



**Nchoe v Naigisa (Environment and Land Miscellaneous Application  
E002 of 2023) [2025] KEELC 7613 (KLR) (6 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7613 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023  
LN GACHERU, J  
NOVEMBER 6, 2025**

**BETWEEN**

**EVANS LEPAPA NCHOE ..... APPLICANT**

**AND**

**KAITET OLE NAIGISA ..... RESPONDENT**

**RULING**

1. The matter for determination is the Notice of Motion Application dated 25<sup>th</sup> February 2025, filed by the Applicant herein Evans Lepapa Nchoe, brought under Sections 1A, 1B, 3, 3A of the [Civil Procedure Act](#), Order 12 Rule 7 and Order 51 Rules 1 of the Civil Procedure Rules, seeking the following orders:-
  1. That this Honourable Court be pleased to set aside and/or vary this Court's Orders of 16<sup>th</sup> May, 2024 dismissing the Applicant's application dated 24<sup>th</sup> May, 2023, for want of prosecution and awarding costs to the Respondent.
  2. That upon the grant of Prayer (2) above, this Honourable Court be pleased to issue an Order reinstating/re-opening the Applicant's application dated 24<sup>th</sup> may 2023 and setting down the same for hearing.
  3. That this honourable court do make such other and further orders as it may deem fit, necessary and expedient in the interests of justice.
  4. That costs of this application be provided for.
2. The Application is supported by the grounds set thereon being; that the Applicant's application dated 24<sup>th</sup> May 2023, was dismissed by this court on 16<sup>th</sup> May 2024, for want of prosecution; that during the period between 2023 and 2024, the Applicant was never aware that the hearing of the said Application was coming up in court; and thus failure to attend court was not deliberate. The applicant averred that



- his former advocates, who filed the Application date 24<sup>th</sup> May 2024, did not make any effort to inform/ update the Applicant accordingly.
3. The Applicant further deposed that his failure to attend court when the matter came up was innocent, and a consequence of lack of communication and/or negligence and dereliction of duty by his former advocates. The applicant deposed that the said mistake and/or confusion should not be visited upon him, as he is an innocent litigant who has been ready, willing and always had every intent to prosecute the Application through his Advocate of choice to its logical conclusion. Further, that he had no intention to delay the prosecution of the said Application.
  4. The Applicant also stated that the dismissed application dated 24<sup>th</sup> May 2023, raises weighty issues of law and facts, hence ought to be determined on merit. Further, that the Application has been brought without undue delay, and the Respondent is not likely to suffer any prejudice.
  5. The Application is also premised on the Supporting Affidavit of Evans Lepapa Nchoe, dated 25<sup>th</sup> February 2025, who averred that the court dismissed the Applicant's application dated 24<sup>th</sup> May 2023 on 16<sup>th</sup> May 2024, for want of prosecution with costs to the Respondent. Further, that despite the Applicant's efforts to always enquire on the status of the Application with his former advocate, the same was never disclosed.
  6. He further deposed that his advocates now on record Kinoti & Kibe Co. Advocates have advised him that the mistake of a Counsel should not be visited upon an innocent litigant, and that the court has inherent powers to grant such orders sought in this Application to preserve the ends of justice. Therefore, the Applicant believe it is just and fair that the orders sought herein be granted.
  7. In opposing the Application, the Respondent filed his Replying Affidavit sworn by Kaitet Ole Naigisa on 16<sup>th</sup> May 2025. The Respondent deposed that by a Notice of Motion dated 25<sup>th</sup> February 2025, the Applicant sought for setting aside of an Order of dismissal of a suit for want of prosecution under Order 17 of the Civil Procedure Rules. He averred that there is no room for setting aside an order of dismissal of the Application under the said Order 17 of the Civil Procedure Rules or any of the sections cited by the Applicant herein. That the correct Order should be Order 12 Rule 7 of the Civil Procedure Rules.
  8. The Respondent further deposed that the Applicant's advocate who filed application dated 25<sup>th</sup> February 2025, is not properly on record pursuant to Order 9 Rule 9 of the Civil Procedure Rules and therefore lacks the legal standing to move the court. Further, that the Applicant herein was represented by the Law Firm of Kiptoo K. & Co. Advocates, who prosecuted the matter until Judgment was delivered.
  9. The Respondent further deposed that the Applicant filed Narok ELC Misc. Application No. E005 of 2022 through the Law Firm of Kudate-Nchoe & Co Advocates, on the 7<sup>th</sup> June 2022, which Application was struck out vide the Ruling of this court delivered on 16<sup>th</sup> March 2023 "KON-1". That later the Applicant once again filed Narok ELC Misc. Application No. E001 of 2024, through the present Law Firm of Kinot & Kibe Co. Advocates, raising similar issues as the previous application, and which Application was once again dismissed on 5<sup>th</sup> December, 2024. "KON-2".
  10. It is Respondent's contention that the Applicant has been indolent in prosecuting his Application, a fact which has been shown by his conduct in failing to attend court on many occasions until the matter was dismissed for want of prosecution.
  11. The Respondent also deposed that the legal substratum for dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and concluded by parties who come to



