

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ELC NO. E012 OF 2024

PHILIP BRIGHTONE BUCHERE-----
1ST PLAINTIFF

GIBSON SHINGIRA MCHARO-----
1ST PLAINTIFF

VERSUS

HENRY KIPKOECH KOGO-----1ST
DEFENDANT

HENRY KIRWA KOGO-----2ND
DEFENDANT

CHIEF LAND REGISTRAR-----
3RD DEFENDANT

AGRICULTURAL DEVELOPMENT CORPORATION-----4TH
DEFENDANT

BEATRICE KOSGEI-----
5TH DEFENDANT

HANNAH CHEBOTIB KORO-----6TH
DEFENDANT

RULING

1. Through an application dated **1/10/2025**, the plaintiffs seek the court to set aside its orders made on **25/9/2025**, dismissing the suit for non-attendance and to reinstate the same for hearing on merits. The grounds are set out on the face of the application and

in a supporting affidavit of Philip Brightone Buchere, sworn on **1/10/2025**.

2. The 1st plaintiff deposes that he is battling with colorectal cancer and on **25/9/2025**, he was attending a Zoom meeting with the German doctor as per the annexed copy of the screenshot, a proposal, and a visa invitation. The 1st plaintiff deposes that he had not disclosed the health condition to his advocate due to obvious privacy reasons; otherwise, he is keen to prosecute the case.
3. The 1st plaintiff deposes that it is only just, fair, and equitable if the orders of **25/9/2025** are set aside, reviewed, or varied, since the defendants stand to suffer no prejudice if the suit is reinstated.
4. The application is opposed by the 5th defendant through a replying affidavit sworn by Beatrice Jepchirchir Kosgei on **24/10/2025**. It is deposed that a party and his lawyer are under a statutory obligation to assist the court in meeting its overriding objection of a just, expeditious, and efficient disposal of the suit; any acts of delay are inimical to the due administration of justice and run afoul of express provisions of the statute and the Constitution.
5. The 5th defendant deposes that the dismissal of the suit was in furtherance of this statutory mandate and

should, for all interests and purposes, unless sufficient cause is shown, be the end of the litigation. The 5th defendant deposes that, looking at the application and the supporting affidavit, it is patently obvious that pertinent issues are not only unsubstantiated but the applicant has also set out to deliberately mislead the court on the factual material culminating in the dismissal order, which conduct therefore disentitles the applicant from the reliefs sought.

6. Further, the 5th defendant deposes that the reliefs sought can only be granted by the court if the applicant places before it sufficient justifiable cause meritorious consideration, which, unfortunately, the applicant has failed to do.
7. The 5th defendant deposes that the 1st plaintiff, by his own admission, the issue of sickness was not brought to the attention of his lawyers on record, or court, for the other parties on or before **25/9/2025**.
8. On the contrary, the 5th defendant deposes that the 1st plaintiff's counsel confirmed to the court that the plaintiffs were ready to proceed during the call-over and that even when the matter was later called for hearing, the only excuse his counsel gave was that he could not reach him; otherwise, the issue of sickness was not mentioned at all. It is deposed that the only

irresistible inference to be drawn, therefore, is that the supposed illness certainly did not prevent the applicant from attending court, making it an afterthought.

- 9.** The 5th defendant deposes that the record will show that the hearing was scheduled to take place in open court, yet on the said date, neither the plaintiffs nor their witness attended the court. Further, despite attempts by the court clerk to reach him by phone, the applicant was nowhere to be found. It is deposed that the 5th and 2nd defendants had travelled all the way from Nairobi to be physically present in court together with their counsel on record.
- 10.** The 5th defendant deposes that all other parties and their counsels were also present in court; otherwise, the plaintiffs and their counsel at the very least should have provided the court with a credible, consistent narrative on the circumstances that prevented him from attending court.
- 11.** Again, the 5th defendant deposes that the worst still is that the whereabouts of the 2nd plaintiff and the challenge that caused his inability to attend the hearing have not been disclosed. The 5th defendant deposes that it is inconceivable that the applicant could have been unwell and not bring it to the

attention of his lawyer to seek an adjournment, knowing very well that he could be required to testify in court at the hearing.

