

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. E019 OF 2022

KIPKOECH KIMILGO (Suing as the administrator of the Estate of the late **KIMILGO ARAP KUKUTO**).....

.....**PLAINTIFF**

VERSUS

ANNAH CHERONO(Sued as administratrix of the Estate of the late **EZEKIEL KIBET BOR**)

.....**DEFENDANT**

RULING.

Introduction.

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 18th February, 2024(sic). It seeks the following orders;

a. Spent

b. That this Honourable Court be pleased to reinstate the application dated 11th November, 2024 which was dismissed on 11th December, 2024 for non-attendance.

c. That costs of this application be provided for.

2. The application is based on the grounds on its face and the supporting affidavit of **Cliff Koome** Counsel for the Plaintiff/Applicant.

Factual Background.

3. The Plaintiff/Applicant commenced the present proceedings vide the Plaint dated 30th November, 2022 where he seeks the following prayers;

a. An order do issue declaring the Plaintiff herein as the lawful and sole beneficiary of a parcel of land measuring 5 acres to be hived of (sic) from what was known as Kericho/Kapsuser/439 as well as its resultant subdivision by virtue of adverse possession and a vesting order do issue thereto.

b. An order do issue declaring that the Plaintiff has a beneficiary interest limited to a 5-acre portion to be hived of (sic) from what was known as Kericho/Kapsuser/439 as well as its resultant subdivision.

c. A mandatory order do issue restraining the Defendants herein from entering into,

further subdividing, transferring, ploughing, farming, selling, leasing, mortgaging, charging, alienating, ploughing, and/or in any other way the may (sic) be construed in whatsoever in respect to the parcel of land known as Kericho/Kapsuser/439 or its resultant subdivision being Kericho/Kapsuser/7498-7503 or further resultants from further subdivision. (sic)

d. An order do issue directing to the District Land Registrar to cancel and/or destroying the title issued to the Defendants or those who claim in their names herein and in place issuing the Plaintiff herein with title limited to 5 acres to be hived of (sic) from Kericho/Kapsuser/439 or its resultant subdivision being Kericho/Kapsuser/7498 - 7503 or further resultants from further subdivision. (sic)

e. An order do issue directing to the District Land Registrar to cancel and/or destroying the resultant titles emanating from the subdivision of title being Kericho/Kapsuser/439.

f. A declaration that the property in all that parcel of land known as Kericho/Kapsuser/439 limited to a portion measuring 5 acres to be hived of (sic) exclusive belongs to the deceased Kimigo Arap Kukuto and now his estate and therefore a private property entitled to the protection of the same under law. (sic)

g. A declaration that the property in all that parcel of land known as Kericho/Kapsuser/439 limited to a portion measuring 5 acres to be hived of (sic) exclusive belongs to the deceased Kimigo Arap Kukuto by virtue of being matrimonial property and therefore a private property entitled to the protection of the same under law. (sic)

h. Costs and interest of this suit.

i. Any other relief that this Honourable Court may deem fit and just to grant.

- 4.** The Defendant/Respondent filed her Statement of Defence on 14th August, 2023 where she denies the averments in the Plaintiff and urges the Court to dismiss the Plaintiff/Applicant's suit with costs.

5. The application under consideration first came up for hearing on 19th February, 2025 when the Court directed that it be served upon the Defendant/Respondent.
6. On 6th March, 2025 the Court issued directions that the application be heard by way of written submissions. On 29th April, 2025 it was mentioned to confirm filing of submissions and then reserved for ruling.

The Plaintiff/Applicant's contention.

7. The affidavit in support of the application is sworn by **Cliff Koome** Counsel for the Plaintiff/Applicant.
8. He contends that the Plaintiff/Applicant's application dated 11th November, 2024 was dismissed for non-attendance.
9. He also contends that he was not able to attend to the same because he was on bed rest.

- 10.** He further contends that he recently came to learn of the said dismissal and adds that the Defendant/Respondent will not be prejudiced in any way if the application is allowed.
- 11.** It is his contention that it will be in the interest of justice that the application under consideration be allowed and the parties be given an opportunity to ventilate the issues raised in the application dated 11th November, 2024.
- 12.** It is also his contention that the Plaintiff/Applicant is apprehensive that he will suffer injustice and irreparable harm if the application is not reinstated.
- 13.** It is further his contention that it is a cardinal principle of law that no man shall be condemned unheard.
- 14.** He ends his deposition by stating that it is in the interest of justice that the present application be allowed and the application dated 11th November, 2024 determined on merit.

The Defendant/Respondent's Response.

15. In response to the said application, the Defendant/Respondent filed Grounds of Opposition dated 26th February, 2025. They are as follows;

a. That the said application is vexations, mischievous, frivolous and otherwise an abuse of the Court process as it seeks to reinstate the application dated 11th day of November, 2024 which in itself is incurably defective, bad in law and has no legs to stand on in law.

b. That the Applicant herein is not keen on making progress in his case and has resorted to bringing a multiplicity of frivolous and vexations applications with a view of wasting the Court's precious time and prolonging the entire suit.

c. That what is pending in this matter is the execution of the order which arose from the mediation report agreed upon by both parties on the 19 day of March, 2024 and adopted by this Honourable Court as an order accordingly. (sic)

d. That the Applicant through the application dated the 11th day of November, 2024 has opened up the entire suit and gone on a fishing expedition with a view of hoodwinking the Honourable Court to grant and/ or ventilate on issues that are not yet agreed upon by the parties herein which totally offends the rules of natural justice and Article 50 of the constitution of Kenya, 2010.

