



REPUBLIC OF KENYA



**Muriithi & another v Muthike & 4 others (Environment and Land Case 29 of 2016) [2025] KEELC 6217 (KLR) (24 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6217 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND CASE 29 OF 2016  
JM MUTUNGI, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**NICHOLAS MURIITHI ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN NDUNGO MURANDI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BETH MUTHONI MUTHIKE ..... 1<sup>ST</sup> DEFENDANT**

**NICHOLAS KIMOTHO RWIMBO ..... 2<sup>ND</sup> DEFENDANT**

**STEPHEN MUTHIKE GATUMU ..... 3<sup>RD</sup> DEFENDANT**

**JANET WAGICHUGU KIREI ..... 4<sup>TH</sup> DEFENDANT**

**NATIONAL IRRIGATION BOARD ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before the Court for determination is a Notice of Motion application dated 16<sup>th</sup> April 2025 brought under Sections 1A, 1B, 3A, and 63(e) of the *Civil Procedure Act*. The Applicants seek to set aside the orders issued on 7<sup>th</sup> October 2024, together with all consequential orders, and to have the matter heard afresh.
2. The application is supported on the grounds on its face and the affidavit of Nicholas Muriithi, the 1<sup>st</sup> Plaintiff. He depones that he had retained the firms of C.S. Macharia and A.J. Kariuki to represent him in this matter. He depones that he was unaware the case had proceeded on 7<sup>th</sup> October 2024 in his absence and that of his counsel. He explains that despite attempts to reach his Advocate Mr. C. S Macharia through calls and text messages, there was no response. He avers that he discovered the matter had been heard and determined only upon visiting the Court registry to find out the status of the case. He avers that failure to attend Court was not intentional and should be excused. He pleads



that the mistake of counsel should not be visited upon a litigant and that the Respondents would not suffer any prejudice if the orders are set aside and the case reinstated for hearing on merit.

3. The application is opposed. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 14<sup>th</sup> May 2025. He gives a detailed chronology of the case since its inception. He states that the suit was filed on 2<sup>nd</sup> March 2016 through the firm of A.J. Kariuki & Co. Advocates. On 12<sup>th</sup> February 2018, he moved the Court to dismiss the suit for want of prosecution. The suit was accordingly dismissed on 21<sup>st</sup> May 2018. He then filed a Bill of Costs and served the Notice of Taxation upon the 2<sup>nd</sup> Plaintiff. Following that, the Plaintiffs applied to reinstate the suit by an application dated 28<sup>th</sup> July 2018. The Court reinstated the suit on 24<sup>th</sup> January 2019 on condition that the Plaintiffs paid thrown away costs of Kshs. 25,000/-.
4. The Plaintiffs thereafter sought and were granted time to comply with Order 9 of the Civil Procedure Rules on 21<sup>st</sup> March 2019 and again on 12<sup>th</sup> June 2019. On 27<sup>th</sup> June 2019, the matter was stood over generally at the Plaintiffs' request.
5. The matter was listed before the Court for mention on 17<sup>th</sup> February 2021, for pretrial directions but as parties had not complied it was adjourned to 4<sup>th</sup> March 2021. On that date, the Plaintiffs again sought more time to enable them to comply and the Court directed them to move the Court when ready. The matter was subsequently listed for hearing on 11<sup>th</sup> May 2023, but was again adjourned at the Plaintiffs' request. A Notice to Show Cause why the suit should not be dismissed for want of prosecution was issued. On 4<sup>th</sup> June 2024, when the Notice came up for hearing, the Plaintiffs' Counsel attended and indicated readiness to proceed, and the matter was fixed for hearing on 7<sup>th</sup> October 2024. On the hearing date, neither the Plaintiffs nor their counsel attended, and the Court dismissed the suit for non-attendance and want of prosecution. The 2<sup>nd</sup> Respondent later filed a Bill of Costs, which he confirms was served upon counsel for the Plaintiffs.
6. The 2<sup>nd</sup> Respondent averred that the suit had been pending for over nine years without meaningful progress. He asserted that the reason given by the Plaintiffs for the failure to prosecute the case and/or attend Court that their Advocate failed to inform them was not reasonable and/or convincing. He urged the Court to dismiss the application with costs.
7. The Court on 21<sup>st</sup> May 2025 directed the parties to urge the application by way of written submission. All the parties complied and filed their respective submissions.
8. I have reviewed the Applicant's Notice of Motion, the Respondent's Replying Affidavit, and the written submissions by both parties. The primary issue for determination is whether a satisfactory explanation has been proffered by the Applicants to justify the Court to exercise its discretion to set aside the order dismissing the suit on 7<sup>th</sup> October, 2024 for non-attendance and want of prosecution.
9. The Court's power to set aside an order of dismissal of a suit for non-attendance is discretionally under Order 12 Rule 7 of the Civil Procedure Rules. Order 12 Rule 7 provides 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.'
10. The power of this Court to reinstate a suit dismissed for want of prosecution or non-attendance is not in doubt. However, the discretion must be exercised judicially and based on sound reasons and not whimsically.



