Makoffu & another v Canuck Holdings Limited & 4 others (Environment and Land Case 231 of 2018) [2025] KEELC 6545 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6545 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 231 OF 2018

OA ANGOTE, J

SEPTEMBER 30, 2025

BETWEEN

MARY MAKOFFU ..... 1ST PLAINTIFF

FREDRICK MAKOFFU ..... 2ND PLAINTIFF

AND

CANUCK HOLDINGS LIMITED ..... 1ST DEFENDANT

JACQUELINE W NJERU FORMERLY T/A JAVISAPA ENTERPRISES LIMITED ..... 2ND DEFENDANT

ANNE WANGARI NJUGUNA ..... 3RD DEFENDANT

HUMPHREY W OKUKU T/A OKUKU AGENCIES AUCTIONEERS .... 4TH DEFENDANT

CHIEF LAND REGISTRAR ..... 5TH DEFENDANT

RULING

1. Vide a Notice of Motion dated 10th March 2025, brought pursuant to Sections 1, 1A, 3A and 7 of the *Civil Procedure Act*, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and Article 159(d) of the *Constitution* of Kenya, the Plaintiffs seek the following reliefs:

    i. That the Order of this Honourable Court dismissing the Plaintiff's suit made on 23rd January 2025 be set aside and the suit be reinstated for hearing inter partes on merit.

    ii. That this Honourable Court be pleased to invoke its inherent power in the interest of justice and reinstate the Plaintiff's suit which was dismissed on 23rd January 2025.

    iii. That this court be pleased to arrest or stay any request for Decree made by the Defendants pursuant to the dismissal order.

iv. That the costs for this Application be in the cause.

2. This application is based on the grounds set out on its face and is supported by the affidavit sworn by the 1st Plaintiff, Mary Makoffu, who deponed that the matter was scheduled for hearing on 23rd January 2025, and that she was aware of the said date and was ready to proceed.

3. However, it was deposed, on the material day, her advocate informed her that he was unwell and would not be in a position to attend court and that he instead sent his colleague to seek an adjournment and advised her that it was unnecessary for her to attend court as the hearing would not proceed.

4. Mary Makoffu deponed that she was later informed, on the following day, that her suit had been dismissed after they failed to proceed with the hearing; that upon inquiry, she was advised by her advocate that the Court had requested for a sick note which was not available at the time when the application for adjournment was made and that in the absence of the sick note, the court proceeded to dismiss the matter.

5. The 1st Plaintiff averred that her advocate later informed her that he obtained a sick note later that day, after visiting his doctor; that as a result, the sick note was not available for presentation to the court at the time the matter was mentioned and that her Advocate has consistently attended court proceedings in this matter and his absence on 23rd January 2025 was not intentional. She maintained that illness was unforeseeable and that her advocate had notified her of his inability to attend court.

6. The 1st Plaintiff contended that the dismissal of the suit has greatly prejudiced her. She urged the court to exercise its discretion to reinstate the suit stating that the failure to proceed with the hearing was not occasioned by any fault on her part. She asserted that she remains desirous of prosecuting the suit to its conclusion.

7. The 1st Plaintiff further deponed that no prejudice would be occasioned to the Defendants by the reinstatement of the suit, as there had been no inordinate delay in filing the application.

8. The 2nd and 3rd Defendants opposed the application through Grounds of Opposition dated 29th May 2025. They averred that the application is fatally defective as it has been filed after judgment and without leave of court and by a law firm that is not on record for the Plaintiffs.

9. Without prejudice to the foregoing, the 2nd and 3rd Defendants contended that the principle of finality of litigation must be upheld and that undue delay defeats equity. It was their position that the Plaintiffs are undeserving of the orders sought as they have inordinately delayed the prosecution and conclusion of this suit.

10. According to the Defendants, the suit was filed approximately seven years ago and had not proceeded to hearing due to several adjournments at the instance of the Plaintiffs.

11. The Defendants further argued that the reason tendered for the Plaintiffs' non-attendance on the date the suit was dismissed does not constitute sufficient cause to justify setting aside of the dismissal orders or reinstatement of the suit.

12. It was the Defendants' view that the Plaintiffs have exhibited indolence in the prosecution of their case and that equity does not aid the indolent but the vigilant.

