



Mwanzia & another v County Government of Makueni & another (Suing in Their Capacity as the Legal Representatives to the Estate of Samuel Nyingi Mbondo - Deceased) (Environment and Land Case E039 of 2024) [2025] KEELC 6785 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE E039 OF 2024
EO OBAGA, J
OCTOBER 9, 2025**

BETWEEN

AGNES MBULA MWANZIA 1ST PLAINTIFF

MARGARET ANTHONY MUTUA 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MAKUENI 1ST DEFENDANT

JAKIMO INFRASTRUCTURE EAST AFRICA LTD 2ND DEFENDANT

**SUING IN THEIR CAPACITY AS THE LEGAL REPRESENTATIVES TO THE
ESTATE OF SAMUEL NYINGI MBONDO - DECEASED**

RULING

1. The 1st Defendant/Applicant filed the Notice of Motion dated 7th April, 2025 under the provisions of Article 159 of *the Constitution*, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*.
2. The following orders have been sought: -
 1. **[Spent]**
 2. That this Honourable Court be pleased to set aside the orders of the Honourable Court dismissing the application dated 13th March, 2025 and all the orders consequential thereto.
 3. That the Honourable Court be pleased to reinstate for determination on its merits the application via certificate of urgency and Notice of Motion dated 13th March, 2025.
3. The application is premised on the grounds appearing on its face together with the supporting affidavit of Dr. Justin Kyambi sworn on even date. The Applicant averred that he is the County Secretary of the 1st Defendant and that their application dated 13th March, 2025 was dismissed on 26th March, 2025 for



non-attendance. The deponent contended that the failure to prosecute the application was as a result of a late notice of the court's directions and orders on their application through the court's CTS system. The deponent contended that the failure to prosecute their application was not out of indolence or negligence.

4. The deponent stated that the mistake is excusable and that it will be greatly prejudiced if the application dated 13th March, 2025 is not reinstated because its right to access to justice will have been impeded and they will have been condemned unheard. He contended that the Applicant is keen on prosecuting the application expeditiously if the same is reinstated. The deponent further averred that there has been no delay in bringing this application and the grant of the orders sought will not prejudice the Respondents in any way.
5. Opposing the application, the 2nd Plaintiff/Respondent filed a replying affidavit sworn by herself on 5th May, 2025. She averred that the dismissed application dated 13th March, 2025 was followed by the directions of this court which were uploaded to the judiciary e-filing system on 17th March, 2025. She added that on 18th March, 2025, the judiciary sent a text message to the parties notifying them that the 1st Defendant's application had been listed for hearing on 26th March, 2025.
6. The 2nd Plaintiff contended that the allegation that there was a late notice of the court's directions and order through the court's CTS system was false and unjustifiable. She further contended that the instant application was an afterthought which is meant to unnecessarily delay the hearing of the main suit. The 2nd Plaintiff urged the court to dismiss the application with costs as no valid reasons had been provided by the 1st Defendant for failing to attend court on 26th March, 2025 for the hearing of their application.
7. Further directions were issued to the parties for the hearing of the above application concurrently with the 1st Defendant's preliminary objection dated 13th March, 2025.
8. The 1st Defendant contended that the suit herein ought to be dismissed with costs on the grounds that the Estate for which the Plaintiffs have sued has four (4) administrators and that two (2) administrators have not given their consent to the institution of the current suit.
9. Through the aforementioned replying affidavit of Margaret Anthony Mutua, the 2nd Defendant contended that they had filed the suit herein together with the 1st Plaintiff with the consent of all the other family members. She invited the 1st Defendant to strict proof of its allegation.
10. Both the application and the preliminary objection were canvassed by way of written submissions.
11. In the 1st Defendant's submissions dated 20th May, 2025, Counsel reiterated that the failure to attend court on the part of the 1st Defendant was due to a genuine and excusable mistake and not through negligence or lack of interest. Counsel contended that the 1st Defendant had acted expeditiously upon learning of the dismissal by filing the application to reinstate promptly. Counsel contended that the suit raises a public interest matter on the provision of water to the residents of Makueni County and that it would cause irreparable prejudice to the 1st Defendant if condemned unheard.
12. Submitting on the preliminary objection, Counsel contended that Section 79 of the [Law of Succession Act](#) provides that the estate of a deceased person vest in the personal representatives. Counsel reiterated that two out of four administrators of the Estate of Samuel Nyingi Mbondo (Deceased) did not give their consent to the institution of the instant suit. Counsel maintained that the Plaintiffs herein did not have locus standi to institute this suit making it incompetent.



