



Ngige (Suing as the Personal Representative of David Mahugu Thondu) ((Suing as the Personal Representative of David Mahugu Thondu)) v Kariuki & 4 others (Environment & Land Case 138 & 146 of 2018 (Consolidated)) [2025] KEELC 4496 (KLR) (12 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 138 & 146 OF 2018 (CONSOLIDATED)
LC KOMINGOI, J
JUNE 12, 2025**

BETWEEN

**CATHERINE NJERI NGIGE APPLICANT
(SUING AS THE PERSONAL REPRESENTATIVE OF DAVID MAHUGU THONDU)**

AND

**GEORGE NGURE KARIUKI 1ST RESPONDENT
DISTRICT LAND REGISTRAR, NGONG 2ND RESPONDENT
DISTRICT LAND CONTROL BOARD, NGONG 3RD RESPONDENT
DISTRICT LAND SURVEYOR, KAJIADO 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. This Ruling is in respect of the Notice of Motion dated 25th November 2024 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 5 and 15 of the Civil Procedure Rules and other enabling provisions. It seeks:
 - i. Spent
 - ii. That the order issued on 22nd October 2024 dismissing the Notice of Motion application dated 14th August 2024 be set aside.
 - iii. That the Notice of Motion application dated 14th August 2024 be reinstated and heard on its merits.



- iv. That costs of this Application be provided for.
2. The grounds are on the face of the Application and are set out in paragraphs 1 to 4. The same is supported by sworn Affidavit of the Applicant's Counsel Nelson Otiende. Counsel depones that the application dated 14th August 2024 sought stay of execution of this Court's judgement delivered on 27th July 2024. When the application came up for directions on the 22nd October 2024, the matter was called out at the virtual Court session, but counsel for the Applicant was absent at the time due to technical hitches. He logged into the virtual court session a few minutes later, only to find that the application had been dismissed for want of prosecution. Counsel now seeks reinstatement of that application on grounds that the Applicant stands to suffer irreparable harm if the application is not heard on merit. It is his averment that the Advocate's error should not be visited on the client.
3. The 1st Respondent in his Replying Affidavit dated 2nd December 2024 contested the application on the grounds that the Applicant did not provide evidence of the technical difficulties he claims to have experienced during the scheduled date when the matter came up. He argued that had Counsel for the Applicant logged into the virtual Court shortly after the matter was called out, then they would have filed this application soon thereafter, and not a month later. There was therefore an inordinate delay in filing of this application, which delay has not been explained and was against the interest of justice. The 1st Respondent also argued that the dismissed application for stay of execution was sub judice because the Applicant had filed a similar one in the Court of Appeal and the same could be pursued in that Court. The 1st Respondent also deponed that the Applicant had not demonstrated the substantial loss alleged because she had not extracted a decree against the Applicant. He prays that, the application be dismissed with costs to the 1st Respondent.
4. This application was canvassed by way of written submissions.

The 1st Defendant/Applicant's Submissions

5. On whether the Notice of Motion dated 14th August 2024 should be reinstated, counsel submitted that the Court had authority and discretion to reinstate a dismissed suit as per Order 12 Rule 7 of the Civil Procedure Rules. And that the discretion should be exercised judiciously taking into consideration reasons for default as held in *Mwangi S Kimenyi v Attorney General & another* [2014] eKLR. Counsel also urged court to be guided by Section 1A and 1B of the *Civil Procedure Act* on doing justice without reliance on undue technicalities arguing that the technical difficulties in logging into the virtual Court was not a wilful default aimed at obstructing the proceedings. And that the Advocate's error should not be visited on the client citing *Margaret Gacigi Gecaga v Gateway Insurance Co Limited & 2 others* [2018] eKLR.
6. Counsel also submitted that the Respondent had already filed his Replying Affidavit to the dismissed application therefore, no prejudice would be suffered by reinstating the suit as held in *Lucy Bosire v Kehancha Div Land Dispute Tribunal & 2 others* [2013] eKLR. And that reinstating the suit was less risky than shutting down the Applicant from the seat of justice with reference to *Reynolds Construction Co (Nig) Ltd v Festus M'arithi M'mboroki* [2022] eKLR. On the issue of inordinate delay, counsel submitted that the one month delay was not inordinate and had not caused any prejudice or injustice to the Respondent and the application should thus be reinstated.

