REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT OF KENYA AT MOMBASA

ELCLC NO. E140 OF 2022

IBRAHIM MWALIMU JONATHAN ..... PLAINTIFF

VERSUS

EZEKIEL SAMMY GAMBO ..... DEFENDANT

RULING

[NOTICE OF MOTION DATED 7TH JULY 2025]

1. The defendant made an application dated 7th July 2025 seeking for the following orders:

"1. Spent

2. Spent

3. That, the proceedings of the court and its consequential of the 16th day of June, 2025 be set aside, varied or discharged.

4. That the court be pleased to order the re-opening of the Plaintiff's case for the purposes of cross-examination of the plaintiff and his witnesses by the defendant and a further order re-opening the

defendant's case to allow the defendant present his case.

5. *There be no orders as to costs in respect of this application."*

The application is supported by affidavit of Angaga Atiang, advocate, sworn on 7th July 2025, inter alia deposing that he was given instructions and came into conduct on 13th June 2016 just before the hearing of 16th June 2025; that the defendant was apprehensive that he would suffer prejudice after not being able to trace his former advocate Geoffrey Were esquire; that on 16th June 2025 his clients were in his office at 8.30 am ready for hearing and because of the numerous matters he had, he requested his colleague Kingsley Taabu advocate to hold his brief and secure a time allocation; that the said advocate informed him and the clients later that a time allocation of 12 noon had been secured; that he sat on the virtual platform from 11.45 am awaiting until around 12.30 pm when he suddenly became aware that the court does its hearing physically and not virtually; that he was not alone on the virtual platform and

annexed a screenshot of some other advocates who had also logged in; that around 12.38 pm he reached out on Whatsapp platform searching for the contacts of counsel for the plaintiff, Mubassu advocates, who confirmed the court's normally conducts open court physical hearings; that he took photos of his clients on the day of hearing, the 16th June 2025, and that his absence was brought about by the confusion of not being familiar with the court's modus operandi in hearing matters.

2. The application is opposed by the plaintiff , through his replying affidavit sworn on 24th July 2025, deposing inter alia that the defendant is misleading the court as his counsel only received a notice of change of advocates on the afternoon 16th June 2025; that Mr. Atiang has not produced any evidence to show the action he took to find out why the court had not logged onto the platform or enquire whether the matter would proceed physically; that the alleged efforts to reach his counsel are not sincere and were only aimed at constructing a narrative; that the responsibility of being informed of court protocols lie with the party and advocates;

that the mistake of counsel are not sufficient to set aside the proceedings of 16th June 2025 as counsel's lapse should not affect his diligence in the suit; that this application is aimed at stalling proceedings so as to undermine administration of justice.

3. The learned counsel for the plaintiff and defendant filed their submissions dated 3rd September 2025 and 20th August 2025, respectively, which the court has considered.
4. The issues raised for determinations by the court are as follow:

    a) Whether the defendant has met the threshold for setting aside the proceedings and re-opening of the case.

    b) Who bears the costs of the application?

5. The court has considered the application, the affidavit evidence by both parties, submissions by counsel, superior courts decisions cited thereon, the record and come to the following determinations:

    a. The application invoked *sections 1A, 1B, 3A and 63(e)* of the Civil Procedure Act and *Order 12 Rule 7* of the Civil

Procedure Rules. *Order 12 Rule 7* of the Civil Procedure Rules provides as follows:

> *"Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just."*

In this suit, there is no judgement entered, or order dismissing the suit that has been made, and the provision of Order 12 Rule 7 is therefore, inapplicable in this instance.

b. On the date fixed for hearing, that is 16th June 2025, the matter was called as usual during the morning virtual session, and the record confirms that both parties were represented by counsel. The court directed that the hearing to commence at noon, but when the matter was called for hearing at 12.05 pm, the defendant and his counsel were absent. That as the defendant's counsel was present earlier during the virtual mention session, when the hearing was confirmed for noon, and had not communicated the reasons of his absence to the court or

plaintiff's counsel, the court directed the hearing to proceed exparte in accordance with *Order 12 Rule 2(a*) of the Civil Procedure Rules. The plaintiff presented three witnesses and closed his case at about 12.30pm, and because the defendant and his counsel were absent, the court marked the defence case as closed, and issued directions on filing and exchanging submissions. The defendant then filed the instant application and during the mention of 29th July 2025, it was fixed for ruling today.

c. The provisions of *sections 3, 3A and 63* of the Civil Procedure Act chapter 21 of Laws of Kenya, codifies the court's inherent powers to do justice and prevent abuse of court process. The defendant has evidently invoked *section 3A and 63(e)* of the said Act, which are some of the provisions an applicant can rely on to seek the court's inherent discretion where there is no express provision in law to base the application on. I therefore find the application to be properly before the court and will be decided on its merit.

d. In the case of Mumias Out growers Company (1998) Ltd versus Mumias Sugar Company Ltd NRB HCCC No. 414 of 2008, the court held that:

> *"The Applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed".*

Bosire J (as he then was) in the case of Muchiri versus Attorney General & 3 Others (1991) KLR 516 stated at page 530 that:

> *"Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice."*

And, in the case of Shah versus Mbogo (1979) EA 116 the court gave guidelines on discretion as follows;

> *"I have carefully considered in relation to the present application the principles governing the exercise of the Court's discretion to set aside a*

judgment obtained exparte. This discretion is intended so 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 has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

e. Whereas the defendant and his counsel may be said not to have done enough to establish whether the hearing was going to be physical or virtual, as the record confirms no such enquiry was made during the virtual mention, the fact that the application was timeously filed and served, leads the court to conclude their absence during the hearing was not deliberate but probably, inadvertence. However, considering that the defendant's lapse necessitating this application that if allowed will result to the reopening of the plaintiff's case for cross-examination, translating to more expenses on the plaintiff, one may be excused to believe that the plaintiff will be prejudiced. I am however of the view that the

plaintiff may be compensated by an award of costs that would be sufficient for the inconvenience. There is therefore, no good reason presented to deny the defendant his right to be heard when it is clear that the defendant had every intention of proceeding with hearing.

f. Under *section 27* of the Civil Procedure Act, costs follow the event unless where there is good reason to depart from that edict. In this instance, though the defendant has succeeded in his application, it is only fair and just that he bears the costs of his application, as the plaintiff is not to blame for his failure to attend court.

6. From the foregoing determinations, the court finds merit on the application dated 7th July 2025 and orders as follows:

   a. *That the court proceedings of the 16th day of June, 2025 are hereby varied and the plaintiff's case re-opened for cross-examination of the three witnesses.*

   b. *That the defendant's case is re-opened and the defendant be at liberty to present his witnesses.*

c. That the defendant to pay thrown away costs assessed at Kshs.30,000 [thirty thousand] to the plaintiff, and Kshs.5,000 [five thousand] to the court before the next hearing date to be fixed after delivery of this ruling.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 22ND DAY OF OCTOBER 2025.

S. M. Kibunja, J.
ELC
MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : M/s Mubasu

DEFENDANT : Mr. Atiang

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.
ELC
MOMBASA.