

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**  
**ELC CASE NO. 36 OF 2019 (OS)**

**ANDREW SOI.....PLAINTIFF**

**VERSUS**

**EDISON  
RUTOH.....DEFENDANT**

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**RULING.**

**Introduction.**

**1.** This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 24<sup>th</sup> January, 2025. The application is expressed to be brought under **Order 51** of the **Civil Procedure Rules** and **Sections 3 & 3A** of the **Civil Procedure Act.**

**2.** The application seeks the following orders;

***a. That service of this application be dispensed with in the first instance.***

***b. That orders be issued for the reinstatement of ELC Suit No. 36 of***

**2019 file from the Environment and Land Court Civil Registry at Kericho as the same was dismissed on 22<sup>nd</sup> day of January, 2025 for want of prosecution. (sic)**

**c. That necessary direction be made.**

3. The application is based on the grounds on its face and the supporting affidavit of **Joshua Kipkemoi Mutai** the Plaintiff/Applicant's Counsel.

**Factual Background.**

4. The Plaintiff/Applicant commenced the present proceedings vide the Originating Summons dated 6<sup>th</sup> June, 2019. The said originating summons were amended on 3<sup>rd</sup> February, 2022 and the Plaintiff/Applicant sought determination of the following questions;

**a. Whether the Plaintiff is entitled to 3.3 acres of land comprised in LR No. Kericho/Ndubai/344 registered in the name of Edison Rutoh by virtue of the**

***Plaintiff's adverse possession of the same in open, quiet and peaceful occupation for a period of over 25 years.***

***b. Whether the said Plaintiff should be declared as the proprietor of the said 3.3 acres in the suit property, LR No. Kericho/Ndubai/344, currently registered in the name of Edison Rutoh.***

***c. That the costs of this suit be provided by the Defendants (sic).***

**5.** The Plaintiff/Applicant also sought for the following orders;

***a. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of 3.3 acres out of all that piece of land known as LR No. Kericho/Ndubai/344.***

***b. An order directing the Land Registrar, Kericho to have Plaintiff registered as the sole proprietor of 3.3 acres out of all that piece of land known as of (sic) LR No. Kericho/Ndubai/344.***

***c. A permanent order restraining the Defendant from entering, alienating,***

***wasting, damaging, disposing or in any other way dealing with the suit land.***

**d. Costs of this suit.**

6. The Respondent filed a Replying Affidavit sworn on 16<sup>th</sup> August, 2019 in response to the Originating Summons.
7. The matter came up for hearing on 22<sup>nd</sup> January, 2025 when it was dismissed for want of prosecution.
8. The application under consideration first came up for hearing on 7<sup>th</sup> October, 2025 and the Court issued directions that it be heard by way of written submissions.
9. On 2<sup>nd</sup> December, 2025 it was mentioned to confirm filing of submissions and on the said date, Counsel for the Defendant/Respondent waived her right to file submissions. The matter was then reserved for ruling.

**The Plaintiff/Applicant's Contention.**

- 10.** The affidavit in support of the application is sworn by **Joshua Kipkemoi Mutai** Counsel for the Plaintiff/Applicant.
- 11.** He contends that this matter was dismissed for want of prosecution on 22<sup>nd</sup> January, 2025.
- 12.** He also contends that the Plaintiff/Applicant commenced the present proceedings vide the Originating Summons dated 7<sup>th</sup> June, 2019 which were amended on 3<sup>rd</sup> February, 2022.
- 13.** He further contends that parties complied with **Order 11** of the Civil Procedure Rules and the matter was then fixed for hearing on 22<sup>nd</sup> January, 2025.
- 14.** It is his contention that on 21<sup>st</sup> January, 2025 he called counsel for the Defendant/Respondent to find out if she was ready to proceed with the hearing. He goes on to state that the Plaintiff/Applicant is of meager means and he resides together with his witnesses in Mulot, Bomet County.

- 15.** It is also his contention that Counsel for the Defendant/Respondent informed him that she will not be ready to proceed as she lost touch with her client.
- 16.** It is further his Contention that Counsel for the Defendant/Applicant informed him that she intended to file an application to cease acting.
- 17.** He contends that he implored Counsel for the Defendant/Respondent not file the said application as it will lead to the matter taking long to be concluded considering the fact that the Plaintiff/Applicant and his witnesses are getting old and sickly.
- 18.** He also contends that Counsel for the Defendant/Respondent then stated that she will seek an adjournment as she puts her house in order.

- 19.** He further contends that based on the said discussion, he informed the Plaintiff/Applicant that the matter will not proceed.
- 20.** It is his contention that when the matter came up for hearing on 22<sup>nd</sup> January, 2025, he informed the Court of the discussion he had had with Counsel for the Defendant/Respondent.
- 21.** It is also his contention that the Court placed the file aside for hearing at 10:30 am. He goes on to state that the matter would not have proceeded as the Plaintiff/Applicant had not travelled from Bomet.
- 22.** It is further his contention that Counsel for the Defendant/Respondent changed tune and informed the Court that she was ready to proceed.

