

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC PETITION NO. 1 OF 2019

FRANCIS MAWEU MBALUTO (Suing as legal representative of the estate of the estate of Mbaluto Illendu (Deceased)).....PETITIONER

-VERSUS-

NGAI ADJUDICATION SECTION COMMITTEE.....1ST RESPONDENT
SUBCOUNTY ADJUDICATION & SETTLEMENT OFFICER
MAKUENI..... 2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL.....3RD
RESPONDENT

AND

JOSEPHAT MUSYOKA MUTONYE.....1ST INTERESTED
PARTY
FRIDAH MUTHEU WAMBUA..... 2ND INTERESTED
PARTY

RULING

1. This is a ruling in respect of a notice of motion dated 23rd June, 2023 in which the Petitioner/Applicant seeks the following orders:
 1. **That the proceedings and all consequential orders issued on 24th October, 2022 effectively dismissing the Petitioner/Applicant's petition be set aside forthwith.**
 2. **That the Petitioner/Applicant's petition be reinstated for hearing and determination on merit.**
 3. **That the costs of this application be in the cause.**
2. The Applicant states that the court issued a notice to show cause why this petition should not be dismissed for want of prosecution. The notice to show cause was received by the secretary of his advocates law firm who filed it away without bringing it to the attention of his advocate. In the last quarter of 2022 the law firm of his advocate split. The split occasioned files to be scattered and it took time to notice that this suit had been dismissed for want of prosecution.

3. The Applicant therefore pleads that the dismissal order be set aside so that he can prosecute his petition. He states that mistake of counsel should not be visited upon him.
4. The Applicant's application was opposed by the 1st Interested Party/Respondent based on grounds of opposition dated 7th July, 2025 as well as a replying affidavit sworn on 7th July, 2025. The Respondent states that the Applicant's supporting affidavit offends the provisions of Order 19 Rule 3 of the Civil Procedure Rules. He further states that the Applicant filed his application almost a year later and that there is no good reason given why this happened.
5. The Respondent further states that it was incumbent upon the Applicant to follow up on his case and cannot simply say that mistakes of his lawyer should not be visited upon him.
6. The Respondent states that the Applicant did not want to include him in the suit despite well being aware that he was in occupation of the suit property and that he was only allowed into the suit upon application to the court.
7. The parties were directed to file written submissions in respect of the notice of motion. The Applicant filed his submissions dated 1st October, 2025. The Respondent filed his submissions dated 9th October, 2025.
8. The Applicant submitted that blunders will continue to be made by advocates for the parties and that that does not mean that once a blunder is made, a litigant should be shut out of the seat of justice. He relied on the case of **Philip Chemwolo & Another –vs- Augustine Kubende (1986) eKLR** where it was sated as follows:

“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 determined on its merits”.

I think 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. In this case, the appellants offered to pay the costs. The respondent will not agree”.

9. On the issue of the supporting affidavit offending Order 19 Rule 3 of the Civil Procedure Rules, he submitted that the proviso to that rule allows a party to depone to matters on information as long as the source is disclosed. He submitted that this is allowed in interlocutory applications.
10. The Respondent submitted that the Applicant offended Order 19 Rule 3 of the Civil Procedure Rules. He relied on the case of **Logose –vs- Law Development Centre (Miscellaneous Cause No. 190 of 2021) (2023) UGHCCD 424** where the court stated as follows:

“The Applicant is guilty of offending Order 19 Rule 3 in her affidavit in support of this application. Under paragraphs 13 and 14 of the affidavit in support, the Applicant relied on information from Mr. Wambuga Sylvester who allegedly informed her that her scripts had been confiscated by the academic Registrar. This information was hearsay and was never substantiated by the Applicant herself.

11. I have carefully considered the Applicant’s application and the opposition to the same by the Respondent. I have also considered the submissions by the parties. There are two issues for determination in this application. The first is whether the Applicant breached the provisions of Order 19 Rule 3. The Second is whether the court should exercise its discretion to set aside the dismissal order.
12. On the first issue, it is the Applicant who has deponed on matters which he was informed by his advocates. He has disclosed the source of his information. This is not a contested matter which should have required the advocate to swear an affidavit. The proviso to Order 19 Rule 3 is clear that in interlocutory applications, a party is allowed to depone to matters on

information as long as the source is disclosed. It is the advocate of the Applicant who knew what happened in his law firm which led to non attendance. The Secretary who was the cause of the non attendance had left the office. There was therefore nothing wrong in the Applicant deponing to matters on information whose sources were disclosed.

13. On the second issue, the Applicant has admitted that the notice to show cause was received but it was filed away before being brought to the attention of the advocate dealing with the matter. The person who was responsible for this had left the employ of the Applicant's advocate firm. As was stated in the case of **Philip Chemwolo (Supra)** blunders will continue to be made and this cannot be used to prevent an innocent litigant from being heard on his case. I find that the Applicant has sufficiently explained the cause of non attendance of his advocate in court during the date of notice to show cause. I therefore allow the Applicant's application dated 23rd June, 2023 in its entirety.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF FEBRUARY, 2026.

IN THE PRESENCE OF:

Mr. Nduva for Mr. Gitonga for 1st Interested Party

Ms. Mwangi for Petitioner

Mr. Onyonka for Mr. Kipkurui for 2nd Interested Party.

Court assistant – Steve Musyoki

ORIGINAL