

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO. E105 OF 2024

JIMMY KALAMA MONGO
PLAINTIFF

VERSUS

1. THE ESTATE OF WILSON JILANI MONGO
2. PATRICK JILANI MONGO
3. THE LAND REGISTRAR, KILIFI
4. PAUL BONGO JILANI
DEFENDANTS

RULING

1. The application before this court for determination is dated **22/5/2025** and is brought under the provisions of **Sections 1A, 1B, 3A, 63** and **80** of the Civil Procedure Act, and **Order 12 Rule 7** of the Civil Procedure Rules. It is filed by the Plaintiff seeking the following orders: -

- 1) That the orders made on the 22/5/2025 dismissing the suit for want of prosecution together with all other consequential orders be reviewed, varied and/or set aside;**
- 2) That the suit filed herein as per the amended Plaint filed on the 11/3/2025 be reinstated for hearing and determined on merit;**
- 3) That the costs of this application be provided for.**

2. The application is supported by an Affidavit sworn on 22/5/2025 by **John Magiya**, Advocate for the Plaintiff/Applicant. He deposed that the suit was listed for mention to confirm compliance with service of the Amended Plaint and summons, which had been effected, with the 1st, 2nd, and 4th Defendants filing responses and a return of service uploaded on 7/4/2025. He attributed the dismissal of the suit to technical challenges with electronic devices or power interruptions, despite his online attendance

and inquiries made through the chat box. Counsel affirmed that the Plaintiff is keen to prosecute the matter, has triable issues deserving determination, and urges the Court to exercise its discretion to set aside the dismissal and reinstate the suit in the interests of justice.

3. The application was scheduled for hearing on **22/9/2025**. On that date, Mr. Kabole, learned counsel for the 2nd and 4th Defendants, indicated support for the application, while Mr. Nyoike, holding brief for Mr. Ojwang, counsel for the 3rd Defendant, sought seven (7) days to file a response. Although the court granted that request, no response has been filed to date. I shall therefore proceed to render my determination notwithstanding the absence of a response by the 1st and 3rd Defendants.
4. The issue that falls for determination is whether the Plaintiff/Applicant has satisfied the legal threshold for review and setting aside of the dismissal orders made on 22/5/2025.
5. **Order 12 Rule 7** of the **Civil Procedure Rules** vests this Court with discretion to set aside or vary any order of dismissal upon such terms as may be just. The principles guiding the exercise of such discretion are well settled. Firstly, the discretion has to be exercised judiciously, as was stated in the case of **Shah vs Mbogo (1979) EA 116** quoted with approval in the case of **John Mukuha Mburu v Charles Mwenga Mburu [2019] eKLR**, where that court held thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a

person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

6. The guiding principles for exercise of that discretion were well stated by the Court of Appeal in **Simon Thuo Mwangi v Unga Feeds Limited [2015] eKLR** as follows:-

“On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.”

7. The Court must be satisfied that there exists sufficient cause to justify the default leading to dismissal, and that the Applicant has demonstrated diligence and an intention to prosecute the suit without undue delay. Above all, the Court must balance the right of the litigant to a fair hearing under **Article 50** of the Constitution against the need for expeditious disposal of cases as enshrined under **Sections 1A** and **1B** of the Civil Procedure Act.
- 8.** It is thus an applicant’s duty to demonstrate the existence of a sufficient cause to warrant the court to exercise that discretion in its favour, in this case, the Plaintiff.
9. In the present case, the Plaintiff explained that the failure to participate during the virtual session on **22/5/2025** was occasioned by technical difficulties with electronic devices and/or power interruptions. This explanation has not been controverted. Indeed, the Court takes judicial notice that virtual hearings are sometimes beset with such unforeseen

technical challenges, which may hinder effective participation despite counsel's diligence.

10. Further, the dismissal of the suit followed the orders issued on **3/4/2025**, wherein the Court directed that unless the Amended Plaintiff was served within seven (**7**) days, the suit would stand struck out for want of compliance. On **22/5/2025**, the Court dismissed the suit on the basis that there was no proof of service of the Amended Plaintiff. However, the record shows that an affidavit of service had indeed been filed on **7/4/2025**. It therefore appears that the Court may have overlooked this material on the record at the time of making the dismissal orders.
11. In my view, this omission constitutes a sufficient ground for review under **Section 80** of the **Civil Procedure Act**, as it is apparent that there was an error on the face of the record. The Court's decision to dismiss the suit was therefore made on the mistaken premise that the Plaintiff had failed to comply, whereas in fact compliance had been achieved.
12. Notably, the present application was filed on the very date of dismissal, highlighting the Plaintiff's diligence and prompt effort to correct the record. In the circumstances, it is only just and fair that the dismissal orders be set aside to enable the suit to be determined on its merits.
13. Accordingly, the application dated 22/5/2025 is allowed in the following terms:

- a) The orders made on 22/5/2025 dismissing the suit for want of prosecution, together with all consequential orders, are hereby reviewed and set aside;
- b) The Plaintiff's suit, as per the Amended Plaint filed on 11/3/2025, is reinstated for hearing and determination on its merits;
- c) Costs of this application shall abide the outcome of the main suit;
- d) the suit shall be mentioned on 20/11/25 for directions as to hearing.

Dated, signed and delivered at Malindi via electronic mail on this 15th day of October, 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**