- 23.** He contends that based on the foregoing, it is clear that it was neither his intention nor the Plaintiff/Applicant's intention to have the matter adjourned. He goes on to state that the delay was caused by miscommunication with Counsel for the Defendant/Respondent.
- 24.** He also contends that the Plaintiff/Applicant will suffer loss if the suit is not reinstated as he has already paid Court fees.
- 25.** He ends his deposition by praying that the Court reinstates the suit so that the Plaintiff/Applicant can have his day in Court. He adds that the Court should not allow mistake of Counsel to affect the rights of parties.

**The Defendant/Respondent's Response.**

- 26.** In response to the Plaintiff/Applicant's application, the Defendant/Respondent filed a Replying Affidavit sworn by **Nelly Chelimo Koskey** his Counsel.

- 27.** She deposes that on 1<sup>st</sup> December, 2025, she was checking the cause list when she discovered that this matter was listed for mention on 2<sup>nd</sup> December, 2025.
- 28.** She also deposes that she checked the CTS and found out that the application under consideration had been filed. She goes on to state that the said application was never served upon them to enable them file a response.
- 29.** She further deposes that the affidavit in support of the application contains allegations that are not true and goes on to state that she has always been ready to proceed with the hearing of this suit.
- 30.** It is her deposition that every time this matter came up for hearing, Counsel for the Plaintiff/Applicant was not ready to proceed and the matter was therefore adjourned severally.

- 31.** It is also her deposition that she had no intention to cease acting for the Defendant/Respondent and also states that if that was the case, then she would have informed the Court.
- 32.** It is further her deposition that on 25<sup>th</sup> of September, 2024, the matter came up for hearing and Counsel for the Plaintiff/Applicant was not ready to proceed which caused the matter to be adjourned and the Plaintiff/Applicant given a last adjournment.
- 33.** She also deposes that subsequently, the matter came up for hearing on 22<sup>nd</sup> January, 2025 and Counsel for the Plaintiff/Applicant was present when the Court set the matter for hearing at 10:30 am in open Court.
- 34.** She further deposes that she went to open Court and out of Courtesy called Counsel for the Plaintiff/Applicant to come to Court.

- 35.** It is her deposition that she and the Court waited from 10:30 am to 11:30 am but Counsel for the Plaintiff/Applicant did not come to Court.
- 36.** It is also her deposition that the allegations made by Counsel for the Plaintiff/Applicant are untrue, baseless and are intended to mislead this Court.
- 37.** It is further her deposition that Counsel for the Plaintiff/Applicant's intention is to blame her for his actions and adds that it is why he did not serve her with the application under consideration.
- 38.** She ends her deposition by stating that the Court record can bear her witness that she was diligent, vigilant and intentional with her client's case and intended to prosecute the matter to its finality.

**Issues for Determination.**

39. The Plaintiff/Applicant filed submissions on 1<sup>st</sup> December, 2025 while the Defendant/Respondent elected not to file submissions.
40. The Plaintiff/Applicant submits on whether the Court should exercise its discretion, set aside the dismissal order and reinstate the suit for hearing.
41. The Plaintiff/Applicant relies on **Sections 1A, 1B & 3A** of the Civil Procedure Act, **Order 17 Rule 2** of the **Civil Procedure Rules** and submits that the Court has the discretion to reinstate a suit which has been dismissed where sufficient cause is shown.
42. The Plaintiff/Applicant relies on the judicial decisions of **Mwangi S. Kaimenyi vs Attorney General & another [2014] eKLR, Tirus Njoroge vs Kenya Revenue Authority [2023] eKLR** and submits that he has

demonstrated diligence and readiness in having this matter heard and determined.

**43.** The Plaintiff/Applicant also submits that the suit was filed in the year 2019 and in the year 2022 he sought and was granted leave to amend the Originating Summons.

**44.** The Plaintiff/Applicant then reiterates the averments in the affidavit in support of the application and submits that when the suit was dismissed on 22<sup>nd</sup> January, 2025, he promptly filed the application under consideration on 24<sup>th</sup> January, 2025.

**45.** It is the Plaintiff/Applicant's submissions that this demonstrates eagerness to have this matter heard and determined.

**46.** The Plaintiff/Applicant relies on the judicial decision of **Patrick Wanyonyi vs Kiprono Chepkwony [2024] eKLR**

and submits that the Defendant/Respondent will not be prejudiced if the suit is reinstated.

- 47.** The Plaintiff/Applicant submits that if the suit is not reinstated, he stands to suffer irreparable loss as the dispute herein is over their family land which is their only home.
- 48.** The Plaintiff/Applicant relies on **Articles 50(1) & 159 (2)(d)** of the Constitution and submits that his witnesses are elderly and frail and filing of a fresh suit will delay justice.
- 49.** The Plaintiff/Applicant concludes his submissions by urging the Court to allow his application as prayed.