12. The 5th defendant deposes that the spacious excuse that, owing to privacy reasons that the applicant could not disclose his health condition to his advocate is incapable of belief. The 5th defendant deposes that it is the nature of the illness that could not be disclosed, for it is the appointment that he was supposedly scheduled to have with his doctor, otherwise, in the absence of an explanation, nothing prevented the applicant from generally informing his counsel that he was at least unwell, even if he was to avail the medical record later.

13. The 5th defendant deposes that the court was quite accommodating to the plaintiffs and went out of its way in making efforts to inquire about his whereabouts, including by calling him through the customer care desk, and further allowed him to testify virtually, but did not respond. The 5th defendant deposes that, in those circumstances, the greater burden is on the plaintiffs to provide a credible explanation for the default.

14. Further, the 5th defendant deposes that the plaintiff's counsel informed the court that he has communicated

to his client through his known number and told him to log in into the court proceedings, and therefore no explanation has been given why the applicant was later unreachable, or he did not indicate to his counsel in the initial or subsequent conversation that he will be unwell.

- 15.** The 5th defendant deposes that the purported WhatsApp screenshot produced as annexure **PBB-(1)** is inadmissible for failure to comply with **Section 106B** of the Evidence Act. The 5th defendant deposes that even taking the applicant's contrived narrative at its highest, he has not demonstrated a link between attending an alleged Zoom meeting with his doctor in Germany on the **25th** day of **September 2025** with **PBB-(1)**. More significantly, the 5th defendant deposes that the particulars of the time when the alleged Zoom meeting occurred, the name of the doctor hosting the said meeting and the Zoom meeting report, and the history of the said doctor have not been disclosed.
- 16.** The 5th defendant deposes that to compound the obvious spacious narrative being proffered, no explanation has been tendered why the applicant was not able to log into the court proceedings virtually and

testify on **25/9/2025** after attending the alleged Zoom meeting with his doctor in Germany.

17. The 5th defendant deposes that for the totality of what has been presented before the court, the applicant has not indicated that he was attending a Zoom meeting at around **11:00 a.m.** on **25/9/2025** with his doctor in Germany. He has not laid a basis for the manner, the exact date he came into possession of the Dendritic Cell Therapy Proposal, acceptance of the proposal, and the invitation letter from Immunyo, as to whether it was before or after the hearing date was fixed, and if so if after becoming aware of the hearing date, he attempted to reschedule the said meeting.

18. The 5th defendant deposes that the entire substratum of the plaintiff's narrative collapses on a scrutiny of annexure **PBB-(1)**, where he admits that he only learned of the hearing on the material day from his advocate, which is a stark contrast with what his counsel had told the court.

19. Again, the 5th defendant deposes that the plaintiff's counsel on record has not sworn an affidavit to contradict this position and in the circumstances is left to wonder who is talking the truth between the two, otherwise, either way one looks at it, it is self-evident that the applicant is engaging in empty posturing in

an attempt to conceal the fact that he was not diligent in prosecuting his case, and must accept to live with the consequences of his indolence.

20. The 5th defendant deposes that the applicant has not disclosed when he learned of the dismissal of his suit, and the steps he took to make the current application. The 5th defendant deposes that the applicant is not truthful, as his advocate informed the court on **25/9/2025** that he had information that, due to unavoidable circumstances, the plaintiffs were unable to travel from Nairobi, where they are based, to attend court.

21. Equally, the 5th defendant deposes that the right of fair trial and the expeditious disposal of the 2nd and 5th defendants is equally sacrosanct and should not be held at the whims of the plaintiff, who, despite being accorded an opportunity to prosecute their case, unjustifiably elected to frustrate its just and expeditious disposal.

22. The 5th defendant deposes that she stands to suffer great prejudice if the application is allowed, for it would mean that she continues to defend a spurious claim even after incurring travelling expenses on **25/9/2025** and sacrificing her busy and demanding schedules to attend court. The 5th defendant deposes

that the application seeks to undermine the due administration of justice based on the plaintiff's conduct, which must be curtailed.

23. The 6th defendant opposes the application through an affidavit, sworn by Hannah Chebotib Korir on **23/10/2025**. It is deposed that whereas a court has discretion to set aside its judgment under **Order 12 Rule 7** of the Civil Procedure Rules, a plausible reason to have the suit reinstated has to be provided, if it is an excusable mistake, or error, or it is meant to deliberately delay the cause of justice.

