

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. E013 OF 2023**

**SOSPETER NGANGA NYAMU**

**ALBERT KARUGA NYAMU**

**(Suing on Behalf of the estate of the late**

**NYAMU WAITATHU (Deceased)..... PLAINTIFF/**

**RESPONDENT**

**VERSUS**

**MUKIRAE CHEGE ..... 1<sup>ST</sup> DEFENDANT/ APPLICANT**

**GICHERU CHEGE ..... 2<sup>ND</sup> DEFENDANT/ APPLICANT**

**THAIRU CHEGE ..... 3<sup>RD</sup> DEFENDANT/ APPLICANT**

**RULING**

1. Before this Court is the Notice of Motion application dated 19<sup>th</sup> May 2025 which seeks the following Orders:

*1. The Honourable Court be pleased to set aside the proceedings of 11<sup>th</sup> March 2025, the consequential orders arising thereof, as well as any further proceedings in this suit pending the hearing and determination of this application inter-parties;*

*2. This Honourable court be pleased to reinstate ELC (O.S) E004 of 2023 Mukirae Chege & Another vs Sospeter Ng'ang'a Nyamu) and that the matter be heard on merit.*

2. The application was premised on the grounds set out on the face of it and the supporting affidavit of Marklewis Wachira Gatutha sworn on even date.

3. In essence, the Applicants contend that their suit was dismissed as a result of failing to attend the hearing set for 11<sup>th</sup> March 2025 which they attribute to a failure on the part of their previous counsel on record.
4. The Applicants submit that dismissal of their suit would result in a manifest miscarriage of justice, inflicting upon them substantial and irreparable harm.
5. The Respondents vehemently opposed the application through the replying affidavit of Albert Karuga Nyamu sworn on 13<sup>th</sup> June 2025.
6. The Respondents contend that the Applicants' suit was dismissed with costs for failure to attend the hearing which date was taken by consent of parties.
7. The Respondents further assert that the Applicants have failed to file and affidavit to support the instant application and have opted to rely on the affidavit of their newly appointed counsel on record.
8. The Respondents contend that it is not enough for the Applicants to allege mistake of counsel without demonstrating that they took reasonable steps to follow up on their case.
9. Accordingly, the Respondents urge the Court to dismiss the application dated 12<sup>th</sup> May 2025 with costs and that the courts directions issued on 11<sup>th</sup> March 2025 be upheld.
10. The application was canvassed by way of written submissions.

### **Issues for Determination**

11. Having considered the application, the affidavit in support, the replying affidavit in opposition, the rival submissions and the relevant authorities, the following issues emerge for determination:
  - i. *Whether the Honourable ought to set aside the proceedings conducted on 11<sup>th</sup> March 2025 and any consequential orders/ decrees arising thereof*
  - ii. *Whether ought to reinstate the Applicants' suit and have the matter heard de novo*

### **Analysis and Determination**

12. The power of this Honourable Court to set aside proceedings and consequential orders is firmly anchored in statute and the inherent jurisdiction of the Court.
13. Under sections 1A, 1B, and 3A of the Civil Procedure Act, the Court is enjoined to facilitate the just, expeditious, proportionate, and affordable resolution of disputes, while retaining residual authority to make such orders as may be necessary to prevent abuse of its process and to secure the ends of justice.
14. This statutory mandate has been consistently affirmed in Kenyan jurisprudence, where courts have held that the discretion to set aside proceedings or orders must be exercised judiciously, with the overriding objective of ensuring that substantive justice prevails over procedural technicalities, and that no party is shut out from being heard where such exclusion would result in manifest injustice.

15. In ***Shah v Mbogo & Another* [1967] EA 116** and ***Mbogo & Another v Shah* [1968] EA 93**, the Court of Appeal underscored that the discretion to set aside is intended to avert injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a litigant who has deliberately sought to obstruct or delay the course of justice.
16. The discretion to set aside proceedings or orders is wide but not capricious, and must be exercised on the basis of reason, fairness, and the interests of justice.
17. Courts have repeatedly held that in determining whether to set aside proceedings or orders regard must be had to the explanation offered for the default, whether the applicant has demonstrated *bona fides*, the length and effect of any delay, and whether the respondent would suffer prejudice incapable of compensation by costs.
18. Where no deliberate abuse of process is discernible, and where refusal to set aside would unjustly shut a party out from the seat of justice, the balance tilts in favour of sustaining the right to be heard.
19. In the instant application, the Applicants submit that non-attendance of the hearing set for 11<sup>th</sup> March 2025 was inadvertent. The Applicants assert that their absence was occasioned by their former counsel on record who left the firm without properly handing over the file.

20. Counsel for the Applicants submits that while blunders may happen from time to time, the same should not any innocent litigant from the seat of justice and placed reliance on a plethora of cases which I have carefully considered.
21. The Applicants urged the Court to set aside the proceedings of 11<sup>th</sup> March 2025 and the consequential orders/ decrees.
22. Conversely, learned counsel for the Respondents submit that litigation is a party driven process and litigants have a duty to follow up on their cases. The Respondents further submit that a litigant cannot blame their advocate while remaining indolent. They urged the Court to dismiss the application with costs.
23. While the Applicants have attributed their non-attendance to an alleged failure by their former counsel to properly hand over the matter, no documentary or affidavit evidence has been placed before the Court to substantiate this assertion.
24. Nonetheless, it is not lost on the Court that the present application was lodged on 19<sup>th</sup> May 2025, approximately two months after the dismissal of the applicants' suit and, crucially, before judgment was entered.
25. The Applicants have since moved with promptitude to regularise their position by instructing new counsel. On the other hand, it is common ground that the hearing date was taken by consent, and the Respondents' contention that litigants bear a personal duty to prosecute their cases is not without merit.

26. The question that therefore falls for determination is whether, in the circumstances of this case, the Applicants' default discloses deliberate indolence or an excusable lapse that ought not to permanently shut them out from the seat of justice.
27. In the Court's view, and having regard to the totality of the circumstances, the balance tilts in favour of granting the Applicants an opportunity to be heard on the merits.
28. Although the explanation advanced for their non-attendance has not been supported by cogent evidence, the Court is not persuaded that the default was deliberate or calculated to obstruct the course of justice.
29. The application was brought with relative promptitude, prior to the entry of judgment, and the Respondents have not demonstrated any prejudice that cannot be adequately remedied by an award of costs.
30. To decline the relief sought in these circumstances would be to elevate procedural lapse above substantive justice, contrary to the spirit and purpose of the Court's discretionary jurisdiction.
31. Having found that the proceedings of 11<sup>th</sup> March 2025 ought to be set aside, it follows that the Applicants' suit is reinstated.
32. The matter be heard *de novo* and afford both parties a full and fair opportunity to ventilate their respective cases on the merits.
33. The upshot of the foregoing is that the application dated 12<sup>th</sup> May 2025 is hereby allowed.

34. The costs shall be in the cause.

It is so Ordered.

**Dated, Signed and Delivered, at Thika this 4th day of February  
2026**

.....  
**J. M. ONYANGO**  
**JUDGE**

**In the presence of:**

1. Mr Ireri for Mr Kingara for the Defendant/Applicants
2. Mr Kimani for the Plaintiff

Court Assistant: Hinga