15th November, 2023.

7. Before the said date, he averred, the Petitioner received a Motion dated the 3rd October, 2023 seeking joinder of the Interested Party into the proceedings; that the Motion was allowed on the 23rd May, 2024 and the Interested Party granted 21 days to file its pleadings and that the Petitioner was granted 14 days upon service to file a response and further documents.

8. The Petitioner's Director stated that when the matter next came up on the 23rd July, 2024, the Petitioner was granted 30 days to file and serve further documents, if need be, as the Interested Party had not served the Petitioner with its pleadings and that the court also directed that the matter proceeds de novo and the hearing was slated for 29th and 30th January, 2025.

9. According to Mr. Alnoor, the Interested Party's Replying Affidavit of 24th June, 2024 raised pertinent issues that required the Petitioner to file a Further Affidavit. Key among them being the allegation that the original allotee and vendor of the suit property, Cab Investments, is a non-existent company and the allotment issued to it was illegal, null and void.

10. He contended that considering that the Petitioner had purchased the suit property from Cab Investments Company Limited over 23.5 years ago during which time transactions and documents were manually prepared and stored, efforts by the Petitioner to retrieve the same from its Advocates

in the transaction M/S A.B Patel and Cab Investment Company Limited's Advocates M/S KKOA Advocates LLP has taken more time than anticipated.

11. By a letter dated the 28th January, 2025, he stated, their Counsel informed the Respondents that they would be seeking an adjournment and 21 days to enable them file a Further Affidavit and adduce further documents and that on 29th January, 2025, they sought for an adjournment as aforesaid but the same was declined by the Court which dismissed the Petition for want of prosecution.

12. According to Mr Alnoor, the need to file further documents was necessitated by the Interested Party's entry into the suit as it had already prosecuted the matter. In the circumstances, he urged, justice dictates that the order dismissing the Petition be set aside and the matter be reinstated and heard on its merits to ensure protection of the Petitioner's right to be heard as guaranteed under Article 50 of the *Constitution*. He stated that the Motion has been brought timeously and the grant of the orders sought would not be prejudicial to any party.

13. In response to the Motion, the Attorney General, on behalf of the 1st and 3rd Respondents filed Grounds of Opposition dated the 3rd March, 2025 in which he averred that:

    i. The Honourable Court is not seized of the requisite jurisdiction to set aside the dismissal order made pursuant to the provisions of Order 17 Rule 4 of the Civil Procedure Rules, 2010. See Erick Kimingichi Wapang'ana t/a Magharibi Machineries Ltd vs Equity Bank Ltd and Anor, C.A No 107 of 2016. In the leading judgment by Kiage JA, the court stated:

> " I agree with the learned judge that upon the order of dismissal being made, the suit ceased to exist and that rendered the court functus officio its powers therein being at an end. The only recourse available to the appellant was to appeal against such dismissal, as was rightly held by the learned judge."

    ii. The Honourable Court cannot sit on an appeal over its own decision rendered on 29th January, 2025. See Njue Ngai vs Ephantus Ngai & Anor[2016]eKLR where the Honourable Court of Appeal stated and observed as hereunder:

> " Another issue may arise as to whether a dismissal of a suit for non-attendance of the Plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this court answered that issue in the affirmative when considering the dismissal of a suit for failure by the Plaintiff to attend court in the case of Peter Ngome vs Plantex company limited(1983)eKLR stating:
>
> > Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The *Civil Procedure Act* does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."
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> Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."

> In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8."

iii. Article 159 of the *Constitution* cannot aid the Applicant for lack of adherence to the rules of procedure. See Kiage JA in Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2013]eKLR

> "I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned..."

iv. The Honourable Court is functus officio. See Telkom Kenya Limited vs John Ochanda(Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014]eKLR where the court held thus: "Functus Officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon....The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re St Nazarire Co (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division".

v. Where a suit has been dismissed for want of prosecution either under Order 17 Rule 2 or 4 of the Civil Procedure Rules, 2010; the only available recourse is an appeal to the Court of Appeal and not otherwise. In Homeboyz Entertainment Limited vs Secretary National Building Inspectorate & 2 Others[2022]eKLR, the court held:

> "My reading of the foregoing provision of the law, suggest and/or connotes that where a Party has been afforded and/or availed sufficient and/or reasonable

opportunity to tender evidence, but same has failed to do so, the court is at liberty to determine the suit forthwith.

