



**Ndisii v Musembi & another (Environment and Land Case
24 of 2019) [2025] KEELC 7392 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7392 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE 24 OF 2019**

**EO OBAGA, J
OCTOBER 30, 2025**

BETWEEN

THERESIA KAVUU NDISII PLAINTIFF

AND

SHADRACK MUINDE MUSEMBI 1ST DEFENDANT

JOSEPH MAKONGE MULUNGYE 2ND DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 28th May, 2025 in which the Plaintiff/Applicant seeks to have the order dismissing the suit set aside. The Plaintiff contends that when the case came up for hearing on 29th May, 2024, her advocate logged into the court's virtual session with a view to informing the court that she was not available for hearing and seeking for adjournment.
2. The Applicant's lawyer did not know that the hearing had been set to proceed physically hence the dismissal of the suit for non attendance. The Applicant states that the Defendants had filed a counterclaim which was not dismissed and that it is important to grant leave to the Applicant to file a reply to defence and defence to counterclaim after her suit is reinstated.
3. The Applicant contends that the reason for non attendance is excusable and that the Defendants/ Respondents will not suffer any prejudice as they will be compensated with costs.
4. The Applicant's application was opposed by the Respondents based on grounds of opposition dated 4th June, 2025. The Respondents contend that the Applicant's application is made in bad faith and is fatally defective, tainted with falsehoods and is groundless and that it does not meet the threshold for setting aside.



5. The Respondent did not file any submissions. The Applicant submitted that there is need for her to be allowed to urge her case and that the reason for non attendance is excusable. She relied on the case of Shah –vs- Mbogo & Another (1967) EA 116 where it was held as follows:

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

6. The Applicant also relied on the case of Mbaki & others –vs- Macharia & Another (2005) 2 EA 206 where it was held as follows:

“The main concern of the courts is to do justice to the parties before them and the rules of procedure are intended to serve that purpose”.

7. I have considered the Applicant’s application, the opposition to the same by the Respondents as well as the submissions of the Applicant. The only issue for determination is whether the Applicant has met the threshold for setting aside the orders made on 29th May, 2024.

8. The Applicant has erroneously indicated that the dismissal of the suit was on 29th April, 2024. The dismissal was actually on 29th May, 2024. At the time of dismissal, both with the advocates for the Plaintiff and the Defendants and the parties themselves were not present. The court made an order dismissing the suit for want of prosecution. The order did not specify whether the counterclaim was dismissed as well. This being the case, it will appear that the counterclaim is still alive.

9. The date for hearing was taken in the absence of the firm of Kasyoka & Co. Advocates. There was no evidence whether the firm of Kasyoka & Co. Advocates had been served with a hearing notice for 29th May, 2024. There is also no evidence that Mr. Kasyoka logged into court virtual session on 29th May, 2024 as he alleges. If indeed he had logged in as he alleges, it would not have taken him a year to file an application for reinstatement of the suit. The truth of the matter is that counsel was not aware that the suit had been dismissed for non attendance until too late. This explains why he did not even know when the suit was indeed dismissed.

10. Notwithstanding the delay in bringing the application for setting aside the dismissal order, I note that the counterclaim was not dismissed. To give an equal opportunity to the parties, I will reluctantly allow the setting aside of the dismissal order. I therefore set aside the order of 29th May, 2024 dismissing the Applicant’s suit for want of prosecution and grant unconditional leave to the Applicant to file a reply to defence and defence to counterclaim within 7 days from today. The costs of this application shall be costs in the cause.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF OCTOBER, 2025.

In the Presence of:

Mr. Ngonze for Defendant.



Court assistant – Steve Musyoki

