



Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwamtsami (Environment and Land Case 6 of 2018) [2025] KEELC 6243 (KLR) (24 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6243 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 6 OF 2018
SM KIBUNJA, J
SEPTEMBER 24, 2025

BETWEEN

MILDRED AKOTH WARRAKAH APPLICANT
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF GAKWELI MOHAMED WARRAKAH - DECEASED

AND

MWAFUMBIRI HAMISI MWAMTSAMI RESPONDENT

RULING

1. The applicant moved the court through the notice of motion dated 3rd February 2025, seeking for the setting aside of the orders made on 30th January 2025 dismissing her suit for non-attendance, and reinstatement of the said suit. The application is based on the ten (10) grounds on its face and supported by the affidavit of Kipkurui Ngeno Birir, advocate, inter alia deposing that he had logged into the Microsoft Teams court session when the matter was called on 30th January 2025, and confirmed for hearing at 10.20 am; that he remained logged in but when the matter was called for hearing, he could not be heard due to some technical issue; that the respondent moved the court to dismiss the suit for non-attendance, even though they had accommodated him previously; that the suit was dismissed, and unless the application is granted, the applicant will suffer immensely from the advocate's mistake.
2. The application is opposed by the respondent through his undated replying affidavit filed on the 22nd April 2025, among others deposing that the hearing date of 30th January 2025 was taken by the applicant who then served him with a hearing notice; that the applicant's counsel and himself attended court and the hearing was confirmed to start at 10.30 am; that when the matter was called for hearing, the applicant and her counsel were not on the session and the suit was dismissed; that the applicant has not given sufficient cause to explain her absence and the application should be dismissed with costs.



3. The court issued directions on filing and exchanging submissions on the 24th February 2025 and 8th April 2025. The learned counsel for the applicant and the respondent filed their submissions dated the 14th March 2025 and 22nd April 2025 respectively, which the court has considered.
4. The main issues for the court’s determinations are as follows:
 - a. Whether the applicant has made out a reasonable explanation for their non-attendance.
 - b. Whether the applicant has met the threshold for the dismissal order to be set aside and suit reinstated.
 - c. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the counsel for the applicant and respondent, the record and come to the following findings:
 - a. The record confirm that the suit was fixed for hearing on 31st October 2024, but was rescheduled to the 30th January 2025, in the presence of counsel for the applicant, who subsequently reportedly served the respondent with a hearing notice. The proceedings of 30th January 2025 further confirms that both the respondent and counsel for the applicant were present during the morning virtual call over. The record further confirms that after the counsel applied for either adjournment or virtual hearing for reasons that the applicant was in Nairobi and unwell, the court directed/ordered as follows:

“Hearing virtually at 10.30 am.”

- b. That the subsequent proceedings started at 11.00 am but only the respondent was present. He informed the court that he was ready for the hearing, and sought for the suit to be dismissed for non-attendance. The court made the following observation and ordered that:

“When this matter was called virtually earlier, Mr. Birir was present and he moved the court to either adjourn or have his client heard virtually. The court agreed and fixed the hearing at 10.30 am. The plaintiff and her counsel are absent both virtually and physically and the plaintiff’s case is dismissed with costs for non-attendance. The file be closed.”

That is the order the applicant seeks to be set aside, with her counsel giving the reason that after the suit was called on 30th January 2025, and confirmed for hearing at 10.20 am, he had remained logged in. The counsel has claimed that when the matter was called for hearing after 10.30 am, he was still logged in but could not be heard allegedly due to some technical issue. That explanation has been disputed by the respondent. Under sections 107 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya, the one who alleges the existence of a fact bears the responsibility to tender proof for the court to find in their favour. There is no evidence presented by the applicant’s counsel to confirm their allegation that they were logged in when the court session started at 11.00 am, and could not be heard due to technical challenges.

- c. Though the virtual hearing had during call-over, been confirmed for 10.30 am, the record confirms it started at 11.00 am. The deposition by the applicant’s counsel in support of the application does not explain the absence of the applicant, who was earlier reported by her counsel to be in Nairobi. The court expected her to join the virtual hearing through an equipment separate from that of her counsel, and she was absent. That even if the counsel was telling the court the truth that he had faced technical challenges, he was not going to testify as



a witness in the hearing of the applicant's case. There was no witness, including the applicant, who had joined the hearing session to testify in the applicant's case. The applicant needed to explain her absence but did not.

- d. Even though the applicant has not presented any reasonable explanation for her absence during the hearing of 30th January 2025, the court is of the view that as the dispute herein relates to land, she deserves one last opportunity to attend and prosecute her case, on condition she pays court adjournment fees of Kshs.5,000/- and respondent's thrown away costs of Kshs.20,000/- in thirty (30) days from today.
6. Flowing from the foregoing determinations, the court finds and orders as follows:
- a. That the application dated 3rd February 2025 is allowed in terms of prayers (2) & (3), that is, the order of 30th January 2025 is set aside and suit is reinstated, subject to the condition here below.
 - b. The plaintiff to pay court adjournment fees of Kshs.5,000/- and defendant's thrown away costs of Kshs.20,000/- within thirty (30) days, in default order (a) above to lapse automatically and the matter to revert to the status ante.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF SEPTEMBER 2025,

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicant: Mr Birir

Respondent :present

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