court seeking justice. Dismissal of a suit is meant to assist in clearing backlogs in court, and the ever-increasing over-loads and restoring public confidence and trust on the judiciary.

12. He contended that upon filing of this Application, the Applicant should have efficiently and effectively have been seen to fast track the hearing and determination of his Application. Therefore, there should be no delay at all based on legal maxim – “justice delayed is justice denied.”
13. Further, it was deposed that the delay of over 12 months by the Applicant to reinstate the suit is clearly inordinate and unreasonable, yet no good explanation has been tendered for the delay and therefore, the averments of paragraph 10 of the Supporting Affidavit are inaccurate.
14. The Respondent further averred that the Application is grossly incompetent, and does not raise any reasonable cause of action to call for grant of the Orders sought, and that it is an abuse of the court process and ought to fail. Further, that the reasons given for reinstatement are unsatisfactory and unfounded, and that the Application is a waste of judicial time as the issues raised therein are misguided and predicated on a wrong premise.
15. The Respondent contended that he is the successful litigant, and is entitled to enjoy the fruits of a successful litigation, but that right is being restricted while in pursuant for the same by the Applicant.
16. The Application was canvassed through written submissions. The Applicant filed his written submissions dated 14<sup>th</sup> July 2025, through Kinoti & Kibe & Co Advocates, and urged the court to allow the Application and raised the following issues for determination;
  - i. Whether the court ought to reinstate the suit.
  - ii. Who will bear the costs of the application?
17. On the first issue, whether the court ought to reinstate the suit, the Applicant quoted Order 17 Rule 2(1) of the Civil Procedure Rules in comparison to Order 12 Rule 7 of the Civil Procedure Rules as disputed by the Respondent on the correct order to base his Application, orders provides as follows; -  
Order 17 Rule 2(1)  

“In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.”

Order 12 Rule 7 of the Civil Procedure Rules further provides that;  

“Where under this Order Judgment has been entered or the suit 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.”
18. Reliance was placed in the cases of:-  

Investment Limited v G4s Security Services Limited [2015]eklr, Philip Chemwolo & Another v Augustine Kubende, [1986]eklr, and Ngige (suing as the personal Representative of David Mahugu thondu) v Kariuki & 4 others [2025] KEELC 4496 (KLR).
19. The Applicant further submitted that Order 17 rule 2(1) of the Civil Procedure Rules requires that a Notice to show Cause be served upon the adverse party before a dismissal order is made. It was his submissions that in the instant case, the Applicant was never served with a Notice to Show Cause as to why the Application should not be dismissed.



