



REPUBLIC OF KENYA



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**Wamae v Mwangi (Sued as the Administrator of the Estate of Mwangi Maingi - Deceased)
(Environment and Land Case 12 of 2022) [2025] KEELC 7329 (KLR) (29 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7329 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE 12 OF 2022
MAO ODENY, J
OCTOBER 29, 2025**

BETWEEN

GRACE WANJIRU WAMAE PLAINTIFF

AND

SIMON THAIRU MWANGI DEFENDANT

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF MWANGI MAINGI -
DECEASED**

RULING

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 18th June, 2025, seeking the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to set aside the orders issued on 12th June, 2025, including the closure of both the Plaintiff's and Defendant's case and the directions for the filing of submissions.
 - c. That this Honourable Court be pleased to grant the Defendant/Applicant leave to file and serve compliance documents under Order 11 of the Civil Procedure Rules within 7 days from the date of the Honourable Court's ruling.
 - d. That this Honourable Court be pleased to re-open the hearing of the matter and the Defendant/Applicant be granted an opportunity to be heard on the merits.
 - e. That this Honourable Court be pleased to order that the Plaintiff's witness be recalled for purposes of cross-examination by the Defendant/Applicant.
 - f. The costs of this application be provided for.



2. The application is supported by the annexed affidavit of Simon Thairu Mwangi, the Defendant/Applicant herein, sworn on 18th June, 2025, where he deponed that the matter came up before the court on 12th June, 2025 and the counsel holding brief for the Defendant (Ms. Kipro) was under the impression that it was coming up for mention to ascertain the status of the Succession matter related to the case. He further deponed that counsel for the Plaintiff, informed the court that the matter was coming up for hearing and they were ready to proceed with one witness.
3. The Defendant/Applicant deponed that counsel communicated on the issue and despite the communication, counsel for the Plaintiff proceeded with the Plaintiff's case ex-parte and the case closed. He further deponed that his advocate informed him that the mistake and the non-compliance was not deliberate but arose from a genuine interpretation of procedural status of the matter and it's interdependence with the Succession proceedings. He stated that no prejudice would be occasioned to the Plaintiff if the orders sought were granted.
4. Grace Wanjiru Wamae, the Plaintiff/Respondent filed a Replying Affidavit sworn on 3rd July, 2025, and deponed that the application is an abuse of court process, as the prayers sought are mischievously crafted to have the matter heard afresh without a prayer for leave to file a response to the originating summons.
5. On the court record is also a Relying Affidavit filed by Wachira Mbuthia, the Plaintiff/Respondent's counsel sworn on 3rd July, 2025, where he deponed that the directions that the case would proceed for hearing in open court at 10:30am were given in the presence of Ms. Kipro, counsel holding brief for Mrs. G.A Ndeda Advocate. Counsel deponed that he informed the court about the conversation between himself and Mrs. G.A Ndeda Advocate, and since the Defendant's representative was not in open court at 10:35am, the court ordered the hearing to proceed.

Defendant/applicant's Submissions

6. Mrs. Ndeda, counsel for the Defendant filed submissions dated 23rd July, 2025, and identified the issues for determination as: whether the application is merited and who should bear the costs. Counsel submitted that the Honourable Court is clothed with wide discretion to set aside its own orders and re-open a matter where sufficient cause has been shown.
7. Counsel submitted that the failure to attend the hearing was caused by a genuine mistake of counsel, relied on Order 18, Rule 1 of the Civil Procedure Rules, Section 146 (4) of the *Evidence Act* and the cases of: Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited [2016] eKLR and Samuel Kiti Lewa v Housing Finance Company & another [2015] eKLR.
8. Counsel further relied on Section 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules 2010 and urged the court to grant the Defendant leave to file and serve compliance documents. Counsel submitted that the application was brought without undue delay, relied on Article 40 of *the Constitution* of Kenya and the cases of Margaret Njoki Kamau v Reuben Ndivo Mwangi (2021) eKLR, Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others (2014) eKLR, Gabriel Mbui v Mukindia Maranya (1993) eKLR, Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 4 others [2014] eKLR and Republic v Communication Authority of Kenya and another ex-parte Legal Advice Centre Kituo cha Sheria [2015] eKLR.