24. The 6th defendant deposes that this suit was commenced on **3/4/2024** under a certificate of urgency. In this instance, it is deposed that the 2nd defendant has not authorised the 1st plaintiff to act on his behalf, did not provide any witness statement or attend the hearing on **25/9/2025**, even in the application, his absence has not been explained, and that he has not in any way expressed any intention or interest to pursue the suit.

25. The 6th defendant deposes that when this matter came for pre-trial conference on **8/4/2025**, the parties agreed by consent for a hearing date of **25/9/2025**. The 6th defendant deposes that she was present in court on **25/9/2025**, when the plaintiff's counsel

sought an adjournment due to some unavoidable circumstances that morning, which were not disclosed to the court.

- 26.** Again, the 6th defendant deposes that the application was opposed by the 2nd and 5th defendants as well as the 6th defendant, which the court declined to allow, and listed the matter for hearing at **11:00 a.m.** virtually or otherwise as the plaintiffs wished.
- 27.** The 6th defendant deposes that at **11:25 a.m.**, Mr. Bororio advocate, indicated that he had communicated with the 1st plaintiff via cellphone number **0724434129 at 11.17 a.m.**, conveying the court's directions, and had also shared the court link for the 1st plaintiff to log in.
- 28.** Additionally, the 6th defendant deposes that, having ascertained that none of the plaintiffs had logged in, the court asked Mr. Bororio advocate, to call his client once again and asked them to log in, who reported that he was unable to reach the 1st plaintiff.
- 29.** The 6th defendant deposes that the court clerk took down the cellphone number to reach out to the plaintiffs, and about ten minutes later, the customer care desk officer reported that calls to the 1st plaintiff's number were not going through, leading to Mr. Bororio

advocate to move another application for an adjournment, which was opposed by the defence.

30. The 6th defendant deposes that in a detailed ruling attached as **HCK-(1)**, the suit was dismissed for non-attendance. The 6th defendant deposes that, despite having no reason not to believe the 1st plaintiff's diagnosis, it is completely unacceptable for him to attempt to leverage his condition as an excuse for his absence from court on **25/9/2025**.

31. The 6th deposes that a review of the attached documents reveals an undeniable truth that the 1st plaintiff intentionally chose not to attend court on **25/9/2025**, and when faced with the repercussion of his deliberate absence, he resorted to belatedly citing health issues in an attempt to elicit sympathy from this court and other parties, which behaviour is utterly despicable.

32. The 6th defendant deposes that the documents provided clearly indicate that the subject Zoom call occurred a day prior, on **24/9/2025** at **3:30 p.m.** Madrid time, which translates to **2:30 p.m.** Kenyan time. The 6th defendant deposes that the 1st plaintiff, therefore, has presented no evidence to justify his absence from court on **25/9/2025** or what prevented him from attending even virtually, given that he was

able to participate in a Zoom meeting the previous day, demonstrating that he had the capacity to log in for the court session on **25/9/2025**.

- 33.** The 6th defendant deposes that the hearing date was set way back in **April 2025**, and almost five months had passed, the plaintiffs had ample time to organize their time schedules and to ensure that they were present in court on the hearing date, which failure to do so is both irresponsible and inexcusable.
- 34.** Further, the 6th defendant deposes that the law is that the exercise by a court of the discretion to set aside default judgment is intended to avoid an injustice or hardship resulting from accident, inadvertence, or mistake or error, and not to assist a party who deliberately sought by their non-attendance on the hearing to obstruct or delay the cause of justice.
- 35.** The 6th defendant deposes that it is utterly impertinent for the 1st plaintiff to suggest that none of the defendants will suffer any prejudice, where they initiated the suit under urgency, failed to, or take the matter seriously in an attempt to reinstate, and now claim seriousness and had to drag parties to court once more by forcing them to invest significant time and resources to defend themselves, where they had abandoned their entire case.

