



**Mtuto v Japheth & another (Environment and Land Case E052 of 2021)
[2025] KEELC 18498 (KLR) (18 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 18498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE E052 OF 2021
FM NJOROGE, J
DECEMBER 18, 2025**

BETWEEN

MWAMBAJI KAILO MTUTO PLAINTIFF

AND

FREDERICK NDUNE JAPHETH 1ST DEFENDANT

MBEYU KALONGO 2ND DEFENDANT

RULING

1. The application dated 7th October 2025 seeks an order setting aside the order made on 6/10/2025 dismissing the suit for want of prosecution and an order reinstating it for hearing on the merits.
2. The application supported by the affidavit of the plaintiff. The grounds on which the application is made are set out at the foot thereof. The are that the matter was coming up for hearing of the main suit on 6th of October 2025 and the plaintiff, who was acting in person after his advocates withdrew from acting for him, travelled to the way from Rabai to the court early in the morning to attend to the matter. However, when he arrived in court he was informed that the matter was to be heard virtually; at that point, the plaintiff who is an old man (72 years) and not conversant with the operating a smartphone moved out of the court to seek assistance on how to log into the court session, but unfortunately the present matter, which was listed as number 2 on the cause list, in the meantime called out called out and dismissed before he could log in. To demonstrate that he was in the court precincts on the material day, he attached a copy of the court entry register. He stated that he would suffer prejudice if the suit was not reinstated.
3. The application is supported by the replying affidavit of the 1st defendant who states that the matter has been listed on several occasions, and that the same has been adjourned repeatedly for the same reasons advanced by the plaintiff and his advocates on record. He gave a long list of dates on which the matter came up for either mention or hearing and on which he claimed the matter was adjourned



at the instance of the plaintiff. He stated that the plaintiff is conversant with virtual court operations, having appeared in court virtually on 6th June 2025 and 3rd April 2025; that the plaintiff is not keen in prosecuting his case. He adds that equity aids the vigilant.

Analysis And Determination.

4. The plaintiff avers that the reason for his failure to proceed on the date of hearing is that he was unable to log into the virtual courtroom; that while he sought help outside the virtual and physical courtrooms, his matter was called out and dismissed. He states that he had expected that the matter would proceed physically in open court, and that he had arrived in the court precincts; he attaches a copy of the register for entry into the court precincts to support his application to set aside the dismissal order.
5. There is no evidence brought by the defendant to show that the plaintiff's assertion that he was within the court precincts on the material day is false. Though the defendant has also asserted that the plaintiff has been appearing in court virtually on earlier dates, for example, on 6th June 2025 and on 3rd April 2025, this court is unable to establish whether that was done with the help of other people which help he could not obtain with ease on the date of the hearing when the matter was dismissed.
6. What remains a solid fact is that the plaintiff came to open court expecting to proceed with the hearing physically in open court. I have considered the age of the plaintiff and in my view he came to open court with a view to proceed physically, just like many other litigants have done. I am also persuaded that when he was informed that the matter is going to be add virtual he went about looking for assistance so that he could participate in the hearing virtually.
7. I find that this is a case in which the court should exercise its discretion in his favor and set aside the order of dismissal to pave the way for a hearing of the suit on its merits.
8. I have considered the application dated 7/10/2025 and found that it has merit and I allow the same in terms of prayers nos 2, 3 and 4 thereof. The reinstated suit shall be mentioned on 27/1/2026 for issuance of a hearing date. All the parties who have not complied required to comply with the Civil Procedure Rules as to filing of trial bundles and other documents before that date.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 18TH DAY OF DECEMBER 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