13. In the alternative and without prejudice, the Defendants prayed that should the court reinstate the suit, such reinstatement should be conditional upon the payment of throw away costs of Kshs. 50,000 by the Plaintiffs.

14. The 2nd Defendant, Jacqueline W. Njeru, also filed a Replying Affidavit sworn on 26th June 2025 in opposition to the application. She deponed that this suit was instituted on 16th May 2018 alongside an application seeking injunctive reliefs, which application was determined on 17th July 2019. She averred that following the determination of the application, no further action was taken by the Plaintiffs until 20th January 2020, when the court listed the matter for hearing.

15. It was Jacqueline Njeru's deposition that the matter first came up for hearing on 15th December 2020, but the same was adjourned at the instance of the Plaintiffs who was said to be in Arusha and was unavailable to testify.

16. According to the 2nd Defendant, the conduct of the Plaintiffs throughout the pendency of the suit demonstrates a pattern of laxity and indolence. She averred that it took the Plaintiffs more than nine years to assert their rights through instituting this suit yet they were well aware of the existence of the arbitration proceedings and the existence of HCCC 524 of 2009 which touches on the subject matter of this case.

17. She maintained that the Plaintiffs could have moved to be enjoined in the said proceedings or applied to set aside or review the orders issued therein but instead, they only acted after the suit property had already been auctioned and sold to third parties.

18. She further deponed that the Plaintiffs filed the instant application more than a month after the dismissal of the suit, which delay, in her view, was unreasonable, inordinate and had not been satisfactorily explained by the Plaintiffs. She contended that if indeed the Plaintiff's advocate was unwell and the sick note was procured on the same day, there was no justifiable reason for the delay in bringing the application.

19. In any event, she noted that the Plaintiff's Counsel knew prior to the hearing date that he would not be able attend court, yet no timely steps were taken.

20. In a Further Affidavit sworn on 10th June 2025, the 1st Plaintiff, Mary Makoffu, averred that the failure by her counsel to seek leave to come on record after Judgment was an oversight. She deponed that this lapse had since been cured through filing and service of a consent dated 2nd June 2025 executed between her current and former advocates in compliance with the provisions of Order 9 Rule 9(b) of the Civil Procedure Rules.

21. She urged that the Court should find that the provisions of Order 9 Rule 9 and 10 of the Civil Procedure Rules had been complied with and that her advocates are properly on record.

Submissions

22. Counsel for the Plaintiffs submitted that the power to reinstate a suit lies within the discretion of the court and that such discretion ought to be exercised judiciously and in the interest of justice. In support of this proposition, reliance was placed on the decisions in Odek vs Nyang'oro [2025] KEELC 193 (KLR) and Thathini Development Company Limited vs Mombasa Water & Sewerage Company & Another [2022] eKLR.

23. It was submitted that the dismissal of the suit was not occasioned by any indolence on the part of the Plaintiffs, who had at all times instructed their counsel to attend court whenever the suit was listed for hearing or mention. Counsel argued that the Plaintiffs cannot be faulted for the events of 23rd January 2025, as their advocate was indisposed on that day and had communicated the same to them in advance.

24. It was their position that the Plaintiffs had demonstrated in their affidavits that the various adjournments in this matter were not attributable to them and that they remained committed to prosecuting the suit to conclusion.

25. Counsel further submitted that the dismissal of the suit was prejudicial to the Plaintiffs, as their suit was dismissed despite the fact that they had been informed by their Counsel that he was unwell and that he would send someone to hold his brief and seek for an adjournment.

26. It was Counsel's further submission that the Plaintiffs are desirous of prosecuting the suit to its conclusion and that no prejudice will be occasioned to the Defendants should the suit be reinstated. Counsel argued that the application had been brought without inordinate delay and urged the court to exercise its discretion in favour for reinstatement, in the interest of justice.

27. On the issue of representation, Counsel submitted that the Plaintiffs instructed the firm of Kiragu Wathuta & Company Advocates to take over the conduct of the matter from Mwamuye, Kimathi & Kimani Advocates. Counsel acknowledged that the current advocates initially came on record without leave of the court, as required under Order 9 Rules 9 and 10 of the Civil Procedure Rules.

