

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC LAND CASE NO. 233 OF 2012

**JOSEPH KIBUNGEI KUGUN
PLAINTIFF**

-VERSUS-

**GILBERT KIPKOECH SUM 1ST
DEFENDANT**
**THOMAS CHERUIYOT MAIYO (Suing as the legal
representative of the estate of
KIMAIYO ARAP KEINO)2ND
DEFENDANT/RESPONDENT**

-AND-

**JOHN CHERUIYOT KEINO 1ST INTERESTED
PARTY**
**GEOFFREY SUM 2ND INTERESTED
PARTY**
**SARAH JOB SAINA 3RD INTERESTED
PARTY**
**BENJAMIN SANG 4TH INTERESTED
PARTY**
**KENNETH SANG 5TH INTERESTED
PARTY**
**JULIUS LIMO 6TH INTERESTED
PARTY**
**PAULINA JEPTEKENY CHEPNGOK 7TH INTERESTED
PARTY**
**SAMWEL KIPSAINA TOO 8TH INTERESTED
PARTY**

**JOSHUA KIPKEMBOI TUWEI 9TH INTERESTED
PARTY
(All suing as the legal representatives of the Estate of
Kiptoo Chepngok)**

RULING:

1. The plaintiff/applicant herein filed a Notice of Motion Application dated 25th September, 2025, seeking the following orders: -
 - i. Spent
 - ii. That this honourable court be pleased to set aside or vary its orders made on the 17.09.2025 dismissing the applicant's application.
 - iii. That an order do issue reinstating the applicant's application dated 02.04.2025 herein, and an order do further issue that the same be heard on priority in the interest of justice.
 - iv. That the costs of this Application be provided for.
2. The application is premised on the 7 grounds on the face thereof and on the Supporting Affidavit sworn on even date, by one Joshua Kiprotich Martim, an advocate of the High Court of Kenya, having conduct of the matter herein on behalf of the applicant.
3. He stated that their previous application was dismissed for non-attendance and/or want of prosecution by this court on 17.09.2025.
4. It was his claim that on the said date, 17.09.2025, when the matter was coming up for mention, he attended court virtually on behalf of the applicant but was not admitted into

the session since the court was operating on a new virtual court link.

5. It is further his claim that the change in the court's virtual link was not communicated to him neither was the same within his knowledge, thus his failure to attend the court session was inadvertent.
6. It is therefore his contention that the applicant should be accorded an opportunity to be heard and present his case in the interest of justice.
7. He added that he has been keen and ready to prosecute the applicant's case on their behalf as instructed save for the mishap that could not have been avoided. He thus maintained that the mistakes of an advocate should not be visited upon the innocent client.
8. He deponed that the defendants/respondents will not suffer any prejudice if the orders sought are granted.
9. In conclusion, he maintained that the application had been filed in good faith and made without delay and therefore urged the court to allow the application as prayed.
10. The application was opposed. However, from a perusal of the court record, I have not seen any replying affidavit filed in response to the application save for the submissions dated 15.12.2025.
11. The application was canvassed by way of written submissions. The applicant filed his submissions dated

28.11.2025 while the respondents filed their submissions dated 15.12.2025 which I have read and considered.

Analysis and Disposition:

12. Having carefully considered the grounds in the application, the supporting affidavit and rival submissions in totality, it is my considered opinion that the main issue arising for determination is whether the applicant has proved his case to warrant the setting aside of the dismissal order issued on 17.09.2025 and the subsequent reinstatement of the application dated 02.04.2025.
13. It is not in dispute that the application dated 10.07.2025 was dismissed for non-attendance and/or want of prosecution. Order 12 Rule 7 gives this court the powers to set aside a judgment or a dismissal order, on an application by a party upon such terms as may be fit and just. This power is however discretionary in nature and must be exercised judiciously and not based on sympathy or whimsically as held in the case of **Mbogo & Another V. Shah [1968] EA 98.**
14. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:-

7. 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.(emphasis mine)

15. The applicant herein has premised his ground for setting aside the dismissal order on the failure by his advocate on record to attend court 17.09.2025, when the matter was coming up for mention.
16. It is his contention that the advocate's failure to attend court on the material date was attributed to the change in the court's virtual link. He averred that the change in the links was neither communicated nor was he aware of the new virtual link. Thus, he was unable to be admitted into the session.
17. The respondent on the other hand has maintained that the applicant has failed to disclose any reasonable or sufficient cause to justify their absence to warrant the exercise of the court's discretion.
18. Even though the applicant avers that the court had changed its virtual link to a new one which was different from the court virtual link he used, he did not annex any proof in support of the same.
19. Further, and as rightfully pointed out by the respondent, it is common practice which this court takes judicial notice of, that the virtual links for each court are usually posted on the Judiciary Causelist portal on a daily basis, which information is available to the general public. The applicant has not

demonstrated any effort or due diligence on his part and the said averments thus remain unsubstantiated claims.

20. Be that as it may, this court is cognizant of its duty to serve substantive justice to all parties to a dispute before it. Each party has a legitimate expectation that they will be given an opportunity to advance their respective cases and a determination reached on merit. This is was the holding in the case of **Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011 [2016] eKLR.**
21. Thus, guided by the provisions of Article 159 of the Constitution on the need for substantive justice as read with Article 50 on the right to a fair hearing and Order 12 Rule 7, I will proceed to grant the applicant the benefit of doubt and set aside the said dismissal orders. Any prejudice caused on the respondents may be compensated by way of costs.
22. In view of the foregoing, it is the finding of this court that there exists a just and sufficient reason to warrant the setting of the dismissal orders of this court issued on 17.09.2025 as sought.

Costs:

23. On the issue of costs, the general rule is that costs shall follow the event unless the court directs otherwise. However, noting the circumstances of present case, I will direct the applicant herein to pay throw-away costs to the respondents as will be determined at the end of this ruling.

Conclusion:

24. In view of the foregoing, I accordingly find that the Notice of Motion Application dated 25th September, 2025 is merited and is hereby allowed on the following terms;

- I. The application dated 25.09.2025 be and is hereby allowed.**
- II. An order be and is hereby issued setting aside the dismissal orders issued on 17.09.2025, dismissing the Applicant's application for non-attendance and/or want of prosecution.**
- III. The application dated 02.04.2025 be and is hereby reinstated for hearing on its merit.**
- IV. The Applicant to pay the respondents throw-away costs of Kshs. 10,000/= within 30 days from the date of this ruling.**

25. It is so ordered.

DATED, SIGNED and DELIVERED in ELDORET this 26TH day of FEBRUARY, 2026.

**HON. C. K. YANO
JUDGE**

Ruling delivered in the presence of: -

Ms. Ndinya holding brief Ms. Awuor for Respondent.

Mr. Maritim for Applicants.

Court Assistant - Laban

ORIGINAL