e. That on the 11th day of February, 2025 this Court clearly pronounced itself on this issue by asking Counsel for the Plaintiff/Applicant to execute the Mediation Order and if faced with any difficulty to report back to this Court for further orders/directions.

f. That the present application borders on disobedience of the directions issued by this Honourable Court on the 11th day of February, 2025 and the same should be treated with the contempt it deserves and dismissed with costs.

g. That the Counsel for the Applicant has not presented any proof to demonstrate

any efforts made towards the execution of the Court order to warrant any intervention by the Court.

h. In a nutshell the application dated the 18th day of February, 2025 is not merited and should be dismissed with punitive costs to the Respondent so as to deter the Applicant from wasting the Court's precious time.

- 16.** Both the Plaintiff/Applicant and the Defendant/Respondent elected not to file submissions.

Analysis and Determination.

- 17.** I have considered the Plaintiff/Applicant's application and the response thereto. It is my view that the only issue that arises for determination is whether the application dated 11th November, 2024 that was dismissed on 11th December, 2024 should be reinstated.

- 18.** Counsel for the Plaintiff/Applicant contends that the Plaintiff/Applicant's application dated 11th November, 2024 was dismissed on 11th December, 2024.

- 19.** Counsel for the Plaintiff/Applicant also contends that he was unable to attend Court on 11th December, 2024 because he was on bed rest.
- 20.** Counsel for the Plaintiff/Applicant further contends that the Defendant/Respondent will not be prejudiced in any way if the application is allowed and the application dated 11th November, 2024 reinstated.
- 21.** The Plaintiff/Applicant has attached a copy of a handwritten medical document. The document is prepared by **Rehema Medical Clinic** on 9th December, 2024. It states that **Cliff Koome** (Counsel for the Plaintiff/Applicant) attended their facility and upon treatment he was advised to take a four-day sick off till he recovered.
- 22.** The Defendant/Respondent in her grounds of Opposition essentially states that the only pending issue in the present suit is the execution of the mediation agreement that the

parties entered into on 19th March, 2024 which was also adopted as an order of the Court.

23. The Defendant/Respondent also states that the Court issued directions on 11th February, 2025 urging Counsel for the Plaintiff/Applicant to execute the said order arising from the mediation agreement.

24. The Defendant/Respondent further states that the application dated 11th November, 2024 intended to open up the entire suit and therefore the application under consideration lacks merit and should be dismissed with costs.

25. In the judicial decision of **HAM vs SOS [2021] eKLR** the Court observed as follows;

“9. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner

that will result in an injustice.”

(Emphasis mine)

26. In the judicial decision of **Dennis Odhiambo v Elius Njoka & another [2021] eKLR**, the Court while considering whether to reinstate an application that had been dismissed for want of prosecution observed as follows;

“17. The general principles governing applications like the one at hand are anchored in the realm of judicial discretion. However, I find it relevant to invoke the provisions of Section 1A(1) of the Civil Procedure Act which provides for the overriding objective of the Court so as to facilitate the just, expeditious, proportionate and affordable resolution of disputes in Court. A party in civil proceedings or an advocate for such a party is under a duty in accordance to the Act, to assist the Court to further the overriding objective by participating in the processes of the Court and to complying with the directions and

orders of the Court as directed. The foregoing discussion is in tandem with the spirit under Article 159 of the Constitution, which guides the Courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.” (Emphasis mine)

- 27.** Counsel for the Plaintiff/Applicant has attached medical documents that show that he was advised to take a four-day medical sick off on 9th December, 2024. The application dated 11th November, 2024 was dismissed on 11th December, 2024.
- 28.** In **Wachira Karani -vs- Bildad Wachira Civil Suit No. 101 of 2011 (2016) eKLR** as was cited in **Robert Kimani Ndungú v Kenya Deposit Insurane (sic) Corporation (Being sued in its capacity as the receiver manager of Chase Bank Limited (In Receivership) [2022] eKLR** the Court held as follows;

“Court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of natural justice.” (Emphasis mine)

- 29.** In the present matter, it is this Court’s view that Counsel for the Plaintiff/Applicant has given a reasonable explanation as to why he was not able to attend Court on 11th December, 2024 when the application was dismissed.
- 30.** The Defendant/Respondent has not demonstrated any prejudice she is likely to suffer if the application dated 11th November, 2024 is reinstated.
- 31.** In any event, the Defendant/Respondent’s response is majorly centered on the merits of the application dated 11th

November, 2024 and the execution of the mediation agreement.

32. It is important to note that the application under consideration only seeks for the reinstatement of the application dated 11th November, 2024. It is only upon the reinstatement of the said application that the Defendant/Respondent can respond to it on its merits.

Disposition.

33. Taking the foregoing into consideration, the Plaintiff/Applicant's application dated 18th February, 2025 is allowed in the following terms;

a. The application dated 11th November, 2024 is hereby reinstated for hearing.

b. The Plaintiff/Applicant shall forthwith set down the application dated 11th November, 2024 for hearing.

c. Each party shall bear own costs of the application.

34. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 13TH DAY OF NOVEMBER, 2025.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Mr. Koome for the Plaintiff/ Applicant.

Mr. R.K. Langat for the Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.