Kiguru v Muhia (Sued in the Capacity of the Legal Administrator of the Estate of Muhia Thuku) & 2 others (Environment and Land Case 16 of 2024) [2025] KEELC 8106 (KLR) (Environment and Land) (20 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8106 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND CASE 16 OF 2024

MC OUNDO, J

NOVEMBER 20, 2025

BETWEEN

STEPHEN NJOROGE KIGURU ..... PLAINTIFF

AND

GEOFFREY KAHIGA MUHIA (SUED IN THE CAPACITY OF THE LEGAL ADMINISTRATOR OF THE ESTATE OF MUHIA THUKU) .... 1ST DEFENDANT

JOSEPH MUCHIRI ..... 2ND DEFENDANT

KORU NGORANI ..... 3RD DEFENDANT

RULING

1. Coming up for determination is a Notice of Motion Application dated the 22nd July 2025 brought pursuant to the provisions of Article 159 (2) (d) of *akn ke act 2010 constitution the Constitution*, Section 1A, 1B & 3A of the *akn ke act 1924 3 Civil Procedure Act*, Order 12 Rule 7 of the Civil Procedure Rules in which the 2nd Defendant Applicant has sought that the court be pleased to vary and or set aside the orders issued on 22nd July, 2025 dismissing the his Counterclaim for non-attendance and thereafter reinstate the suit for hearing of the 2nd Defendant's Counterclaim on merit. That the costs of the Application abide the outcome of the suit.

2. The said application was supported by the grounds therein and the Supporting Affidavit of equal sate sworn by Kiage, Ezra Juma, Counsel for the Applicant who established a history of diligence and willingness to prosecute the Counterclaim, contrasting it with the perceived conduct of the other party (the Plaintiff Respondent). That on the He deponed that on the 5th May 2025, the matter did not proceed for hearing on the 2nd Defendant's counterclaim because the Plaintiff's counsel sought to cease acting wherein he had been indulged On the 21st May 2025, the Applicant's Advocate again obliged the

Court's request to grant the Plaintiff Respondent another 21 days to comply with directions, despite the matter being scheduled for hearing.

3. The matter had then been fixed for mention to confirm compliance on the 24th June 2025 on which date the Defendants in the counterclaim were absent despite proper service and previous indulgence by the other parties. That a date had then been fixed for hearing of the Counterclaim for the 22nd July 2025. A notice had been served upon the parties.

4. That when the matter had come up for hearing on 22nd July 2025, he had diligently logged into the virtual court session at 9:00 am so as to establish that all parties were ready to proceed before embarking to commute to Naivasha Law Courts. That he had confirmed to the court that he was ready to proceed with the hearing of the counterclaim and sought a time allocation of 11:30 am. The court however allocated 11:00 am as the time for hearing wherein he had left immediately for Naivasha with a view to arrive at the time stipulated.

5. That however, upon arrival at 11:32 am, he was informed that the Honorable Court had dismissed his client's counterclaim under the provisions of Order 12 Rule 3(1) of the Civil Procedure Rules. That despite the presence of the of the Defendant in the Counterclaim, he had not denied or admitted any part of the claim and therefore the provision of the law could not have legitimately formed the basis for the dismissal of the counterclaim since neither party had addressed the Honourable Court.

6. That the Plaintiff Respondent who was unrepresented by Counsel was also not accorded audience since his Counsel was legally still on record. That accordingly, the court had erroneously dismissed a long-standing suit suo moto without justification.

7. That the Applicant had always been ready to prosecute his counterclaim and the consequences of his failure to arrive in court in good time should not be meted upon the litigant. That his mistake, if any, should not limit the right of the 2nd Defendant Applicant to be heard in court of competent jurisdiction and to the fullest extend of merit possible. That it was trite, that the focus of the court should be on the merits of the case and rights of parties rather than punishing innocent litigants for procedural errors or mistakes made by legal counsel. He placed reliance in the decided case of Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co. Ltd & 2 others [2018] eKLR where the court had cited the case of Belinda Muras & 6 Others v Amos Wainaina [1978] KLR.

8. That the counterclaim was an old matter of 16 years and which raises meritorious triable issues that need further interrogation of the Court. That it was thus entirely unjustifiable to have the suit dismissed on a technicality in which the Court has not applied itself correctly as to the provisions relied upon. That in the event that the suit was condemned unheard, the Applicant stood to suffer grave loss and prejudice.