28. However, Counsel submitted that the Plaintiffs have cured the procedural defect by filing a consent between their previous and current advocates, which consent was annexed to the Further Affidavit. Counsel urged the court to find that the Plaintiff's current advocates were properly on record after judgment.

29. Counsel relied on the decision in Abdinoor Shurie vs Halima Bundid [2020] eKLR, where the court, notwithstanding non-compliance with Order 9 Rule 9, allowed an application for reinstatement. In that case, the court held that Article 50 of the *Constitution* enshrines the right to be heard, and that where a suit can still be prosecuted and justice achieved, a party should be granted the opportunity to do so.

30. Counsel for the 2nd and 3rd Defendants submitted that the dismissal of the suit was in accordance with the provisions of Order 12 Rule 1 of the Civil Procedure Rules, under which the court had discretion to dismiss a suit where a party fails to appear and prosecute the same.

31. It was submitted that in the absence of the Plaintiffs or their counsel on the scheduled hearing date, the court was justified in declining the request for adjournment, particularly in the absence of any supporting evidence of illness at the time.

32. It was argued that the sick-off note produced by the Plaintiffs was not proof of illness nor did it give the date on which the advocate was attended to at the hospital. Further, it was submitted that the Plaintiffs themselves, having claimed to be ready for hearing, ought to have attended court in person. It was argued that the absence of the Plaintiffs, based on the assumption that they would get an adjournment, was in the Defendant's view, indicative of disrespect towards the court.

33. Counsel maintained that the modus operandi of the Plaintiffs throughout the course of this suit is one of laxity as they have on numerous occasions slept on their rights, and that it is trite law that equity does not aid the indolent but the vigilant.

34. On the issue of delay, it was submitted that this application was filed after an unreasonable and inordinate delay, which had not been sufficiently explained by the Plaintiffs. Counsel argued that if the sick note was procured on the same day the matter was dismissed, there was no reason why the Plaintiffs took so long to file this application.

35. In support of their position, the 2nd and 3rd Defendants relied on the cases of Esther Wamaitha Njihia & 2 Others vs Safaricom Ltd [2014] eKLR, Josphat Oginda Sasia vs Wycliffe Wabwile Kiiya [2022] eKLR, Shah vs Mbogo & Another [1966] EA 116 and Gideon Mose Onchwati vs Kenya Oil Co. Ltd & Another [2017] eKLR.

Analysis and Determination

36. Upon consideration of the application, responses and submissions filed by the parties, the following issues arise for this court's consideration:

    a. Whether the application offends Order 9 Rule 9 and 10 of the Civil Procedure Rules.

    b. Whether this court should reinstate the suit.

37. The Plaintiffs' application for reinstatement stems from the events of 23rd January 2025, when the suit was dismissed for want of prosecution. On that date, the matter was listed for hearing. Mr. Kabuchu, holding brief for Mr. Kimathi, Counsel for the Plaintiffs, applied for an adjournment on the ground that the Plaintiffs' Counsel was unwell. The application was opposed by Counsel for the Defendants, who submitted that the matter had previously been adjourned on multiple occasions.

38. In declining the request for adjournment and subsequently dismissing the suit, the Court considered, inter alia, the age of the matter; the absence of any medical documentation to support the claim of illness; and the existence of an application by Counsel to cease acting, which had neither been mentioned nor addressed during the proceedings.

39. The Plaintiffs now seek that this Court sets aside the orders of dismissal and exercise its discretion to reinstate the suit. It is the 1st Plaintiff's contention that the dismissal was occasioned by circumstances beyond her control and not as a result of any default or indolence on her part. She urges the Court to allow the reinstatement, asserting that it is in the interest of justice that the matter be heard and determined on its merits.

40. The 2nd and 3rd Defendants have however challenged the application on the grounds that it is non-compliant with Order 9 Rule 9 of the Civil Procedure Rules.

41. Order 9 Rule 9 of the Civil Procedure Rules sets out the procedure that guides the change of counsel after Judgment has been entered:

> "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—
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> (a) upon an application with notice to all the parties; or
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> (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."