Plaintiff/respondent's Submissions

9. Mr. Mbuthia, counsel for the Plaintiff/Respondent filed submissions dated 29th July, 2025, and identified the following issues for determination:
 - a. Whether the Defendant has established sufficient cause warranting the court to exercise its discretion to set aside ex-parte proceedings?
 - b. Whether the Defendant has made out a case for reopening of the Plaintiff's case?
 - c. Who pays the cost of the application?
10. On the first issue, counsel submitted that the application has not been made in good faith and even if the court were to grant the Defendant leave to file and serve compliance documents, it would be an exercise in futility since there is no response to the Originating Summons and is no specific prayer for the same.
11. Counsel submitted that the Defendant's application is a delaying tactic and relied on the cases of: Wachira Karani v Bildad Wachira [2016] eKLR, Rama v Fikiri & 3 others KEELC 9 (KLR), Mosbey & 6 others v Busienei & 2 others KEELC 4076 (KLR), Re Ali Sele, Benson Wairagu & Joseph Ng'ethe Gitu [2008] eKLR, William Macharia Maina & another v Francis Barchuro & others 2019 eKLR, CMC Holdings Limited v James Mumo Nzioki [2004] eKLR, Robert Chebet v Raymond Kimeli Koror (2018) KEELC 207 KLR and Nalichandra Devchand Dhodia & another v Evans Onyango (2019) eKLR.
12. On the second issue, counsel submitted that the application lacks merit and relied on case of Maneno & others v Ibrahim & others 2023 KEELC 19324. On the third issue, counsel relied on Section 27 of the Civil Procedure Act and urged the court to award cost of the application to the Plaintiff.

Analysis And Determination

13. The issue for determination is whether the court should set aside the orders issued on 12th June, 2025, and grant the defendant leave to file documents to comply with Order 11 of the Civil Procedure Rules.
14. This application requires the exercise of judicial discretion, which must be done judiciously. In the case of Patel v. E.A. Cargo Handling Services Ltd [1974] E.A. 75 the court stated that:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”
15. This is a matter that was filed in 2022 and in 2024, the court had issued a Notice to Show cause why the matter should not be dismissed for want of prosecution. On 23rd July 2024 the court gave an order directing the Applicant to take action within 30 days, failure to which the suit stands dismissed.
16. The Plaintiff took action and fixed the matter for hearing on 12th June 2025, when both counsel for the Plaintiff and the Defendant were present during the call over. The court gave a time allocation for the hearing at 10.30 am, and Ms. Kiprop, for the Defendant, did not appear during the hearing in open court. The court therefore proceeded with the Plaintiff's case, and closed the defence case, as neither the defendant nor counsel was present.



17. This is not an appropriate case for counsel to throw in the tired phrase of mistake of counsel should not be visited upon the litigant. This is a case of pure negligence where counsel did not act in the interest of the client. What was difficult in appearing in court when the matter came up for hearing and request for an adjournment on the reasons currently being advanced in this application.
18. Has the Applicant shown any sufficient cause or reason why the court should exercise its discretion to set aside the proceedings and reopen the case? Sufficient Cause was defined by the Supreme Court of India in *Parimal v Veena* which was cited with approval in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR. In the judicial decision, the said Supreme Court stated that:
- “Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”
19. Counsel for the Defendant/Applicant also prayed that apart from setting aside the proceedings and reopening the case, the defendant should be allowed to comply with the provisions of Order 11 of the Civil Procedure Rules. Counsel did not address the issue of the Defendant never filing a response to the Originating Summons.
20. Civil Procedure Rules, 2010 require parties to furnish their evidence in advance before commencement of the trial. Order 3, 7 and 11 of the Civil Procedure Rules and more specifically Order 3 rule 2 provides:
- All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—
- the affidavit referred to under Order 4 rule1(2);
 - a list of witnesses to be called at the trial;
 - written statements signed by the witnesses excluding expert witnesses; and copies of documents to be relied on at the trial including a demand letter before action:
- Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.
21. It is therefore clear that parties are to furnish all the documents and list of witnesses they wish to rely on at the trial, while filing their pleadings. The court has the discretion to grant leave for additional documents to be filed and such leave should not prejudice the other parties.



22. In the case of Wadhwa (as the legal representative of the Estate of Deshpal Omprakash Wadhwa) v Mohamed & 4 others (Environment & Land Case 51 of 2012) [2022] KEELC 13771 (KLR) (27 October 2022) (Ruling), this court held that:

“Order 11 also provides that the court may grant such leave for a party to supply the documents at least within 15 days before the pre-trial conference. That notwithstanding, there is no clear-cut provision setting out the consequences of failure to comply with those rules. This does not however mean that a party will be allowed to hide their evidence only to ambush the other party at the hearing stage.”

23. In the case of Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR Kasango J. stated:

“17. Uganda High Court, Commercial Division in the case Simba Telecom –v- Karuhanga & Anor(2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case Smith v New South Wales[1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case Simba Telecom(supra) held thus:

“I agree with the holding in the case of Smith v South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

24. The Applicant has not sufficiently addressed the issue of why the case should be reopened and allowed to comply with Order 11. Be as it may, it is on record that the hearing of this case was awaiting the finalization of Succession Cause No. 551 of 2015 which was subsequently finalized.



25. Taking into account the circumstances of this case, it would be in the interest of justice to allow the Defendant/Applicant to file a Replying affidavit and documents within 14 days and pay thrown away costs of Kshs. 20,000/ within 14 days from the date of this ruling, failure to which the order lapses.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 29TH DAY OF OCTOBER 2025.

M. A. ODENY

JUDGE