The Plaintiff/1st Respondent's submissions

7. On whether the reinstatement application was merited, counsel submitted that there was a parallel application for stay of proceedings at the Court of Appeal in Nairobi Court of Appeal case No. E544 of



2024 pending determination. Therefore, the Notice of Motion application was an abuse of the Court process as held in *National Bank of Kenya Ltd vs Shimmers Plaza Ltd* [2009] eKLR.

8. On the issue of this application being filed inordinately late, counsel submitted that the Applicant had not given sufficient reason to reinstate the suit as outlined in *Ivita vs Kyumbu* [1984] KLR 441 and counsel's reason of technical difficulties was insufficient. Counsel also submitted that for stay to be granted, substantial loss ought to be evidenced as held in *James Wagalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR but since no execution had been levied against the Applicant, there was no evidence of substantial loss.
9. Counsel argued that the application was meant to delay conclusion of the suit and it should be dismissed with costs to the 1st Respondent.

Analysis and Determination

10. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions, statutes and the authorities cited and find that the issues for determination are:
 - i. Whether the Notice of Motion dated 14th August 2024 ought to be reinstated;
 - ii. Which orders should issue?;
 - iii. Who should bear costs of the application?
11. The 1st Defendant's/Applicant claims that counsel's absence at the virtual session when the Notice of Motion application dated 14th August 2024 came for directions was no fault of her own, attributing it to technical hitches. He urged court to reinstate the Notice of Motion so that it could be heard on its merits arguing that reinstating it would not be prejudicial to the Plaintiff/1st Respondent.
12. The Plaintiff/ 1st Respondent contested reinstatement on grounds that there was no evidence of the technical difficulties in joining the virtual court session as claimed by the Applicant and that it took the Applicant over a month to seek reinstatement, which was inordinately late. The 1st Respondent also contested reinstatement of the application on grounds that a similar application was pending at the Court of Appeal and this was akin to forum shopping.
13. Is reinstatement of the dismissed Notice of Motion application merited?

Order 12 Rule 7 of the Civil Procedure Rules provides that: "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."
14. It is trite that the decision to reinstate a suit is discretionary from case to case and the conditions to be met are; whether there is a plausible and reasonable explanation for the non-attendance; whether there is inordinate delay in filing the application for reinstatement; whether the Respondent will suffer prejudice if the suit is reinstated; whether there is a meritorious cause of action or triable issues raised in the suit; and what is in the best interest of justice.
15. Counsel has attributed his non and/or late attendance of the virtual court to technical difficulties. The Respondent has contested this on grounds that there was no evidence to support this.
16. While as deponed by the Respondent, there is no evidence to support the alleged technical difficulties, this Court is alive to the fact that technological hitches on the virtual courts platforms occur from time to time affecting Court's attendance of not only litigants but also judicial officers. Therefore, with or without evidence, this Court finds the explanation as reasonable.



17. On whether the one month delay in filing the application is inordinate, while there is no single universally accepted definition of inordinate, the Supreme Court of Kenya, in *Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya*, Judge of the High Court of Kenya [2022] KESC 16 (KLR) held:

“... whether a delay is inordinate is a question to be determined on a case by case basis and on the peculiar facts and circumstances; that inordinate delay should not be difficult to discern where it occurs- it should be apparent, self-evident and obvious.... five months’ delay was simply a delay, not inordinate delay. We believe too, that, justice could still be served despite the delay...”

18. From the foregoing, while the one month delay in filing this application can be argued as a delay, this court does not find that this delay is inordinate, inexcusable or has caused any injustice to the Plaintiff/1st Respondent.

19. I also find that at this juncture, no prejudice will be suffered if the application is reinstated and determined on its merits.

20. On the issue of pendency of another application as argued by the Plaintiff/1st Respondent, this Court finds that the issue at hand is on the reinstatement of the Notice of Motion. As such, whether the Notice of Motion is sub judice is a question that cannot be determined at this juncture. Once the dismissed application is reinstated, parties will have a day to canvass this ground at the appropriate forum.

21. I therefore find that this application is merited and the Notice of Motion dated 14th August 2024 is hereby reinstated.

22. Costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12TH JUNE 2025.

L. KOMINGOI

JUDGE.

In the presence of:

Mr. Muriithi for Mr. Nzaku for the Plaintiffs.

Mr. Otieno for the 1st Defendant/Applicant.

N/A for the other Defendants.

Court Assistant – Mutisya.

