



**Ngao v Ngao (Deceased) & another (Environment and Land Case 197 of 2017) [2025] KEELC 6169 (KLR) (23 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6169 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 197 OF 2017  
NA MATHEKA, J  
SEPTEMBER 23, 2025**

**BETWEEN**

**NTAMBA MWEU NGAO ..... APPLICANT**

**AND**

**MWEU NGAO (DECEASED) ..... PLAINTIFF**

**AND**

**THERESIA MUASYA ..... DEFENDANT**

**RULING**

1. The application is dated 24<sup>th</sup> February 2025 and is brought under Section 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 12 Rule 7 of the Civil Procedure Rules, 2010 seeking the following orders;
  1. That this Application be heard on priority basis.
  2. That this Honourable Court be pleased to set aside its orders issued on 11<sup>th</sup> June, 2019 dismissing the suit under Order 17 Rule 2 of the Civil Procedure Rules.
  3. That upon grant of prayer 2 herein above this Honourable Court do issue an order for the reinstatement of the suit for hearing and final disposal.
  4. That further the court to substitute the Plaintiff with the Applicant.
  5. That necessary directions be made.
2. It is based on the annexed Affidavit of Eunice Katisya Katila the following grounds that the suit herein was dismissed for want of prosecution. That failure to take the necessary action to prosecute the suit herein was occasioned by the fact that the Plaintiff herein was sick and frequently needed urgent medical care. That despite the medical care given to the Plaintiff, the Plaintiff passed on 13<sup>th</sup> December, 2021. That the Applicants were advised by their advocates on record that for a substitution



to take place they were to file for a Succession Cause. That the Advocates on record filed a Miscellaneous Succession Cause and Limited Grant of Letters of Administration Ad litem were issued to the Applicant. That the delay was further occasioned by the illiteracy of the Applicant who is old and only relies on the Counsel of her Advocate. That based on the orders issued by this court the Advocates for the Defendants/Respondents misinterpreted the orders and wrote a letter misdirecting the Applicant and the Sacco from which the suit property was purchased. That the parties herein are unable to live in peace unless this matter is heard to its logical conclusion. That the Applicant is now eager and anxious of having the matter herein be concluded and obtain the necessary orders from this Honourable Court. That the Applicant stands to suffer a grievous injustice if the file is not reinstated as the matter would not have been prosecuted in a just and proper manner to its conclusion.

3. This court has considered the application and submissions therein. The Respondent was served but failed to file any response. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the Civil Procedure Rules, 2010 which provides thus;

"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."

4. This provision is amplified by Order 51, rule 15 which provides that the Court may set aside an order made ex parte. In setting aside ex parte orders, the Court must be satisfied of one of two things, namely, either that the Applicant was not properly served or that the Applicant failed to appear in Court at the hearing due to sufficient cause. Essentially, setting aside an ex parte order is a matter of the discretion of the court.

5. In *Esther Wamaitha Njihia & two others vs Safaricom Ltd (2014) Eklr*, the court held inter alia that;

"The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali.*) It also goes without saying that the reason for failure to attend should be considered."

6. It then follows that the decision whether or not to set aside an ex parte order is discretionary. The discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. See *Shah vs Mbogo & Another (1967) EA 116*.

7. The Applicant stated that failure to take the necessary action to prosecute the suit herein was occasioned by the fact that the Plaintiff herein who was 76 years old was sick and frequently needed urgent medical care. That despite the medical care given to the Plaintiff, the Plaintiff passed on 13<sup>th</sup> December, 2021. That the Applicant was not aware of this suit until 2019. The Applicant submitted that the suit was dismissed on 11<sup>th</sup> June 2019. This is a 2017 matter and the current application is dated 24<sup>th</sup> February 2025. The Applicant is guilty of laches. Even if the Applicants were old there was no evidence given that they were incapacitated. I find the reasons given for the delay inexcusable and there



is no sufficient ground for me to set aside the dismissal orders. I find that this application is not merited and I dismiss it with no orders as to costs as it was undefended.

9. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**