20. Further, it was submitted that the above position is yet to be controverted by the Respondents who only claim that the Applicant's Advocate ought to have followed up on their case.
21. The Applicant pleaded with the court to find that his failure not to attend court when matter came up was innocent and a consequence of the lack of communication and/or negligence and dereliction of duty by his former advocate. Therefore, the Applicant urged the court to find that the mistake and/or confusion by his former advocate should not be visited upon the Applicant, who was at all material times ready, willing and with intention to prosecute his Application to a logical conclusion.
22. On who payment of costs of the Application, the Applicant submitted that Section 27 of the *Civil Procedure Act* grants the court discretion to grant costs. However, it is trite law that costs usually follow the events unless special circumstances present themselves. In conclusion the Applicant urged the court to allow the instant Application as he has demonstrated a keen interest in prosecuting his case and that the reinstatement of the suit herein will serve to ensure the fair administration of justice by having the Application dated 24<sup>th</sup> May 2023, be decided on merit.
23. The Respondent filed his written submissions dated 20<sup>th</sup> July 2025, and submitted that the provisions of Order 9 Rule 9 of the Civil Procedure Rules are mandatory for an advocate or a party coming on record post judgment to either first seek leave of court by way of a formal Application, or obtain consent from the outgoing counsel. It was submitted that the Law Firm of Tanyasis Lemein & Co. Advocates, the previous advocates did not file either of the documents envisaged in Order 9 Rule 9 of the Civil Procedure Rules, and ALL pleadings filed by the said Law Firm ought to be struck out.
24. The Respondent also submitted that the Applicant's pending Application seeks to stay the execution of the Judgment delivered on 13<sup>th</sup> April 2022, and decree issued on 27<sup>th</sup> April 2022, which has already been perfected, and a title deed arising from the said judgment issued to the Respondent.
25. The Respondent relied on various decided cases among them being; Equity Bank Limited v West Link MBO Limited – Civil Application No. 78 of 2011, Ivita v Kyumbu [1984]KLR 441, Nzoia Sugar Company Limited v West Kenya Sugar Limited (2020)eklr, Edney Adaka Ismail v Equity Bank Limited [2014] eklr, savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani)HCCS No.397 of 2002, mobile Kitale Service Station v Mobil Oil Kenya Limited & another [2004]eklr and Ronald Mchenzie v Damaris Kiarie [2021]EK.
26. On the issue of costs, the Respondent submitted that the Black Law Dictionary defines "Cost" to mean;
- The expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other."
27. Therefore, it was the Respondent's submissions that the proviso under the provisions of Section 27(1) of the *Civil Procedure Act*, Cap 21, holds that costs follow the events. It is trite law that the issue of costs is the discretion of courts. It is the Respondent's prayer that the application be dismissed with costs.
28. The above are the pleadings, the grounds for and against the instant Application, the rival written submissions, which this court has carefully considered and finds as follows;
29. The main issue for determination is whether the instant application is merited.
30. The orders sought are for setting aside and/ or varying the dismissal orders of 16<sup>th</sup> May 2024, and reinstatement of the Applicant's Notice of Motion Application dated 24<sup>th</sup> May 2023, and set it down for hearing.



31. The Application is vehemently opposed by the Respondent, who averred that the Application sought to be reinstated was wrongly filed, as the Advocate who filed it did not comply with Order 9 Rule 9 of the Civil Procedure Rules; further, the application is an abuse of the court process as a similar application had been filed and dismissed vide Narok Misc Application No E001 of 2024;
32. Further, that the Applicant was indolent in prosecuting the said Application and the court correctly dismissed it for want of prosecution.
33. Before determining whether the Application for setting aside and reinstatement if merited or not, this court will first determine whether the instant application is properly filed by the Law Firm on record of Kinoti & Kibe Co Advocates.
34. A perusal of the court record shows that the dismissed Application dated 24<sup>th</sup> May 2023, was filed by the Law Firm of Tanyassis Lemein & Co Advocates, who sought for stay of execution of the Judgement of the trial court in Narok CMCC NO 24 OF 2018; Evans Lepapa Nchoe v Kaitet Ole Naingisa, and for leave to file Appeal out of time.
35. The Law Firm of Tanyassis Lemein & Co Advocates had come on record for the Applicant after filing a consent to come on record, which consent was signed by the previous advocates who prosecuted the matter before the trial court. The consent was filed in compliance with Order 9 Rule 9 of the Civil Procedure Rules, which states;
  - “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
    - (a) upon an application with notice to all the parties; or
    - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
36. However, after the dismissal of the said Application, the Applicant herein through the current Advocates filed Narok Misc No E001 of 2024, which Application sought for Orders that the Appeal be admitted out of time. Those are similar Orders that had been sought in the dismissed Application dated 24<sup>th</sup> May 2023. However, the court dismissed the said application for seeking similar Orders with the dismissed Application instead of seeking to reinstated the dismissed Application.
37. It is on the background of the dismissed Notice of Motion Application dated 2<sup>nd</sup> April 2024, in Narok Misc. Application No E001 OF 2024, that the Applicant filed the instant Application.
38. The dismissed Application was filed by the Law Firm of Tanyassi Lemein & Co Advocates. The said Law Firm filed a Memo of Appearance dated 24<sup>th</sup> May 2023, and Notice of Appointment of Advocates on the same date.
39. The Law Firm of Kinoti & Kibe Advocates filed the instant Application on 25<sup>th</sup> February 2025, but did not file a Notice of Change of Advocates. Is the said Law Firm properly on record?
40. There are two ways wherein a new Law firm can come on record when another Law Firm is already representing a party in court. These two methods, are provided under Order 9, Rule 5 and Rule 9 of the Civil Procedure Rules: Order 9 Rule 5 of CPR provides;
  - “A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change