59. It is apparent, that by the usage of the Word; by determining the suit, the court is granted the liberty to either enter judgment, where there is a limb of the claim that is admitted by the adverse party or better still dismiss the suit as against the Defendant. Nevertheless, it is imperative to note that even where the suit is dismissed for want of prosecution, such a dismissal constitutes or amounts to a Judgment in favour of the Defendant. Whereas, a dismissal which is done in the absence of the Parties or one of the Parties, is amenable to be set aside pursuant to an application under Order 12 Rule 7 of the Civil Procedure Rules 2010, a Dismissal for want of prosecution, made and/or undertaken in the presence of the Parties leads to an Inter-Partes judgment, in the nature of a Dismissal and same does not lend itself to setting aside.

62. In the circumstances, it is my humble position that having entertained arguments from both the Plaintiffs and the Defendants, on the 16th December 2021, the resultant decision is one that can only be Appealed against and not otherwise."

vi. The Application is an abuse of the court process, un-procedural and lacks merit and should be dismissed with costs.

14. The 4th Respondent filed Grounds of Opposition on the 3rd March, 2025 premised on the grounds that:

i. The Petitioner is attempting to re-litigate matters that have already been determined as the very grounds advanced in the present application are identical to those raised before this Honourable Court on 29th January, 2025, when the Petitioner, having utterly failed to comply with the prior directions, sought an adjournment and further indulgence on the filing of documents. The court considered and decisively rejected these pleas culminating in the dismissal of the Petition for want of prosecution. Thus, the Petitioner's persistence in this futile exercise is, at best, an abuse of process and, at worst an affront to the court's authority.

ii. The Petitioner was afforded more than sufficient time and opportunities to comply with the court's directions but chose not to do so. Specifically:

a. On 21st May, 2024, following the enjoinment of the Ethics and Anti-Corruption Commission (EACC), the court ordered a de novo hearing and granted parties 14 days to file their respective documents in response to any document filed by the Interested Party, EACC.

b. On 23rd July, 2024, despite the EACC having complied, the Petitioner had still failed to file its documents. In a remarkable display of leniency, the court exercised its discretion and granted an additional 30 days scheduling the hearing for the 29th and 30th January, 2025 close to six (6) months later.

c. On 29th January, 2025, when the matter came up for hearing, the Petitioner had still failed to comply, had not filed its further pleadings, and unsurprisingly sought yet another extension.

d. Owing to the above, the Petitioner has demonstrated a consistent pattern of defiance, neglect, and non-compliance, warranting the rejection of an adjournment application.

iii. This is not a case where a party was denied the opportunity to be heard as alleged in ground (xxi) of the application but rather, a textbook example of a litigant who squandered every chance given. Having voluntarily chosen inaction over diligence, the Petitioner cannot now feign victimhood.

iv. The Petitioner's prolonged non-compliance and continued mischief is causing undue hardship and prejudice to the Respondent. Sections 1A and 1B of the *Civil Procedure Act* enshrines the overriding objective of ensuring the just, expeditious, proportionate, and affordable resolution of disputes thus the court's dismissal of the Petition was not only warranted but also aligned with these principles.

v. The decision to dismiss the Petition was made in the presence of both parties, after considering arguments and granting ample opportunities to the Petitioner. The court is now functus officio and cannot revisit or sit on appeal over its own decision.

vi. The reliance on Order 12 Rule 7 of the Civil Procedure Rules is misplaced, as the rule applies in instances where a suit is dismissed for non-attendance of the Petitioner's or its Counsel. Contrarily, the order dismissing the Petitioner's suit was heard after the Petitioner through its Counsel was heard on the adjournment application thus Order 12 Rule 7 does not apply.

15. The Interested Party responded vide a Replying Affidavit by Margaret Wambeti Ngari, dated 27th February, 2025. Ms Ngari deponed that she is an Advocate of the High Court of Kenya and an investigator duly appointed pursuant to Section 23 of the *Anti-Corruption and Economic Crimes Act*, 2003 and a member of the team that investigated the allegations of irregular allocation of L.R No 209/14392 I.R No 86123 to Cab Investments Limited, and as such competent to swear the Affidavit.