- 36.** Similarly, the 6th defendant deposes that the plaintiffs, after the suit was dismissed, have no right to return with weak excuses and expect the matter to resume from where it was left in court, which conduct should not be accepted or tolerated. The 6th defendant deposes that the court should dismiss the application with costs; otherwise, no valid justification has been presented that would permit this court to exercise its discretion under **Order 12 Rule 7** of the Civil Procedure Rules and reinstate the suit.
- 37.** The 2nd and 5th defendants rely on written submissions dated **24/10/2025**. It is submitted that the 1st plaintiff has not demonstrated that he was at least bedridden or very sick on **25/9/2025**, which prevented him from attending the virtual hearing, more so when he had attended a virtual doctor call the previous day, to inform the court that he was unwell, or to tell his lawyers on record, as much, other than saying due to unavoidable circumstances, of not travelling from Nairobi.
- 38.** They submit that the issue of health was an afterthought and an attempt to approbate and reprobate, and is a fishing expedition of reasons following the ruling on **25/9/2025**. The 2nd and 3rd defendants submit that the 1st plaintiff is not a truthful

person to benefit from the discretion of the court; otherwise, he was evasive on **25/9/2025**, and did not wish to prosecute his case, and the documents used by him offend **Section 106B** of the Evidence Act, and are misleading to the court. Reliance is placed on **Shah -vs- Mbogo & Another [1957] EA 116.**

- 39.** The 2nd and 5th defendants submit that the source and the makers of annexure marked **PDD-(1)** are not disclosed, and the makers did not swear any affidavit to authenticate them, more so when the said proposal acceptance and the invitation letter have not been properly serialized and marked as required.
- 40.** The 2nd and 5th defendants submit that the plaintiffs have not refuted the grave allegation that he had communicated with his advocate on **25/9/2025**, through his known cellphone number, which was also used to send the court virtual link and or explain why on **25/9/2025**, after receiving the link while the court was waiting for him to log in, did not do so and instead became unreachable on his known cellphone number.
- 41.** The 2nd and 5th defendants submit that the 1st plaintiff was reckless, casual, and did not take this court seriously on **25/9/2025**. The 2nd and 5th defendants submit that no sufficient case has been shown to warrant the setting aside of the orders of **25/9/2025**.

- 42.** Further, the 2nd and 5th defendants submit that they had travelled from Nairobi to attend court, utilizing **Kshs. 56,000/=**, and sacrificed their time and resources, out of their busy schedule, including the 5th defendant, who is an advocate, had left her duties as an advocate in Nairobi to attend the hearing, only for the plaintiff to waste the chance and the right to a fair hearing, yet they are enjoying a temporary injunction issued on **9/10/2024**. Reliance is placed on **Utalii Transport Co. Ltd -vs- NIC Bank Ltd & Another [2014] eKLR.**
- 43.** The 6th defendant relies on written submissions dated **24/10/2025**. It is submitted that whereas the court under **Order 12 Rule 7** of the Civil Procedure Rules has discretion to set aside a default judgment, the main concern, as held in **Pithon Waweru Maina -vs- Thuka Mugiria [1983] KECA 117,** is to do justice to the parties.
- 44.** The 6th defendant in this case submits that the plaintiffs have no plausible reason to have the orders set aside, otherwise, it was not an excusable mistake or error but a clear attempt to deliberately delay the cause of justice, as held in **Shah -vs- Mbogo (supra)** and **Wafula -vs- Wepukhulu & 5 Others Civil Suit**

No. 55 of 2010 [2025] KEELC 1421 [KLR] (20th March 2025) (Ruling).

- 45.** What the court is being asked to find is that the dismissal of the plaintiffs' case for non-attendance on **25/9/2025** should be upset since the 1st plaintiff has shown sufficient cause for non-attendance. The way I understand it is that the 2nd plaintiff is not opposed to the dismissal of the suit. Equally, the 1st plaintiff does not speak for the co-plaintiff on this point.
- 46.** In determining whether or not to exercise the discretion, the court considers the conduct of the applicant, if it amounts to abuse of the court process, prejudice to the opposite parties, and the interest of justice to the parties. See **Mwangi S. Kamenyi -vs- Attorney General & Another, Misc. Civil Suit No. 720 of 2009.**
- 47.** In **Tana and Athi Rivers Development Authority - vs- Jeremiah Kimigho Mwakio & 3 others [2015] KECA 674 (KLR),** the court held that courts will readily excuse a mistake of counsel, but to do so is not automatic, and that a client has a corresponding duty to the court and also to the other side.
- 48.** In **Ivita -vs- Kyumbu [1984] KLR 441,** the court held that justice is justice to both the plaintiff and the defendant and that the position of the two parties

would be considered, including the prejudice to the respondent by a delayed action.