of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

41. The suit herein was dismissed when the Law Firm of Tanyassi Lemein Co. Advocates were on record, and are considered to be the Law Firm representing the Applicant. However, the Applicant is at liberty to engage a new advocate by following the laid down rules as provided in Order 9 Rule 5 of CPR. The new Advocate ought to have filed a Notice of Change of Advocates.
42. Though a party has a right to change their legal representation, this change must be done formally by filing the appropriate documents in court, being a Notice of Change of Advocates. Instructing a new advocate is not enough to be "properly on record".
43. Further, after filing Notice of Change, there must be proper service of the said Notice of Change or application on all relevant parties to the suit (including the former advocate). This court has not seen this Notice of Change of Advocate, and consequently, the Law Firm of Kinoti & Kibe Co Advocates are not properly on record for the Applicant.
44. In the case of *Mansukhalal Jesang Maru v Frank Wafula* [2022] KEELC 929 (KLR), the court held;

“Order 9 Rule 5 provides for situations where a party wishes to change Advocates. In such a case, the change is not complete unless and until the Notice is filed and served on all parties. In this matter, the Plaintiff did not change his Advocates whom he had instructed earlier: he only appointed another law firm to act alongside the initial firm. Thus, the Rule does not apply here. The Applicant must have known that his contention on this was leading him nowhere and beat a hasty retreat while seeking shelter in the provision that I refer to below.”
45. What is the effect of not filing Notice of Change of Advocates? Failure to comply with the law means the previous advocate is still legally recognized, as appearing for the party, and the new advocate is not considered to be on record. Consequently, the court finds and holds that the Law Firm of Kinoti & Kibe Advocates are not properly on record for the Applicant herein.
46. As properly submitted by the Respondent, and relying on the holding of the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salt v IEBC & 7 Others* (2014) eklr, Article 159 of *the Constitution* is not a panacea in each and every instance of breach of procedure and it is only available in deserving cases. Consequently, Article 159 of *the Constitution* cannot aid the Advocates herein who are not properly on record.
47. Order 9 Rules 5 and 6 of CPR, are couched in mandatory terms, and the Applicant and his advocates had no option, but to comply. That compliance was not done, and this court finds and holds that the instant Application was filed by a Firm of advocates which is not properly on record, and for that reasons, the instant Application cannot stand.
48. Consequently, the court finds and holds that the Notice of Motion Application dated 25<sup>th</sup> February 2025, having been brought by a Firm of Advocates not properly on record for the Applicant cannot stand, and the instant Application is dismissed entirely with costs to the Respondents.
49. Having found that the instant Application was filed by a Law Firm not on record, this court finds no reasons to determine the merit or demerit of the said Application, but proceeds to dismiss the said Application entirely with costs.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 6<sup>TH</sup> DAY OF NOVEMBER 2025.**

**L. Gacheru**

**Judge.**

Delivered online in the presence of

Elijah Meyoki - Court Assistant

Mr. Muturi holding brief for Mr. Kibe Mungai for Applicant

Mr. Kamwaro for Respondent

**L. Gacheru**

**Judge.**