16. She deponed that she is aware that the Petitioner was granted 30 days from the 23rd July, 2024 to file a response to the Interested Party's Affidavit and the matter set down for hearing de novo on the 29th and 30th January, 2025 and that the matter was dismissed for want of prosecution since the Petitioner was not ready to prosecute its case despite the hearing dates having been issued 6 months prior and in the presence of its Counsel.

17. According to Ms Ngari, the Petitioner has not advanced a plausible reason for not filing a response to the Interested Party's Affidavit within the 6 months' period between the last mention date and the hearing dates and that as per annexure 9(a) of the Affidavit in support of the Petitioner's application, the Petitioners did not take any steps to procure the necessary documents until 16th December, 2024, 14 months after learning of the assertion that Cab Investments is a non-existent company which was disclosed at the onset in the Interested Party's Affidavit served upon them on 30th October, 2023.

18. Ms Ngari deponed that the Petitioner did not offer any explanation as to why its witnesses could not attend court to prosecute its case whereas the matter had two days of hearing and that consequently, the Petitioner has not made a case for the exercise of this court's discretion.

19. In any event, it was urged, the Interested Party has through its investigations revealed that the Petitioner does not have an arguable case for the reasons that the suit property was alienated public land designated as a transport corridor and therefore unavailable for allocation and that even after relocation of the railway line, the area was never decommissioned to land available for private use.

20. The 2nd Respondent did not participate in this Motion.

Submissions

21. The Petitioner filed submissions on 22nd April, 2025. Counsel submitted that contrary to the 1st Respondent's contention, the present Petition was dismissed pursuant to the provisions of Order 12 of the Civil Procedure Rules and is to be distinguished from a dismissal under Order 17 Rule 4 referenced in the Eric Kimingichi case(supra).

22. As such, it was contended, this court has jurisdiction to set aside the same pursuant to Order 12 Rule 7 as read together with Section 3A of the *Civil Procedure Act*. Reliance was placed on the cases of Godfrey Kirimi vs Catherine Makena [2021] eKLR, John Nahashon Mwangi vs Kenya Finance Bank[2015]KEHC 6789(KLR), LS & Another(Suing through Next Friend and Guardian BS) vs Wasuna & 2 Others[2023]KEHC 21357(KLR).

23. It was submitted that in any event, in view of the provisions of Order 17 Rule 2(6) of the Civil Procedure Rules, the contention that the only recourse for a party whose suit has been dismissed under Order 17 Rule 2 or 4 is to appeal is incorrect.

24. According to Counsel, guided by the decision in Josephat Mabiala Akoyo vs George Sifuna & Another[2022]eKLR, when asked to reinstate a suit dismissed for want of prosecution, the court is called upon to exercise its wide and unfettered discretion judiciously. It was urged that Order 12 Rule 7 seeks to uphold the rules of natural justice and to protect a litigant's rights to a fair hearing as protected under Article 50 of the *Constitution*. The case of John Nahashon Mwangi Case(supra) was cited in this regard.

25. In the circumstances, Counsel contended, prior to the joinder of the Interested Party into the proceedings, the Petitioner had prosecuted its case to its finality; that the Interested Party raised new issues that required further documentation and that considering the age of the transaction in issue, being the purchase of the property from Cab Investments, efforts by the Petitioner to retrieve the documents took longer than anticipated. The same, it was stated, constitutes sufficient cause as explained in Wachira Karani vs Bildad Wachira [2016] eKLR.

26. Counsel urged that as expressed in Sebei District Administration vs Gasyali [1968] E.A 300, denying a party the right to be heard should be the court's last resort and that none of the Respondents has established that the reinstatement will cause them any prejudice. Counsel cited the case of John Harun Mwau vs Standard Limited[2017]KECA 150(KLR) in this regard.

27. Finally, Counsel averred that the Petition raises triable issues, being that, it inter-alia, challenges the compulsory acquisition of the suit property without compensation in violation of the right to property protected under Article 40(3) of the *Constitution*. In support, Counsel cited the cases of CMC Holdings vs James Mumo Nzioki[2024] eKLR, Patel vs East Africa Cargo Handling Services Ltd[1974]EA 75 and Moi University vs Vishwa Builder Ltd [2010]KECA 397(KLR).

