

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION NO. 1 OF 2012**

**SOLOMON GITHINJI MURAGE**  
**.....PETITIONER/APPLICANT**

**-VERSUS-**

**OFFICER COMMANDING MARAGUA**

**POLICE STATION ..... 1<sup>ST</sup>**  
**RESPONDENT**

**THE HON. ATTORNEY-GENERAL ..... 2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1. The Petitioner/Applicant herein filed the subject Notice of Motion application dated 30<sup>th</sup> November 2023 under Certificate of Urgency, anchored under **Order 12 Rule 7** as read together with **Order 45, Order 51, Rule 1 of the Civil Procedure Rules 2010** and **Sections 1A, 1B, 3A, and 80** of the **Civil Procedure Act**. The Petitioner/Applicant is seeking the following orders as against the Respondents and that the Petitioner/Applicant be allowed to prosecute this suit. He also prays that costs of the Application be provided for.

2. The Petitioner/Applicant subscribed to the position that by dismissing the suit for non-attendance on 22<sup>nd</sup> November 2023 when the matter came up for mention for directions on how to proceed with the petition, this Court denied the Petitioner/Applicant the opportunity to prosecute his suit. Furthermore, the Court session started much earlier than 10 a.m. which was the time communicated prior to 22<sup>nd</sup>

November 2023. Consequently, the Petitioner/Applicant inconvenienced leading to the drastic orders by the court. The application is founded on the following eleven (**11**) grounds:

- i. That this honorable court issued an order dismissing this suit for non-attendance on 22<sup>nd</sup> November, 2023 when this matter was coming up for mention for directions on how to proceed with the petition without according the Petitioner/Applicant opportunity to prosecute his suit.*
- ii. That the matter has never come up for hearing because the court is yet to give direction on how the petition should proceed.*
- iii. That there was communication from court that proceedings of this honorable court were to start at 10.00am but it started much earlier.*
- iv. That the Petitioner and his Advocate's non-attendance was not intentional but was due to reasons beyond their control since there was a network breakdown which made it difficult for the petitioner's Advocate to address the court and by the time the counsel arrived in open court the matter had already been called and dismissed.*
- v. That the Court did not consider the efforts made by the Petitioner / Applicant since 2012 to have this suit heard and determined without delay.*
- vi. That the petitioner has been taking and serving dates to the Respondents however on most of those specific dates the court has not been sitting reason whereof the matter has taken this long in court.*
- vii. That the Petitioner / Applicant stands to suffer irreparably unless the order issued on 22<sup>nd</sup> November, 2023 is set aside and the matter proceeds to hearing so as to ensure that justice is done.*

- viii. *That the Respondents do not stand to suffer any prejudice if the orders sought are granted since they will also be accorded an opportunity to cross examine the Petitioner and his witness.*
- ix. *That the Petitioner should not be condemned unheard as this will be against the rules of natural justice and the Constitution of Kenya 2010.*
- x. *That it is only fair and just that the suit be set down for hearing and a hearing date be issued.*
- xi. *That it is in the interest of justice and the overriding objective of the law that the orders sought herein be granted.*

3. The subject application was dispensed by way of written submissions.

4. Through written submissions dated 3<sup>rd</sup> November 2025 the Petitioner/Applicant identified three issues for determination namely; whether the suit should be reinstated, whether the Plaintiff/Applicant is entitled to the prayers sought and whether the Defendant/Respondent will be prejudiced in the event the suit is reinstated.

5. The Petitioner/Applicant relied on the holding of the Court by the case of **Kenya Power & Lighting Co. Ltd v Kenya Cold Storage 1964 Ltd Hccc No.387 Of 2002**, where the Court held as follows:

***"Nevertheless, dismissal of a suit under OXVI Rule 2(1) of the Civil Procedure Rules requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made"***

6. Further guidance was placed in the reasoning of the Court in the case of **Belinda Muras & 6 Others -Vs- Amos Wainaina [1978] Klr** where the Court declared that:

***"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."***

7. Reliance was further sought in the decision of the Court in **Phillip Chemwolo & another v Augustine Kubede [1982-88] Klr 103 At 1040** where the Court ruled that:

***"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 heard on merit."***

8. The Petitioner/Applicant further cited and relied upon the dictum of the Court in the case of **M K v M W M & another [2015] eKLR**, where it was held that:

***"[T]he courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made."***

9. Further guidance was sought in the holding of the Court in **Onyango v Attorney General (1986-1989) EA; Mbaki &**

**others v Macharia & Another (2005) 2 Ea 206; And, Associated Warehouse Co. Ltd & Others v Trust Bank Ltd Hccc No. 1266 Of 1999.**

10. The return of service on file dated 16<sup>th</sup> September 2025 filed by *Willis Agayi*, a licensed court process server, contains court process bearing an imprint of the stamp belonging to the 2<sup>nd</sup> Respondent herein which is dated 26<sup>th</sup> June 2025. The Respondents did not file written submissions in response to the application before the Court. On the basis of the aforesaid return of service, the Court is satisfied that the Respondents were properly served with court documents relating to the instant application and elected not to put in any response.

11. Having considered the Petitioner/Applicant's pleadings and submissions, the following issue for resolution by the Court was isolated: *whether the application before the Court is meritorious.*

12. The Petitioner/Applicant's argued and submitted that the Court in dismissing his suit for non-attendance on 22<sup>nd</sup> November 2023 started its sessions earlier than 10AM whereas the Court had communicated prior to that date that the Petitioner/Applicant's suit would be mentioned at 10 AM. It is noteworthy that the Petitioner/Applicant's claim that by the time his advocate on record appeared before the open court on 22<sup>nd</sup> November 2023, the matter had already been called out and dismissed.

13. The Court finds the reasons offered by the Petitioner/Applicant for non-attendance before Court on 22<sup>nd</sup> November 2023 to be reasonable and excusable. The foregoing position is fortified by the dictum of the Court of Appeal in the case of **Richard Nchapai Leiyangu vs IEBC & 2 others Civil Appeal No. 18 of 2013**, where it held as hereunder:

***“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”.***

14. Furthermore, following the reasoning of the Court in **Wachira Karani v Bildad Wachira [2016] KEHC 6334 (KLR)**, this Court is persuaded that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case.

15. ***Final Orders:***

- i. The order of this Honorable court dated 22<sup>nd</sup> November 2023 dismissing the Petitioner/Applicant’s suit for non-attendance is hereby set aside and the Petitioner/Applicant’s suit is reinstated for hearing on its merits.***
- ii. The Petitioner/Applicant shall set the suit down for hearing within forty-five (45) days from the date of this Ruling, failure to which the suit shall stand dismissed.***
- iii. Costs to abide the outcome of the main suit.***

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF MARCH, 2026.**

**HON. T. W. Ouya  
JUDGE**

**For Petitioner .....Ms Mwangi H/B Mr Muchoki  
For Respondents.....No Appearance  
COURT ASSISTANT.....Brian**

ORIGINAL