49. In **Philip Chemolo & Another -vs- Augustine Kubende [1982-88] KAR 1046**, the court held that a fair hearing is fundamental and is at the cornerstone of the judicial system. The court said that a default judgment is not set aside in the exercise of discretion but as a matter of judicial duty to uphold the integrity of the judicial process.

50. In **Patel -vs- EA Cargo Handling Services Ltd [1974] EA 75**, the court held that there are no limits on a judge's discretion to set aside or vary an ex parte judgment, since the main concern is to do justice to the parties.

51. The plaintiffs are not denying knowledge of the hearing date. Equally, the 1st plaintiff is not denying giving his counsel on record, Mr. Bororio, the reason being that he had not travelled to court due to unavoidable circumstances on the morning of the hearing. The 1st plaintiff is also not denying that attempts were made by his lawyer and the court registry to reach him, and he was also sent the link to join court proceedings virtually.

52. The 1st plaintiff is not refuting that his cellphone was unreachable between **11:00 a.m.** and **12:10 p.m.**,

when the suit was dismissed after his lawyer made a second attempt to seek an adjournment since he was unable to explain for the second time, why his client(s), whom he or they had talked to and sent a link to join virtually, was then unreachable.

- 53.** The 1st plaintiff's lawyer on record has not sworn any affidavit to say that, indeed, at **11:00 a.m.**, he was told of any sickness or ongoing virtual client-doctor Zoom meeting, hence the reason why his client(s) could not log in. There is also no record that the 1st plaintiff's earlier explanation by his lawyer at **11:30 a.m.** was communicated to the court, that the reason for non-attendance was due to an existing health condition.
- 54.** The 1st plaintiff now admits that he withheld vital material from both his lawyer and the court and the other parties, moments before his suit was dismissed for non-attendance.
- 55.** What I find curious is that the 1st plaintiff has now opted to let go of his privacy rights, yet ideally if he were under any such danger, nothing would have stopped him, as submitted by the respondents, to merely state that he was sick.
- 56.** The applicant has not offered medical records to show when he was diagnosed with the medical condition

and whether he has been undergoing treatment locally before now opting for foreign treatment. Such information, if it were availed to the lawyer and the court, would have enabled the court to make an inference that the medical documents are not tailor-made for this application or do not amount to an afterthought, as submitted by the defendants, for purposes of court sympathy.

57. Parties should always stick to what is legal and factually justifiable. There is no compliance with **Section 106B** of the Evidence Act as regards annexures **PBB-(1)** and **(2)**. Being truthful and honest is key.

58. In ***Mwilavia -vs- Mangachiu & Others ELC E001 of 2023 [2024] 44145 [KLR] (29th March 2024) (Ruling)***, the court held that courts are duty-bound to enforce the non-adjudgment policy of the judiciary, as it deals with the backlog of cases. The court said that whereas sickness may befall anybody and can come calling anytime, it behooves parties and their lawyers to disclose such information, and when called upon to substantiate the same through evidence.

59. Further, the court said that withholding such vital information will militate against exercising discretion in favour of an applicant. The court held that a case

belongs to a party and not the advocates on record. The court said that if a court were to turn its eyes on the other side and allow parties to decide when to and when not to come to court, and endlessly delay cases, there would be no end to good litigation, especially when enjoying interim orders.

60. The court also held that an applicant seeking to set aside must lay bare before the court evidence to establish whether, indeed, the non-attendance was genuine, in good faith, with reasons, and not intended to derail the cause of action.

61. The court cited **Peter Mumo Masave -vs- Mutua Kioko & Another [2019] eKLR**, where the court set aside its order based on medical evidence by a doctor. In this application, issues have been raised as to when the Zoom meeting arose and on the authenticity of the annexures. The applicant has not offered a plausible explanation as to the authenticity or veracity of the documents raised by way of a supplementary affidavit.