28. The 4th Respondent filed submissions on the 18th May, 2025. Counsel submitted that it is clear beyond peradventure that courts are creatures of the *Constitution* and statute and as such can only exercise such jurisdiction as conferred on them by the same. Reliance was placed on the cases of Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 Others SC Application No. 2 of 2011 [2012] eKLR and China Bente Industry (K) Limited v Komen & another (Environment & Land Case 358 of 2019) [2022] KEELC 15387 (KLR) (21 November 2022) (Ruling).

29. According to Counsel, the record will show that upon the court's refusal to grant the Petitioner an adjournment on 29th January 2025, the Petitioner's Counsel made an oral application seeking reconsideration of the court's decision to dismiss the Petition on the same facts which was denied.

30. As such, it was argued, the present Motion is res judicata and contravenes the doctrine of issue estoppel. Counsel placed reliance on the cases of In Trade Bank Limited vs LZ Engineering Construction Limited, [2000] 1 EA 266 and the Indian Case of Celir LLP vs Sumathi Prasad Bafna and Ors, 2024.

31. Counsel averred that guided by the exposition in China Bente Industry (K) Limited vs Komen & another (supra), the dismissal having been made or taken inter-parties, the court cannot re-visit the subject matter and purport to restore or reinstate the same as this will be tantamount to sitting on appeal over, and in respect of its own decision. The case of Mwangi vs Consolidated Bank of Keya Limited & 3 Others [2024] KECA 250(KLR) was equally cited in this regard.

32. Further, it was submitted, upon dismissal of the Petition for want of prosecution, the court was rendered functus officio which as explained in Telkom Kenya Limited vs John Ochanda [2014]eKLR is a principle of finality and which expresses that once a judge has decided a matter before him, his jurisdiction to revisit the matter is spent. Reliance in this respect was also placed on the cases of Railway Corporation vs Edermann Properties Ltd & Another[2022]KESC 42(KLR), China Bente Industry (supra) and Homeboyz Entertainment Limited vs Secretary National Building Inspectorate and 2 Others[2022]eKLR.

33. Counsel contends that in view of the foregoing, the Motion constitutes an abuse of the process of the court which as explained by the Court of Appeal in Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others[2009]KLR 229 is the improper use of the judicial machinery or processes to bring about a result which it was not designed to produce.

34. The Petitioner's conduct, it was urged, marked by consistent inaction and disregard for the court's authority is inimical to the overriding objectives under Sections 1A and 1B of the *Civil Procedure Act*.

35. The right to be heard, it was asserted, is not absolute and in this instance, the Petitioner drove itself from the seat of justice. The cases of Nginyanga Kavole vs Gideon Mailu[2019]eKLR, Isiolo Stage View Enterprises vs Isiolo County Government [2018] eKLR, George Abonyo Obete vs EcoBank Kenya Limited [2017] eKLR, and Railway Corporation vs Edermann Properties Ltd & Another[2022]KESC 42(KLR) were referenced in this regard.

36. The Interested Party filed submissions on 16th May, 2025. Counsel submitted that whereas the right to be heard is sacrosanct, the Petitioner is only entitled to be afforded an opportunity to be heard. In this instance, it was stated, the Petitioner, having failed to utilize the opportunity, cannot complain of being denied an opportunity to be heard. Reliance was placed on the case of Union Insurance Co Kenya Limited vs Ramzan Abdul Dhanji, Civil Appeal No 179 of 1998.

37. According to Counsel, reinstatement of a suit dismissed for want of prosecution is a discretionary remedy and not as of right and having failed to comply with the directions of the court, the court ought not to exercise its discretion in the Petitioner's favour. Counsel cited the case of Nesco Services Limited vs CM Construction (E.A) Limited, [2021] eKLR in this respect.

Analysis and Determination

38. Having considered the Motion, responses and submissions, the issues that arise for determination are:

    i. Whether the Motion is competent?

    ii. Whether the court should reinstate the Petition?

39. Vide their respective responses, the 1st, 3rd and 4th Respondents and the Interested Party seek to impugn the present Motion. It is their contention that this court is devoid of jurisdiction to entertain the same on the ground that it is res judicata, contravenes the doctrine of issue estoppel and the court is functus.

40. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act*, which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

41. It is clear from the forgoing that this doctrine applies to bar subsequent proceedings when there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy. [See the Supreme Court Judgment in John Florence Maritime Services Limited & Another Vs Cabinet Secretary Transport & Infrastructure & 3 Others [2021]KESC 39 (KLR).]

42. Intricately tied to this principle, is the doctrine of issue estoppel which was described by the House of Lords in Arnold & Others vs National Westminster Bank PLC (1991) 2 A.C thus:

> " Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

43. According to the 4th Respondent, the Petitioner is attempting to re-litigate matters. It asserts that the grounds advanced in this Motion are identical to those raised before this court on 29th January, 2025 which the court considered and decisively rejected.

44. The court has considered the record. On 29th January, 2025, the matter was due for hearing. Counsel for the Petitioners sought an adjournment contending that they were not ready to proceed because they needed to file a Further Affidavit and adduce additional documents in response to the 4th Respondent's and the Interested Party's Replying Affidavits. The court declined to adjourn the matter noting that the reasons given for the adjournment were insufficient.

45. The Petitioners counsel thereafter indicated that he did not have a witness and sought for a stay of proceedings to enable the Petitioner appeal. The court proceeded to dismiss the matter. The dismissal marked the end of the day's proceedings on the matter.

46. As aforesaid, the twin doctrines of res judicata and issue estoppel envisage finality in litigation by precluding parties from re-opening matters that have been conclusively determined by a court of competent jurisdiction. In the present case, however, the Motion before the court seeks the reinstatement of the Petition. This is to be distinguished from what was sought before the court on the 29th January, 2025, being a request for adjournment. Notwithstanding the advancement of the same grounds, these are distinct issues.

47. Ultimately, the court rejects the contention that this Motion is res judicata and/or triggers the principle of issue estoppel.

48. Turning to the question of whether the court is functus officio, the same embodies the legal principle of finality, ensuring that once a court has fully rendered its decision, it has exhausted its jurisdiction over that matter.

49. Speaking to the same, the Supreme Court in Raila Odinga & Others vs IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law" (2005) 122 SALJ 832 in the following words:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

50. It is indeed trite that once a court has determined a matter, it exhausts its jurisdiction over the same. Nonetheless, like with all principles, there are exceptions. These were highlighted by the court in Mombasa Bricks & Tiles Ltd & 5 Others vs Arvind Shah & 7 Others [2018] eKLR, thus:

> " I understand the doctrine, like its sister, the res- judicata rule to seek to achieve finality in litigation. It is a way of a court saying, 'I have done my part as far as the determination of the merits are concerned hence let some other court deal with it at a different level'. It is designed to discourage reopening a matter before the same court that has considered a dispute and rendered its verdict on the merits.
>
> It however does not command that the moment the court delivers its judgment in a matter then it becomes an abomination to handle all and every other consequent, complementary, supplementary and necessary facilitative processes.As was held by the court of Appeal in Telkom Kenya Ltd vs John Ochanda, the bar is only upon merit-based decisional engagement. To say otherwise would be to leave litigants with impotent decision incapable of realization towards closure of the file.
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> ...There are several proceedings that can only be undertaken after judgment and not before. The following are just but examples; Application for stay; Application to correct the decree; Application for accounts; Application for execution including garnishee applications; Applications for review; Application under section 34 of the Act.
>
> If one was to accede to the position taken by the judgment debtor that the court is functus officio then it would mean that the provisions of law providing for such proceedings are otiose or just decorative and of no substance to the administration of justice."

51. It is the 1st and 3rd Respondents' contention in this regard that having dismissed the suit pursuant to the provisions of Order 17 Rule 4 of the Civil Procedure Rules, 2010, the court's jurisdiction is spent and the court is functus officio as regards the plea for reinstatement.

52. The 4th Respondent similarly submitted that as the decision to dismiss the Petition was made in the presence of parties, after considering arguments and granting ample opportunities to the Petitioner, the provisions of Order 12 Rule 7 are inapplicable and as such, the court is now functus officio and cannot revisit or sit on appeal over its own decision.

53. Considering these arguments, it is clear that the first port of call is a determination of the nature of the dismissal herein. This being a Petition, the same is ordinarily guided by the provisions of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, hereinafter the Mutunga Rules.