9. That the right to a fair hearing under the provisions of Article 50 of *akn ke act 2010 constitution the Constitution* is a principle of Natural Justice and the same could not be limited or derogated from as per the provisions of Article 25 of *akn ke act 2010 constitution the Constitution*. That the instant Application had been brought without unreasonable delay and in good faith. That it was in the wider interest of justice that the orders sought be granted as the Applicant was desirous on prosecuting the suit. That the Honourable Court has discretion and inherent power to grant the orders sought in the interest of justice as provided for under the provisions of Section 3A of the *akn ke act 1924 3 Civil Procedure Act*.

10. In response to the 2nd Defendant's Application, the Plaintiff Respondent vide his Grounds of Opposition dated 10th September 2025 stated that:

i. That the Application dated 22nd July 2025 is bad in law, vexatious and a time-wasting Application.

ii. That the Application has no merit.

iii. That the Applicant's Application is misconceived, witch hunt and malicious aimed to delay the Plaintiff's suit and deny him justice.

iv. That the 2nd Defendant Applicant were present in court on the day that their counterclaim was dismissed but opted decided to stay outside the court room.

v. That the 2nd Defendant Applicant had logged in when the court had allotted time for the hearing of the counterclaim but never addressed the court to confirm his time in court hence ignorance in law has no defence.

vi. That the allegation by the 2nd Defendant Applicant's Advocate is baseless and has no legal basis for he could seek for time allocation convenient to his arrival in court.

vii. That the alleged claim at the counter claim is an action that had been dealt with by court of competent jurisdiction at Naivasha Chief Magistrate court Criminal case No. 1641 of 2009 wherein the Plaintiff Respondent was found not to have committed the alleged damages hence the counterclaim was res judicata.

11. He thus prayed that the court dismisses the Applicant's Application dated 22nd July 2025 and set the hearing date for the suit herein.

12. The Application dated 22nd July 2025 was disposed of by way of written submissions which I shall summarize as herein under.

2nd Defendant Applicant's Submissions.

13. The 2nd Defendant Applicant vide his submissions dated 8th October 2025 in support of his Notice of Motion dated 22nd July 2025 summarized the factual background of the matter before framing one (1) issue for determination to wit; whether the application herein was merited.

14. The Applicant submitted that while dismissal for non-attendance was a valid concept to save judicial time, the dismissal in this case was procedurally flawed: That the Court Record did not reflect non-attendance because the Applicant's counsel had appeared before the Court virtually and sought a time allocation for the prosecution of the Counterclaim. That the dismissal was based on Order 12 Rule 3 (1) of the Civil Procedure Rules, which provides for the consequences of non-attendance, but the Applicant contends the rule was improperly applied given their counsel's initial appearance and request for time.

15. The Applicant's Counsel conceded to the late arrival in court but argued that it was a minor, unintentional error that should not prejudice the litigant That he was approximately 70 Kms from the court at a time he was required to appear in open court wherein he had appeared 32 minutes later than the time scheduled by the court which shortfall was an unintended mistake caused by the vagaries of the transport system.

16. Reliance was placed on the decision in Shah v Mbogo & another [1967] 6A U7 on the principles guiding the reinstatement of a dismissed suit, which focus on whether or not the error was excusable. That the long-standing legal principle was that mistakes of Counsel ought not to be visited upon a litigant, especially in a case that has been diligently prosecuted for many years. He cited the case of

Zebedee Mmata Injera v Benson Anubi Luhong; Joanne C. K. Luhongo (Interested Party) [2021] KEELC 2795 (KLR).

17. That driving a litigant away from the seat of justice 13 years after filing the suit, merely because Counsel was late by a margin of minutes, would occasion undue injustice and violate the litigant's right to a fair hearing.

18. The Applicant contended that the application was filed immediately and that the Respondent would suffer no prejudice. He cited the case in Utalii Transport Company Limited & 3 Others v Nick Bank Limited & Another [2014] eKLR.

19. On costs, he submitted that no prejudice would be faced by the Respondent who had time and again litigated the instant suit with a lot of lethargy, failed to pay costs awarded to other parties and numerously sought for unwarranted adjournments. That in its Grounds of Opposition the Respondent had indicated that on the day the suit was dismissed the Applicant was lingering outside the court premises yet it had failed to inform the court of the same, neither did it inform the Applicant that its matter had been called in court for the second time. That in any case, the Respondent had filed its Grounds of Opposition and did not serve them upon the Applicant or his Advocates.

20. It was his submission that the only available remedy was reinstatement of the suit for expedient prosecution of his counterclaim. He hinged his reliance in the decided case of Kenya Union of Sugar Planation & Allied Workers v Busia Sugar Industries Limited (Cause 56 of 2021) [2022] KEELRC 13365 (KLR) (2 December 2022) (Ruling) to submit that in the instant case, the court's record indicates that only the Defendant had attended court and that would be the likely reason why the instant suit had been dismissed on account of the provisions of Order 12 rule 3 and not any other provision. That indeed, it was conceded that the Applicant was estopped from bringing a fresh suit against the Respondent effectively prompting the instant application.

