

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELCC NO. E073 OF 2020**

**GEM  
LIMITED.....PLAINTIFF/APPLICANT**

**INVESTMENTS**

**-VS-**

**PRAFULCHAND  
.....DEFENDANT/RESPONDENT**

**RAJA**

**RULING**

**1.** The plaintiff/applicant filed the notice of motion dated 8<sup>th</sup> July 2025 under the provisions of **Articles 40,48 and 159 (2)** of the **Constitution, Sections 1A, 1B, 3A and 63 (e)** of the **Civil Procedure Act, and Order 12 Rule 7** of the **Civil Procedure Rules** seeking the following orders:-

- 1. *Spent.***
- 2. *Spent.***
- 3. *That the honourable court be pleased to set aside the order of dismissal made on 14<sup>th</sup> October, 2021 and all consequential orders thereto and reinstate the case for hearing and determination.***
- 4. *That the costs of this application be in the cause.***

**2.** The application is premised on the grounds appearing on its face together with the supporting affidavit of Dr. Evans Odhiambo Kidero sworn on even date. The plaintiff/applicant

deposed that it had recently learnt that the present suit was dismissed on 14<sup>th</sup> October, 2021 and the decision upheld on 24<sup>th</sup> February, 2022. Further, that the defendant/respondent was awarded costs of the suit and hence the plaintiff/applicant is at risk of execution.

**3.** The plaintiff/applicant deposed that on the material date when the suit was being dismissed, it had not been made aware of the hearing date by its previous counsel to ensure the availability of their witnesses. It was further contended that the plaintiff/applicant should not be punished for the mistakes of its previous counsel. Further, that it became suspicious after there were no updates despite numerous follow-ups.

**4.** The plaintiff/applicant deposed that the defendant/respondent was equally unaware of the dismissal of the suit as evidenced by their application dated 3<sup>rd</sup> July, 2024 seeking to have the suit dismissed for want of prosecution. The plaintiff/applicant further deposed that it has a valid claim that raises triable issues and therefore pleads for an opportunity to ventilate the same for a determination on the merits. It was contended that the dismissal of the suit did not offer a solution to the parties since the dispute still persists.

5. In conclusion, the plaintiff/applicant deposed that the defendant/respondent shall not suffer any prejudice which cannot be settled with costs. It was urged that it is in the interest of justice that the application should be allowed.
6. In opposition to the application, the defendant/respondent filed the replying affidavit sworn by himself on 14<sup>th</sup> August, 2025. He deposed that the plaintiff/applicant had failed to prosecute the suit since the year 2020 which amounts to an inordinate and inexcusable delay. He further deposed that the plaintiff/applicant had not justified the delay, and that it has also shown a lack of interest and diligence in pursuing the matter. He urged the court to dismiss the application for lack of merit.
7. The application was canvassed through written submissions. The plaintiff/applicant did not file its written submissions. The defendant filed its written submissions dated 4<sup>th</sup> December, 2025 and submitted that the law places the burden squarely on an applicant to demonstrate credible and compelling reasons for failure to prosecute a matter. The defendant/respondent submitted that the plaintiff/applicant has not shown any reason as to justify the reinstatement of a

suit that has been abandoned for over five years. It was further submitted that the plaintiff/applicant first moved the court in August 2020 and that no further steps had been taken.

- 8.** It was further submitted that the plaintiff/applicant had not demonstrated its efforts in following up on its case through its advocates. It was further contended that the prolonged inactivity on the part of the plaintiff/ applicant in prosecuting its suit amounted to abuse of court, and granting the application would amount to rewarding indolence as well as contravene the overriding objective of civil litigation.
- 9.** Having considered the application, the primary issue for determination is *whether the court ought to set aside the order dated 14<sup>th</sup> October, 2021 dismissing the suit for want of prosecution and subsequent thereto grant an order for reinstatement.*
- 10.** As indicated by the defendant/respondent, the last action on the part of the plaintiff/applicant was filing of the application dated 12<sup>th</sup> August, 2020. Afterwards, no action was taken on the plaintiff/applicant's part.

11. Being a discretionary power, the Court of Appeal observed as follows in **CMC Holdings Ltd v James Mumo Nzioki [2004] eKLR** with regard to the setting aside of *ex-parte* orders:-

*“Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us 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 in our mind not be a 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.”*

12. The overriding objective under **Section 1A** of the **Civil Procedure Act** is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. **Order 17 Rule 1** of the **Civil Procedure Rules**, provides as follows:-

*‘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.'***

- 13.** The plaintiff/applicant attributed the failure to prosecute the suit since the year 2020 on a lapse on the part of its previous counsel in disseminating information concerning the hearing dates in order to avail its witnesses. Although the plaintiff/applicant asserted that its suspicions had grown on the lack of information from its advocates, no evidence was produced to show that follow-up attendances or letters had been made to the court registry to demonstrate due diligence.
- 14.** Judicial decisions abound on the need for litigants to stay abreast with their suits in order to avert blaming their counsel at every instance of an error on their part. In the case of **Habo Agencies Limited v Wilfred Odhiambo Musingo [2015] eKLR**, the Court of Appeal aptly held as follows: -

***“It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in***

***and to follow up their cases even when they are represented by counsel.”***

- 15.** In the case of **Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi HCCC 397/2002**, the court observed as follows: -

***“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case.***

***The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case.”***

- 16.** From the record, it is clear that there had been prolonged inactivity on the part of the plaintiff/applicant before the order for dismissal of the suit was issued. Once again, the plaintiff/applicant took no steps for about three and a half years since 14<sup>th</sup> October, 2021 up to the making of the present application on 8<sup>th</sup> July, 2025 which is enough demonstration of

its indolence in prosecuting the suit expeditiously. No satisfactory reasons have been advanced to the court to justify setting aside of the dismissal orders.

17. In **Shah v Mbogo [1967] EA 116** at 123B Harris, J judiciously held as follows: -

***“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”***

18. From the above, I find that the notice of motion dated 8<sup>th</sup> July 2025 is devoid of merit and it is hereby dismissed with costs to the defendant/ respondent.

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2026.**

**HON. MBOGO C.G.  
JUDGE  
03/02/2026.**

***In the presence of:***

*Ms. Benson Arunga - Court assistant*

*Mr. Akwaro holding brief for Mr. Otieno for the Defendant*

*No appearance for the Plaintiff/Applicant*

ORIGINAL