

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**  
**ELC CASE NO. 229 OF 2019**

**MACHARIA NJUGUNA**

**DAVID MUTUA MSAKU**

**ELIJAH KANIU CHEGE**

**(being officials of QUARRY**

**VILLAGE**

**GROUP).....PLAINTIFF/APPLICANT**

**DEVELOPMENT**

**VERSUS**

**MWIHIKE FARMERS**

**COMPANY**

**LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

**1.** Before me is the notice of motion dated 8<sup>th</sup> April, 2025 filed by the plaintiff/applicant, and it is expressed to be brought under the **Judicature Act, High Court (Practice and Procedure Rules (Part 1 rule 3) Article 159(2) & 50 of the Constitution 2010, Sections 1A, 1B & 3A of the Civil Procedure Act and Order 12 Rule 7 and Order 51 of the Civil Procedure Rules** seeking the following orders: -

***1. Spent.***

***2. Spent.***

***3. That the firm of Messr. Awuor & Company be granted leave to come on record for the plaintiffs/applicants herein in place of Messrs Gacau Kariuki & Company Advocates.***

**4. That the honourable court be pleased to vary or set aside its orders issued on 23<sup>rd</sup> March, 2023 striking out the applicants suit and do reinstate the plaintiff's suit for hearing and determination on merit.**

**5. THAT the Honourable court be pleased to revive this matter.**

**6. That the costs of this application be provided for.**

2. The application is premised on the grounds *inter alia* that this matter was slated for mention on 23<sup>rd</sup> March, 2023 when it was struck out for want of prosecution. The application was supported by affidavit of David Mutua Masaku, sworn on even date.
3. The applicants deposed that their suit was struck out on 23<sup>rd</sup> March, 2023 for non-attendance which information they were not aware of since their advocates on record had informed them that the suit had been settled. Further, that they only came to know of the dismissal when they saw a 3-month period eviction notice on their residential wall on 20<sup>th</sup> February, 2025.
4. It was deposed that they have filed the present application after two years as they were not aware that the matter had been dismissed and that their advocates on record had also not informed them. That it is in the interest of justice that the suit be reinstated

since the defendant/respondent will suffer no prejudice if the prayers sought are allowed.

5. The defendant/respondent filed its grounds of opposition dated 9<sup>th</sup> June 2025, challenging the application on the following grounds:-

**1. That the application is bad in law in that it is misconceived, frivolous, vexatious and extremely incompetent.**

**2. That the application seeks to defeat the ends of justice as the orders sought are untenable in law as this suit was struck out for offending the provisions of Order 37 Rule 7 of the Civil Procedure Rules.**

**3. That the suit was therefore not struck out for want of prosecution as alleged by the plaintiffs/applicants.**

**4. THAT the instant application is an afterthought made in bad faith and aimed at wasting the honourable court's judicial time.**

6. The defendant/respondent also filed its replying affidavit sworn on 10<sup>th</sup> June, 2025 by Kibanyu Kimani. The defendant/respondent deposed that when the preliminary objection dated 27<sup>th</sup> September, 2022 came up for hearing on 24<sup>th</sup> January, 2023, the

plaintiff/applicant's counsel sought for 30 days to file a supplementary affidavit in compliance with Order 37 Rule 7 of the Civil Procedure Rules. That when the matter came for mention to confirm compliance on 23<sup>rd</sup> March, 2023, the plaintiff/applicant's counsel had not complied and neither was he present in court. For this reason, the suit was struck out.

7. The plaintiff/applicant filed a further affidavit in response thereto which is sworn on 30<sup>th</sup> June, 2025. The plaintiff/applicant reiterated the contents of the supporting affidavit sworn on 8<sup>th</sup> April, 2025.
8. The application was canvassed through written submissions. The plaintiff/applicant filed their written submissions dated 30<sup>th</sup> June, 2025 while the defendant/respondent filed its written submissions dated 4<sup>th</sup> July, 2025.
9. I have considered the application, the grounds of opposition thereof, the replying affidavit and the written submissions filed by the parties. The sole issue for determination is *whether the application is merited.*
10. **Order 12 Rule 7 of the Civil Procedure Rules provides:-**

***“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.”*

11. The Court of Appeal in **Njue Njagi versus Ephantus Njiru & Another [2016] eKLR** stated that dismissal of a suit for none attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.
12. This court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake, as it was held in the case of **Shah versus Mbogo & Another [1967] E.A. 116**.
13. Also, in **CMC Holdings Limited versus Nzioki [2004] 1 KLR 173**, it was held that:-

*“In law, the discretion that a court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the*

***recourse open to it, as the learned magistrate did here... In doing so, she drove the appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."***

14. The plaintiff/applicant seeks the reinstatement of their suit which was struck out. It was argued that the plaintiffs/applicants only realized of the outcome of the case when they saw an eviction notice on the suit property. They contended that the same was not intentional since it was due to non-communication by their advocate on record.
15. I have perused the proceedings in this matter. When this matter came up for mention on 23<sup>rd</sup> March, 2023, the learned counsel for the plaintiff/applicant who was present informed the court that he had not complied with the directions of the court issued on 24<sup>th</sup> January, 2023. The directions of the court given on 24<sup>th</sup> January, 2023 were to the effect that failure to file the supplementary affidavit within the time stipulated would mean that the suit is struck out. In addressing the court on the material date (23<sup>rd</sup> March, 2025), the learned counsel left it to the court to decide the fate following his failure to file the same. In doing so, the orders issued on 24<sup>th</sup> January, 2023 kicked in and the suit was struck out.

**16.** However, being mindful of the duty of the court which is to do substantive justice, I am persuaded to exercise discretion in favour of the plaintiff/applicant. Indeed, the period in bringing forth this application is lengthy and considering the reasons given by the plaintiff/applicant that they only became aware of the same through an eviction notice, it is only fair that they are given the chance to prosecute their case. In turn, such delay can be mitigated through costs.

**17.** From the above, this court hereby exercises its discretion in favour of the plaintiff/applicant and allows the notice of motion dated 8<sup>th</sup> April, 2025 in the following terms:-

***1. The firm of Messrs. Awuor & Company is hereby granted leave to come on record for the plaintiffs/ applicants herein in place of Messrs. Gacau Kariuki & Company Advocates.***

***2. The orders issued on 23<sup>rd</sup> March, 2023 striking out the applicant's suit are hereby set aside and the plaintiff/applicant's suit is hereby reinstated for hearing and determination on merit.***

***3. The defendant/respondent is awarded costs of this application. The same is assessed at Kshs.45,000/.***

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 20<sup>TH</sup> DAY OF JANUARY, 2026.**

**HON. MBOGO C.G.  
JUDGE  
20/01/2026.**

***In the presence of:***

*Ms. Vena Aron - Court assistant*

*Ms. Mwangi for the Defendant/Respondent*

*Mr. Wambugu for the Plaintiff/Applicant*