54. In the circumstances, however, the rules do not speak to dismissals and reinstatements and regard will have to be had to the provisions of the Civil Procedure Rules. [See the Court of Appeal decision of Karl Wehner Claasen vs Commissioner of Lands & 4 others [2019] eKLR.]

55. The Civil Procedure Rules outline two primary provisions for the dismissal of suits. Orders 12 and 17. Order 12 addresses the procedures for hearings and the consequences of non-attendance by parties. Of relevance is Order 12 Rule 3 which provides:

> "(1)If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

56. And Order 12, Rule 7 which states:

> " 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."

57. Order 17 deals with prosecution of suits. Of relevance herein is Order 17, Rule 2 which states:

> "(1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) .....
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) A suit stands dismissed after two years where no step has been undertaken....."

58. Order 17, Rule 3 states as follows:

> " Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by Order 12, or make such other order as it thinks fit."

59. And Order 17, Rule 4 provides that:

> " 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."

60. It is clear that the two make reference to distinct circumstances where the court may dismiss a suit and the reliefs, if any.

61. Turning to the facts of the present matter, the record shows that on 29th January 2025, the Petition was scheduled for hearing. However, the Petitioner's Counsel requested for an adjournment, citing a lack of preparedness and the absence of their witnesses. The court, having considered the application, declined to grant the adjournment and proceeded to dismiss the Petition, stating:

> " In the absence of the Petitioner and having declined to adjourn the matter, I dismiss the matter with costs for want of prosecution."

62. In view of the foregoing, it is apparent that the crucial factor leading to the dismissal of the Petition was the Petitioner's absence for the purpose of proceeding with the hearing due to its lack of witnesses. This situation aligns directly within the framework of Order 12 of the Civil Procedure Rules.

63. Order 12, Rule 7 provides a remedy to parties whose matters have been dismissed thereunder providing that the court may, on application, set aside or vary the judgment or order upon such terms as may be just.

64. This provision vests this court with jurisdiction to revisit and, if merited, set aside a dismissal order. It follows therefore, that the court is not functus officio and it cannot be said that in entertaining the Motion, it is sitting on appeal over its own decision. Ultimately, it is the finding of the court that this Motion is competent.

65. It is trite that the court's discretion to set aside a dismissal order and reinstate a suit must be exercised judiciously and not arbitrarily. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error.

66. This position was expressed in the case of Shah vs Mbogo & Another (1967) EA 116, where the Court of Appeal of East Africa held that:

> " The 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 it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

67. More recently, the Court of Appeal in Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR stated that:

> " ...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."

68. The court in Wachira Karani vs Bildad Wachira [2016] eKLR appreciated that the threshold to be met by an Applicant seeking to have the court set aside its orders as aforesaid is the demonstration of sufficient cause. As to what constitutes sufficient cause, the Court of Appeal in the case of BML vs WM [2020] eKLR, explained as follows:

> " What amounts to sufficient cause depends on the circumstances of each case and the court is called upon to exercise its discretion depending on the said circumstances. Musinga, JA

in the case of The Hon. Attorney General v the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur) defined sufficient cause to be:

> "Sufficient cause" or "good cause" in law means: .....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See BLACK'S LAW DICTIONARY, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

Similarly, the Supreme Court of India in the case of Parimal v Veena [2011] 3 SCC 545 observed 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."

69. By way of brief background, the Petitioners instituted this Petition on 26th November, 2021 seeking inter-alia, for orders of mandamus directing the 3rd Respondent to withdraw a caveat registered against the title of the suit property, L.R No 209/14392 on 4th January, 2011 by the Registrar of Titles and directing the 2nd and 4th Respondents to compensate the Petitioner for compulsorily acquiring the suit property at the rate of Kshs 3,000,000/=.

70. It also sought mesne profits for the unlawful and constructive acquisition of the suit property at a monthly rate of Kshs 3,500,000/=.

71. The hearing proceeded on the 28th March, 2023 and 3rd October, 2023 where 3 witnesses testified for the Petitioner and its case was closed. The matter was next scheduled for hearing on the 4th October, 2023. However, the same could not be reached and a further date given for the 14th and 15th November, 2023.