42. Accordingly, once judgment has been entered, any change of advocates can only take effect upon a court order made on an application served on all parties, or through a consent duly filed by both the outgoing and incoming advocates.

43. In this matter, it is not refuted that the consent between the outgoing firm of Mwamuye, Kimathi & Kimani Advocates and the incoming firm of Kiragu Wathuta & Company Advocates was filed on 2nd June 2025, the same having been triggered by the Defendants' response to the current application.

44. It is thus evident that the present application was filed in contravention of the clear requirements of Order 9 Rule 9 of the Civil Procedure Rules. The question that now arises is: what is the effect of this non-compliance?

45. There appear to be two schools of thought in this respect. On the one hand, some courts have held that the provisions of Order 9 Rule 9 are mandatory in nature and that pleadings filed in contravention of the same should be struck out. [see Stephen Mwangi Kimote vs Murata Sacco Society Ltd [2018] eKLR].

46. The other school of thought maintains that the Court should prioritize the determination of substantive issues on their merits, notwithstanding non-compliance with Order 9 Rule 9 of the Civil Procedure Rules. According to this view, non-compliance with the said provision amounts to a procedural technicality that is curable under Article 159(2) (d) of the *Constitution* and the Court's overriding objective. [see Abdinoor Shurie vs Halima Bundid [2020] KEELC 3354 (KLR) and Regina Nang'unda Tundwe vs Margaret Nasimiyu Wasike [2021] eKLR.]

47. In addressing this issue, the Court is mindful that the underlying purpose of Order 9 Rule 9 is to safeguard advocates from potentially unscrupulous clients. This position was aptly articulated in S.K. Tarwadi vs Veronica Muehlemann [2019] eKLR, where the Court observed as follows:

> "...In my view, the essence of Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a Judgment is delivered and then sack the advocate and either replace him...."

48. The court is in this respect guided by the Court of Appeal decision of Tobias M. Wafubwa vs Ben Butali [2017] eKLR in which it was held as follows:

> "We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the *Constitution* and the overriding principles could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus;
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> > "All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed, all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all..."

49. Notwithstanding the initial non-compliance with Order 9 Rule 9, this court notes that the said consent has not been opposed. Further, no prejudice has been occasioned to the Plaintiffs by the change of counsel. This court therefore adopts the said consent as an order of this court.

50. The Plaintiff seeks to have the dismissal order issued on 23rd January 2025 set aside. On their part, the Defendants contend that the Plaintiffs' conduct in this matter has been characterized by indolence and is undeserving of the exercise of this court's discretion.

51. By way of a brief background, this suit was commenced by a Plaint dated 15th May 2018. In the Plaint, the Plaintiffs averred that by a sale agreement dated 20th August 2009, she purchased Flat Number 3, Block C erected on L.R. No. 3734/15 Lavington Nairobi from the 1st Defendant and that she took possession of the property in 2009. Despite the foregoing, the Plaintiffs asserted that they were unable to register the lease, due to a prohibitory order registered on 17th February 2010 against the title of the property.

52. The 2nd, 3rd and 4th Defendants entered appearance, with the 2nd and 3rd Defendants filing a Defence dated 15th November 2020. In their pleadings, they denied the Plaintiffs' allegations concerning the sale of the suit premises in their favor.

53. They asserted that the Plaintiffs were fully aware of the dispute between the 1st and 2nd Defendants before the High Court, as well as the subsequent arbitral proceedings, but chose not to seek for joinder in both processes. It was their position that no valid claim lay against them and that the Plaintiff's only remedy, if any, lies in a claim for breach of contract against the 1st Defendant.

54. The court record shows that the matter was first scheduled for hearing on 15th December 2020. On that date, the Court granted the Plaintiffs' application for adjournment on account of late service of pleadings and documents.

55. When the matter was next listed for hearing on 5th July 2021, Counsel then on record for the Plaintiffs informed the Court that he was not ready to proceed, having ceased to receive instructions from the Plaintiffs. He further indicated that an application to cease acting had been filed.

56. Consequently, the hearing was adjourned. The application to cease acting was subsequently heard on 26th July 2021, in the absence of the Plaintiffs, and was allowed unopposed. The matter was then rescheduled for hearing on 1st December 2021. On that date, the Court again adjourned the hearing to allow the Plaintiffs to regularize their legal representation.