11. In the case of *Ivita v Kyumbu* (1984) KLR 441, the Court laid down the governing test as follows:

“The test is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant: so, both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must, however, satisfy the Court that it will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the Court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”

12. In the present case, it is not in dispute that the Plaintiffs and their Counsel were absent on 7<sup>th</sup> October 2024, leading to the dismissal of the suit for nonattendance and want of prosecution. The Plaintiffs explanation was that they were unaware of the hearing date due to their Counsel’s failure to communicate and/or inform them of the hearing date.

13. The Court has reviewed the record and notes that the suit has had a chequered history marked by adjournments, non-compliance with procedural directions, and repeated indulgences granted to the Plaintiffs. The matter has been pending since 2016, with long periods of inactivity. The Plaintiffs overtime have been given several opportunities to comply with procedural requirements, and even when they assured the Court they were ready to proceed in June 2024, they failed to attend the scheduled hearing in October 2024.

14. While it is true that an advocate’s mistake should not always be visited upon a client, the conduct of this matter reveals a persistent pattern of inaction and delay attributable to the Plaintiffs. Litigants have a duty to follow up on their matters and ensure that they are diligently prosecuted. The instant suit was filed back in 2016 and the record does not show the Plaintiffs have been keen to have the same finalised. The suit was on 21<sup>st</sup> May, 2018 dismissed for want of prosecution but was reinstated on application by the Plaintiffs by consent on 25<sup>th</sup> January 2019. The Plaintiffs however do not appear to have taken any proactive steps to prosecute the suit and the Court on 13<sup>th</sup> March 2024 in the presence of Counsel for the Plaintiffs observed that the Plaintiffs did not demonstrate any keenness to prosecute the suit prompting the Court to fix the matter for hearing of a Notice to Show Cause why the suit should not be dismissed for want of prosecution on 4<sup>th</sup> June 2024. On the date (4<sup>th</sup> June 2024) the Plaintiffs’ Counsel, Mr. C. S. Macharia, together with the Defendants Counsel, Ms. Ndungu attended Court and the Plaintiff’s Counsel affirmed the Plaintiffs were ready to prosecute the suit and prayed for a hearing date. The Court fixed the suit for hearing on 7<sup>th</sup> October, 2024 when it was only the Defendants Counsel and the Defendants attended Court. The Plaintiffs’ Counsel and the Plaintiffs were absent and on the application of the Defendants Counsel, the Court dismissed the suit for nonattendance and want of prosecution as there was no explanation given for the non-attendance of the Plaintiffs and their Advocate.

15. The explanation that the Plaintiffs offered for failure to attend Court for the hearing was that their Advocate on record had not informed them of the hearing date. An Advocate duly appointed by a party to represent them is an agent of such party and is deemed to have the ostensible authority of the party to take actions on behalf of the party and the party is bound by any such actions. The hearing date of 7<sup>th</sup> October 2024 was taken in the presence of the Plaintiffs’ Advocate and the Plaintiff were



deemed to have had notice of the hearing date of the suit. The explanation given by the Plaintiff's for failure to attend the Court is generalised that they were not informed of the hearing date of the case which raises the question whether they had abandoned their case to their Advocate. They had a duty to follow up with their Advocate on the progress of the case, as the case belonged to them and not the Advocate. The least one would have expected was perhaps an Affidavit from the Advocate explaining why he and/or his clients did not attend Court for hearing of the case on the date set for hearing. As matters stand, there is no reasonable explanation that has been given why there was no attendance by the Plaintiffs or their Advocate at the hearing of the case.

16. In the case of Savings and Loans Ltd –vs- Susan Wanjiru Muriti. Nairobi (Milimani) HCCC No. 397 of 2002, Kimaru J (as he then was) expressed himself as follows:-

“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 suit on the sole ground of 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.---“

17. In the instant matter although the Plaintiffs Applicants aver they had been trying to contact their former Advocate, there is nothing exhibited to support such averment. There are no specifics on when, they attempted to reach their former Advocate either on phone or through text. One gets the impression that the Plaintiffs may only have been awoken from their slumber when they learnt the suit had been dismissed and costs were awarded against them. I am not satisfied any sufficient basis has been laid to warrant the exercise of discretion in favour of the Plaintiff/Applicants to set aside the order of 7<sup>th</sup> October 2024 dismissing the suit for nonattendance and want of prosecution. I accordingly dismiss the Notice of Motion application dated 16<sup>th</sup> April, 2025 with costs to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