21. He urged the honorable court to reinstate the suit with no orders as to costs and fix the counterclaim for hearing in the new term.

Plaintiff Respondent's Submissions .

22. In opposition to the Application, the Plaintiff Respondent vide his submissions dated 25th October 2025 in support of his Grounds of Opposition dated 19th September 2025 submitted that the Counsel for the Plaintiff Respondent and the Plaintiff himself were present in court but the mover of the court despite admitting to having been present in court was not present. That further, although his clients had been present, they had decided to remain outside the court room.

23. That 16 years pending for the hearing of the counterclaim which actually bars the hearing of the main cause of action was a long inordinate delay to deny the Plaintiff Respondent an opportunity to be heard. He placed reliance in the decided case of Mwanasokoni v kenya Bus Services Ltd [1985] KECA 82 (KLR) to submit that every litigation must come to an end.

24. That the 2nd Defendant Applicant did not prove the threshold for reinstatement of the instant suit since they had delayed to prosecute the same for 16 years hence to reinstate the counterclaim herein was prejudicial to the Plaintiff Respondent as justice delayed is justice denied. That in any case, the 2nd Defendant Applicant did not substantiate the cause of lengthy delay in the hearing of the instant suit.

25. That indeed, the court had on its own wisdom dismissed the suit according to be provisions of Order 12 rule 3 which permits the court to dismiss the same. That consequently, the 2nd Defendant Applicant's Application dated 22nd July 2025 ought to be dismissed with costs.

Determination.

26. I have carefully perused and considered the pleadings, and the written submissions filed. I have considered the affidavit filed in support of the application and the Grounds in opposition herein filed. I have also considered, whether the reasons presented before me by the Applicant's Counsel for their failure to be in court when the matter came up for hearing pursuant to responding during the call over, constituted an inadvertent excusable mistake or whether it was meant to deliberately delay the cause of justice.

27. I have also considered the Respondents' response and written submissions against allowing the said application to wit that the excuses offered by the Applicant were baseless and has no legal basis as he ought to have sought for time allocation convenient to his arrival in court. I find the issue for determination herein as being whether the Applicant's counterclaim suit should be reinstated

28. It is not in dispute that on the 22nd July 2015 when the matter was called out during the call over, the Applicant's Counsel was present wherein the court gave time allocation for hearing for 11:00 am. At the stipulated time there had been no appearance of both the Applicant and his Counsel wherein the court waited up to 11:25 am, called out the matter but only the Plaintiff was present. In line with the provisions of Order 12 Rule 3(1) of the Civil Procedure Rules, the Applicant's counterclaim was dismissed.

29. Order 12 of the civil Procedure Rules deals with hearing and the consequence of non- attendance wherein Rule 3 is titled ''when only defendant attends'' and sub-section 1 goes on to state as follows:

    1. ''If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court''.

30. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide 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.''

31. Setting aside a judgment or order for dismissal is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue held inter alia: -

> ''The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court.''

32. The Supreme Court of India in the case of Parimal vs Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed 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."

33. In the instant case, did the failure by the Applicant and or his Counsel to respond to the matter when it was called for hearing of their counterclaim constitute sufficient cause or was it meant to deliberately delay the cause of justice?

34. In this case, the court has been informed that counsel did not intentionally refuse to prosecute their counterclaim but it was owing to the fact that he had to travel from Nakuru to be in Naivasha to persecute the matter wherein due transport intricacies he had delayed to be in court by around 32 minutes after the matter had been called out, I find did not constitute sufficient cause given that on the 24th June 2025 the hearing date had been taken in the presence of Counsel for the Applicant with directions that the matter shall be heard in open court.

35. I have however considered the words of Apaloo, JA in the case of Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103 that:

> " Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

36. I am aware that the discretion granted to the court on whether or not to allow the application to set aside its order of dismissing the 2nd Defendant's counterclaim is intended to be exercised judiciously to avoid injustice or hardship and that the door of justice should not be closed because a mistake has been made by a Counsel who ought to know better. I am also aware that there is no error or default that cannot be put right by payment of costs and it is for the foregoing that I will allow the application dated 22nd July 2025 on condition that the 2nd Defendant pays the both the court adjournment fee and costs to the Plaintiff.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 20 TH DAY OF NOVEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND COURT – JUDGE