72. The Interested Party filed a Motion for joinder into the proceedings on 3rd October, 2023. Directions were given on the filing of responses to the Motion and the court vacated the hearing dates of 14th and 15th November, 2023.

73. The Motion came up for directions on the 14th November, 2023 and 9th April, 2024 and a ruling was thereafter delivered on the 23rd May, 2024. The court allowed the joinder granting the Interested Party 21 days to file its pleadings, witness statements and the necessary documents. The Petitioner and the Respondents were granted corresponding leave to file responses within 14 days.

74. On the 23rd July, 2024, the court directed that the matter would begin de novo on 29th and 30th January, 2025. All other parties were granted 30 days to file any other relevant documents.

75. When the matter came up for hearing on the 29th January, 2025, Counsel for the Petitioner sought an adjournment indicating that they were not ready to proceed and would require time to file a Further Affidavit. The court declined to grant the adjournment. Noting that the Petitioner did not have any witnesses, the court dismissed the matter giving rise to the present Motion.

76. The court has carefully considered the record, including the explanation advanced by the Petitioner in support of its application. The Petitioner's position is that it encountered challenges in acquiring documents to respond to the allegations by the Interested Party considering that the information sought was with regards to transactions carried out over 20 years ago.

77. In response, the Respondents and Interested Party assert that the reasons advanced are insufficient and that the Petitioner had ample time to file the relevant documents. In any event, the Interested Party asserted, the Petition does not raise triable issues.

78. The court notes that the Interested Party, in its Motion dated 3rd October, 2023 seeking joinder to these proceedings, stated as one of its grounds that investigations had revealed the original allottee of the suit property Cab Investments was a non-existent entity. The Petitioner responded to this Motion and was at that juncture duly put on notice of the Interested Party's assertions.

79. Upon the successful joinder of the Interested Party, it filed a Replying Affidavit dated 24th June 2024, further elaborating its claims aforesaid. When the matter came up for mention on 23rd July 2024, Counsel for the Petitioner informed the Court that they had just received the Interested Party's witness statement and requested additional time to prepare a response. The court granted all the parties thirty (30) days to file any further documents.

80. From the foregoing, it is evident that the Petitioner was placed on formal notice regarding the nature of the Interested Party's claim as early as October 2023. Even if for the sake of argument, the timeline is computed from July 2024, the date when the witness statement was received, a period of approximately seven months had elapsed as at the time of the dismissal of the matter.

81. The Petitioner has adduced into evidence correspondence which shows the Petitioner seeking documents from KKOA Advocates LLP, Cab Investment Limited's Counsel and a reminder thereto. These letters are dated 16th December, 2024 and 14th January, 2025, a few days to the hearing date of 29th January, 2025.

82. Although the conduct of the Petitioner in this regard falls short of the standard expected of it, the court must evaluate the totality of the circumstances, including the Petitioner's prior conduct in these proceedings. It is evident that before the joinder of the Interested Party, the Petitioner had diligently prosecuted its case.

83. Moreover, the record indicates that the Respondents themselves have on multiple occasions sought and received extensions of time to file pleadings and supporting documents.

84. As to whether or not the Petition raises triable issues, the court affirms that it does. As explained by the Court of Appeal in Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono (2015) eKLR, a bona fide triable issue is any issue that would require further interrogation by the court during a full trial. The constitutional violations alleged warrant full interrogation.

85. The court is also not convinced that reinstating the matter would occasion any material prejudice to the Respondents, particularly given their own benefit from the court's indulgence on prior occasions.

86. The court is also guided by the exposition in Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others [2013] eKLR thus:

> " 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 jurisdiction 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."

87. Ultimately, court finds that the interests of substantive justice would be best served by allowing the reinstatement of the Petition.

88. For those reasons, the court finds the Motion dated 14th February, 2025 to be merited and grants the following orders:

    i. The orders issued on the 29th January, 2025 be and are hereby set aside.

    ii. The Petition is hereby reinstated.

    iii. The Petitioner shall bear the costs of the Notice of Motion dated 14th February, 2025.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Kibogy for 1st Interested Party.

Ms Ahomo for Petitioner/Applicant

Mr. Kinywa for Sagana for 4th Respondent

Ms Wanini for 2nd Respondent

Mr. Allan Kamau for 1st and 3rd Respondent

Court Assistant: Tracy