62. In **James Wafula Simiyu -vs- Fidelity Commercial Bank Ltd 2014] eKLR**, the court observed that discretion must be exercised while balancing the acts of prejudice, real hardship to the parties, nature of the case, right to be heard, and the fact that the summary

dismissal of the case drives a litigant from the seat of judgment, without being heard.

- 63.** After the respondents have explained the prejudice to be occasioned by the setting aside, based on impediment to fair trial, aggravated legal and travel costs, delay of the case by disinterested plaintiffs, the plaintiffs have not offered anything by way of costs as an adequate remedy.
- 64.** The respondents have pleaded and submitted that the sword of justice must cut both ways, and that as defendants, they are also entitled to expeditious disposal of the suit. It is trite that such matters on fair hearing are constitutional rights under **Articles 48, 50, and 159** of the Constitution. The court, under **Section 3A** of the Civil Procedure Act, has inherent powers to make such orders as may be necessary to meet the ends of justice, or to prevent an abuse of the process of the court.
- 65.** In doing so, courts, as held in **Stephen Boro Gitiha - vs- Family Finance Building Society & Others [2009] eKLR**, are now in the driver's seat of justice, to weed out as far as practicality possible the scourge of the civil process to ensure dispute resolution is achieved in a just, fair, and expeditious manner.

- 66.** An opportunity to be heard was given to the plaintiffs. The date was taken five months away from **25/9/2025**. It is not clear whether the sickness occurred between the taking of the hearing date and the hearing date. The seriousness or otherwise of the 1st plaintiff's sickness, such that it impeded his attendance in court, has not been substantiated.
- 67.** In ***Utalii Transport Co. Ltd*** (*supra*), the court said that it is the primary duty of the plaintiff to take steps to progress their case since they are the ones who dragged the defendant to court.
- 68.** The plaintiffs were granted an opportunity, as the court observed that the broader equity is to be used, unless there is fraud or intention to overreach, since the court exists for the purpose of deciding the rights of parties, but not to impose discipline.
- 69.** In ***Wachira Karani -vs- Bildad Wachira [2015] KEHC 850 [KLR]*** Mativo J, as he then was, observed that the court must exercise care to avoid abuse of the system and against unjust or ridiculous results. The court said that a litigant ought not to bear the consequences of his advocate's default unless he was privy to the default, or the default resulted from his failure to give him proper instructions.

- 70.** In **Registered Trustees of the Archdiocese of Dar es Salaam -vs- Chairman of Bunju Village Government & others, Civil Appeal No. 47 of 2006**, the court said that sufficient cause should be liberally construed, to advance substantial justice, where no negligence or inaction or want of bona fide is imputed to the applicant.
- 71.** In **James Kanyiita Nderitu & another -vs- Marios Philotas Ghikas & another [2016] eKLR**, the court emphasized that the right to be heard before an adverse decision is taken against a person is fundamental. The plaintiffs failed to seize the opportunity to avail themselves and substantiate their claim. They failed to exercise their right to a fair hearing. They cannot, therefore, turn around to claim denial of the right to a fair hearing.
- 72.** Being given an opportunity to be heard is the surest way of achieving justice for the parties, as held in **John Florence Maritime Services Limited & another -vs- Cabinet Secretary for Transport and Infrastructure & 3 Others, Petition No. 172 of 2015**.
- 73.** I think I have said enough to reach a conclusion that the application dated **1/10/2025** is due for dismissal. It is dismissed with costs.

74. Orders accordingly.

Ruling dated, signed, and delivered via Microsoft Teams/Open Court at Kitale on this 3rd day of December 2025.

In the presence of:

Court Assistant - Dennis

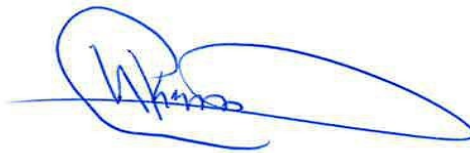
Parties absent

Mr. Bororio for the plaintiffs present

Mr. Bikunda for the 2nd - 5th defendants present

Mr. Kere for 6th defendant present

Miss Auta for the 4th defendant present



**HON. C.K. NZILI
JUDGE, ELC KITALE.**