



Kihara Waweru Construction – Company Limited v Murkuku & another (Environment and Land Case 183 of 2017) [2025] KEELC 6811 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6811 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE 183 OF 2017
MD MWANGI, J
OCTOBER 3, 2025**

BETWEEN

KIHARA WAWERU CONSTRUCTION – COMPANY LIMITED ... APPLICANT

AND

LIKERIAN OLE SAMBU MURKUKU 1ST RESPONDENT

ADAN ABDI IBRAHIM 2ND RESPONDENT

(In respect of the plaintiff's Notice of Motion application dated 16th May 2024 seeking to reinstate the instant suit)

RULING

Introduction

1. Before this Court for determination is the Notice of Motion dated 16th May 2024 in which the Applicant seeks the following substantive orders:
 - a. Spent
 - b. That this Honourable Court be pleased to reinstate the suit which was dismissed on 23rd April 2024 for want of prosecution following a Notice to Show Cause.
 - c. That the costs of this Application be in the cause.
2. The application is premised on the grounds set out in the supporting affidavit sworn by Peter Odhiambo on 16th May 2024. He deposes that the Plaintiff instituted the suit on 30th May 2013 seeking completion documents to facilitate transfer of land, but the matter was subsequently referred to arbitration pursuant to an arbitration clause in the sale agreement. He avers that despite several steps being made towards appointment of an arbitrator, including correspondence with the Defendant and



the Chartered Institute of Arbitrators, the process stalled as the Defendant claimed to lack resources to facilitate arbitration.

3. The Applicant further deposes that the matter was dismissed on 23rd April 2024 following a Notice to Show Cause of which the Plaintiff was neither served nor aware, and that efforts to trace the court file prior thereto had been futile. He contends that the dismissal was prejudicial as the Defendants have already served a bill of costs, and unless the suit is reinstated, the Plaintiff stands to suffer irreparable loss and denial of the right to be heard.
4. The application is opposed through the Grounds of Opposition dated 29th May 2024. The Defendants contend that the application is devoid of merit and amounts to an admission that the Plaintiff ought not to have instituted the suit in the first place. They argue that no plausible explanation has been given for the Plaintiff's non-attendance on the date the matter was dismissed. Further, the Defendants challenge the propriety of counsel swearing the supporting affidavit on behalf of the Plaintiff in respect of contested matters of fact, and maintain that no sufficient grounds have been laid to warrant the exercise of this Court's discretion in favour of the Applicant.

Directions

5. The court directed that the application be canvassed by way of written submissions. The parties did not comply within the stipulated timelines.

Analysis and Determination

6. From a perusal of the application and the response thereto, the sole issue for determination is whether the Plaintiff/Applicant has met the threshold for the reinstatement of the suit that was dismissed on 23rd April 2024 for want of prosecution following a Notice to Show Cause.
7. The discretionary power to reinstate a dismissed suit is grounded on Section 3A of the [Civil Procedure Act](#), Cap. 21, which preserves the Court's "inherent power ... 'to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court' and 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.”

8. However, it is worth stating that exercise of such discretion, being judicial discretion, should not be arbitrary. It should be guided by the laid down principles including the principles of natural justice.
9. In *Bilha Ngonyo Isaac v. Kembu Farm Ltd & another* (2018) eKLR, the Court of Appeal reaffirmed the decision in *Shah v Mbogo & Another* [1967] EA 116, where the East African Court of Appeal held that:

“The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not so as to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

10. The Plaintiff/Applicant contends that they were never served with the Notice to Show Cause. It is deposed that prior attempts to trace the court file had proved futile, and that steps had been undertaken towards appointment of an arbitrator pursuant to the arbitration clause in the sale agreement. On the other hand, the Defendants argue that the reasons advanced are implausible, that the record does



not reflect that the file went missing at any time, and that counsel improperly swore an affidavit on contested matters on behalf of the Plaintiff.

11. The Court is mindful that the right to be heard is a fundamental tenet of justice as enshrined in Article 50(1) of the Constitution, which stipulates that:

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

12. Guided by this constitutional provision, it is imperative to balance the prejudice likely to be suffered by the Plaintiff if the suit remains dismissed, against the inconvenience to the Defendants if reinstatement is allowed. While the Plaintiff has not demonstrated absolute diligence, the Court takes into account its hallowed duty to do justice at all times.

13. In *Ronald Mackenzie v Damaris Kiarie* (2021) eKLR, the court rightly observed that:

“The application herein seeks to reinstate the suit. It is trite that the decision on whether the suit should be reinstated for trial is a matter of judicial discretion and it depends on the facts of each case. The principles that should guide the court when dealing with such an application were well laid out in the case of *Ivita Vs Kyumbu* [1984] KLR 441 which are; the reasons for the delay; whether the delay is prolonged and inexcusable and if justice can still be done despite the delay.”

14. In the present circumstances, it is evident that there was some delay in prosecuting the matter. However, such delay may be excusable since genuine efforts were made by the Plaintiff to trace the court file and to initiate the arbitral process as contemplated in the sale agreement. As was observed in *Ronald Mackenzie v Damaris Kiarie* (2021) eKLR, a credible explanation for delay may outweigh its duration.

15. The Plaintiff has further alleged that it was not served with the Notice to Show Cause and was therefore unaware of the dismissal, a fact which, if established, would amount to a serious denial of the right to be heard and an injustice that cannot be remedied except by reinstatement of the suit. I also note that there is no suggestion of deliberate evasion or indolence on the part of the Plaintiff; rather, the delay appears to have been occasioned by logistical challenges in tracing the court file and stalled arbitral proceedings.

16. In exercising its judicial discretion, this Court must be guided by the constitutional guarantee of the right to be heard under Article 50, and it would be unduly harsh to deny the Plaintiff its day in court on account of procedural mishaps. Against this backdrop, I am persuaded that the interests of justice justify the reinstatement, albeit on terms that will safeguard the interests of the Defendants.

17. Accordingly, and for the reasons set out above, the Court makes the following orders:

- a. That the Plaintiff's Notice of Motion dated 22nd May 2024 is hereby allowed.
- b. That the orders of this Court made on 23rd April 2024 dismissing the suit for want of prosecution are hereby set aside, and the suit is reinstated for hearing and determination on the merits.
- c. That the Plaintiff shall pay the Defendants throw away costs of KShs. 20,000/- in the next 30 days from the date of this ruling.
- d. That the costs of this application shall be in the cause.



It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 3RD DAY OF OCTOBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Muema h/b for Mr. Njeru for the Defendants/Respondents

N/A by the Plaintiff/Applicant

Court Assistant: Mpoye