13. Counsel for the 1st Defendant urged the court to allow both the application herein and the preliminary objection with costs.
14. The 2nd Defendant has not entered an appearance and neither have any replies been filed on its behalf.
15. Having considered the application, the primary issue for determination is whether the Court ought to set aside the order dismissing the application dated 13th March, 2025 and subsequent thereto, order a reinstatement thereof.
16. The record indicates that the 1st Defendant's application was dismissed pursuant to an order of this court dated 26th March, 2025 an account of the non-attendance by the 1st Defendant.
17. Being a discretionary power, the Court of Appeal observed as follows in *CMC Holdings Ltd v James Mumo Nzioki* [2004] eKLR with regard to the setting aside of ex-parte orders: -

“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.”
18. The overriding objective under Section 1A of the *Civil Procedure Act* is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Order 12 Rule 7 of the Civil Procedure Rules, 2010 provides as follows:-

‘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.’
19. The Applicant attributed the failure to attend court on a late realization that the matter had been fixed for hearing on 26/03/2025 through the online CTS system of the court. It was contended that the mistake was not deliberate or through negligence. The Applicant expressed its keenness to prosecute their application promptly further urging that the mistake was inexcusable.
20. In *Shah v Mbogo* [1967] EA 116 at 123 B. Harris J, judiciously held as follows:-

“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 the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
21. From the record, it is clear that the Applicant has been consistently attending court and which lends credence to the explanation that their failure to attend court was not deliberate or negligent. The instant application was filed on 7th April, 2025 which is approximately fourteen (14) days after the application was dismissed. Evidently, there was no significant delay in the filing of the present application which further indicates that the 1st Respondent is keen on prosecuting its application.
22. The Plaintiffs/Respondents did not advance any valid reasons as to why the dismissal order should not be set aside and hence no prejudice has been established.
23. Consequently, it is the finding of this court that the 1st Defendant's application is meritorious and ought to be allowed.



24. As regards the preliminary objection, the sole issue for determination is whether the 1st Defendant's preliminary objection herein is merited.
25. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. Justice Law coined an apt description of what constitutes a preliminary objection in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 (at page 700) wherein the learned judge held as follows: -
- “In so far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
26. In the same case, Sir Charles Newbold, P. held as follows: -
- “The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
27. In *Oraro v Mbaja* [2005] eKLR, J.B. Ojwang J. (as he then was) described it as follows: -
- “I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
28. The 1st Defendant has sought that the suit herein be struck out on the basis that the Plaintiffs lack locus standi to either prosecute the suit. It was alleged that the Estate of Samuel Nyingi Mbondo (Deceased) on whose behalf the Plaintiffs are suing as legal representatives ought to be represented by four legal representatives as opposed to two.
29. The Plaintiffs strenuously challenged the said allegation stating that they had the consent to sue the Defendants given to them by all family members.
30. The 1st Defendant's preliminary objection is clearly blurred by factual details which are obviously contested. It does not qualify to meet the threshold as set out in the *Mukisa Biscuit* case above. The 1st Defendant's preliminary objection is incompetent.
31. In the end, the 1st Defendant's Notice of Motion dated 7th April, 2025 is meritorious and is hereby allowed in terms of prayers 2 and 3. Conversely, the 1st Defendant's preliminary objection is incompetent and is hereby dismissed with costs.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF OCTOBER, 2025.

IN THE PRESENCE OF:

Ms. Mwau for Plaintiff.

Mr. Njeru for 1st Defendant/Applicant.

Court assistant – Steve Musyoki