57. The matter was next listed for hearing on 11th October 2022, but the Court was not sitting. On 23rd May 2023, The Plaintiffs' Counsel sought for adjournment, citing the pendency of a ruling in Civil Case No. 524 of 2009, which had been scheduled for 7th July 2019. The Court allowed the application. When the matter came up again for hearing on 26th February 2024, the Court was not sitting. The suit was thereafter mentioned on 18th July 2024, and in the presence of all parties, was fixed for hearing on 23rd January 2025.

58. On 23rd January 2025, Mr. Kabuchu, holding brief for the Plaintiffs' Counsel, informed the Court that Counsel had been taken ill and requested that the matter be taken out. Having considered the age of the suit, the absence of supporting medical documentation, and the history of the matter, the Court proceeded to dismiss the suit for want of prosecution. It is this dismissal order that the Plaintiffs now seek to set aside.

59. Order 12 of the Civil Procedure Rules 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."

60. Order 12, Rule 7 states 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."

61. 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. This provision vests this court with jurisdiction to revisit and, if merited, set aside a dismissal order.

62. It is well established that the discretion of the Court to set aside an order of dismissal and reinstate a suit must be exercised judiciously and not capriciously. Such discretion is not meant to assist a party who has deliberately sought to obstruct or delay the course of justice, but rather, to prevent undue hardship occasioned by an inadvertent mistake, excusable error, or other sufficient cause.

63. 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."

64. 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."

65. 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:
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> > " 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."

66. The court is also guided by the exposition in Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 others [2013] eKLR where it was held as follows:

> " 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."

67. Having considered the circumstances in this case, this court must find that the Plaintiffs have not presented any sufficient cause for their failure to appear on 23rd January 2025. From the string of adjournments on the part of the Plaintiffs apparent on the record of this court, it is evident that the Plaintiffs have been guilty of gross indolence and have failed to prosecute their suit diligently.

68. Moreover, it is apparent that the Plaintiffs' advocate's illness was known to him as early as the day preceding the hearing. Accordingly, counsel had both the opportunity and the obligation to place before this Court credible evidence of his medical condition. His failure to do so undermines the explanation offered and cannot justify the non-attendance or warrant the adjournment sought.

69. This notwithstanding, it cannot be gainsaid that a suit belongs to a party and not to their advocate. In the case of Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 as quoted in Neeta Gohil vs Fidelity Commercial Bank Limited [2019] eKLR, it was stated that:

> " whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such Advocate's failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour,

is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

70. Although the dismissal of a suit is a drastic measure that effectively denies a litigant access to judicial recourse, it must be emphasized that a party who approaches the Court also bears the corresponding duty to prosecute its case with diligence. The right to be heard, while fundamental, must be exercised in a manner that upholds procedural fairness and does not occasion undue delay or prejudice to the opposing party.

71. This Court reiterates the expression by the Court in Ecobank Ghana Limited vs Triton Petroleum Company Limited (in receivership) & Others Civil Case No. 24 of 2009 (UR):

> "Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination as opposed to what has been termed as "draconian" the move to dismiss suits precipitously. However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of overriding principles alluded to above, the time for change of the customary mind set is here. Litigants should therefore stand guided that they must embrace themselves to up the gear, for speed and vigilance will now be the trend. The wheels of justice will no longer be turning on the thrust of a team engine."

72. On this premise, this court finds that the Plaintiffs have not demonstrated any sufficient cause for this court to set aside its order of dismissal of this suit. No legitimate reason has been tendered explaining the failure of the Plaintiffs to attend court when the matter came up for hearing on 23rd January 2025.

73. In view of the foregoing, the Court finds that the Application dated 10th March, 2025 is unmerited and the same is dismissed. For avoidance of doubt, the suit stands dismissed as ordered by the court on 23rd January, 2025.

74. As costs follow the event, the Plaintiffs shall bear the costs of this Application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Muturi holding brief for Muhatia for 4th Defendant

Ms. Wachege for 2nd and 3rd Defendants

Mr. Kimathi for Plaintiffs/Applicants

Court Assistant: Tracy