**Analysis and Determination.**

- 50.** I have considered the Plaintiff/Applicant's application, the response thereto and the submissions. The only issue that arises for determination is whether the application dated 24<sup>th</sup> January, 2025 has merit.

- 51.** The Plaintiff/Applicant contends that the present suit was scheduled for hearing on 22<sup>nd</sup> January, 2025.
- 52.** The Plaintiff/Applicant also contends that his Counsel reached out to Counsel for the Defendant/Respondent on 21<sup>st</sup> January, 2025 who informed him that she intended to file an application to cease acting as she lost touch with her client.
- 53.** The Plaintiff/Applicant further contends that based on the said information, he did not travel to Court on 22<sup>nd</sup> January, 2025.
- 54.** It is the Plaintiff/Applicant's contention that surprisingly on 22<sup>nd</sup> January, 2025, Counsel for the Defendant/Respondent informed the Court that she was ready to proceed and since he was absent, the suit was dismissed for want of prosecution.

**55.** The Plaintiff/Applicant therefore seeks that the suit be reinstated and he be given an opportunity to prosecute his case.

**56.** In response, Counsel for the Defendant/Respondent denies that any such discussions took place on 21<sup>st</sup> January, 2025. She contends that she has always been ready to proceed with the hearing of this suit.

**57. Order 12 Rule 3 (1) of the Civil Procedure Rules** provides as follows;

***“1. If on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court.”***

**58. 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)

**59.** In the judicial decision of **HAM v SOS [2021] eKLR** the Court observed as follows;

***“9. In an application for reinstatement of a dismissed suit or application, an applicant appeals to the discretion of the Court. The Court must caution itself not to exercise its discretion in a manner that will result in an injustice.”***

(Emphasis mine)

**60.** In the judicial decision of **Fidelity Shield Insurance Comapny (sic) Limited v Architects & another [2025] KEHC 9989 (KLR)** the Court held as follows;

**“Reinstatement of a suit dismissed for want of prosecution is a discretionary remedy that the Court must exercise judiciously. This is of course taking cognizance of the unique circumstances of the case. Article 50[1] of the Constitution guarantees every party the right to a fair trial. Giving an opportunity to a party to present its case is at the heart of the constitutional imperative of fair trial.”** (Emphasis mine)

**61.** A perusal of the Court record shows that on 25<sup>th</sup> September, 2024, this suit came up for hearing. Counsel for the Plaintiff/Applicant informed the Court that he was not ready to proceed as he was not able to reach his client. Counsel for the Plaintiff/Applicant then sought for a last adjournment.

The hearing was adjourned and the adjournment was marked as the last. The suit was rescheduled for hearing on 22<sup>nd</sup> January, 2025.

**62.** On 22<sup>nd</sup> January, 2025, Counsel for the Plaintiff/Applicant and the Defendant/Respondent appeared virtually during the call over and the hearing was confirmed and set to proceed at 10:30 am.

**63.** At 11:30 am, the Court issued the following directions;

***“This matter is for hearing. It was in Court on 25<sup>th</sup> September, 2024 and marked as a last adjournment.***

***Counsel for the Plaintiff was present during the call over in the morning and was informed that the matter would proceed at 10:30 am.***

***We have been waiting for over one hour and neither him nor his clients are present in Court.***

***Consequently, this suit is dismissed for want of prosecution with costs to the Defendant.”***

- 64.** From the Court record, it is evident that Counsel for the Plaintiff/Applicant was given a last adjournment on 25<sup>th</sup> September, 2024.
- 65.** It is also evident that Counsel for the Plaintiff/Applicant failed to show up in open Court on 22<sup>nd</sup> January, 2025 at 10:30 am when the matter was scheduled to proceed for hearing.
- 66.** The Plaintiff/Applicant submits that he filed the application under consideration on 24<sup>th</sup> January, 2025 which is soon after the suit was dismissed. This is a misrepresentation. A perusal of the application under consideration shows that it is dated 24<sup>th</sup> January, 2025 and it was filed in Court on 17<sup>th</sup> June, 2025.
- 67.** A further perusal of the Court record shows that a representative of Counsel for the Plaintiff/Applicant went to

the registry on 24<sup>th</sup> July, 2025 and fixed the application under consideration for hearing on 7<sup>th</sup> October, 2025.

- 68.** It is therefore evident that there was a delay of about five months in the filing of the application under consideration.
- 69.** The Plaintiff/Applicant has not given an explanation as to the delay in its filing and has instead contended that it was filed on 24<sup>th</sup> January, 2025.
- 70.** In the judicial decision of **STEPHEN NDICHU v MONTY'S WINES AND SPIRITS LTD [2006] KEHC 3445 (KLR)** the Court held as follows;

***“...The discretion is free and the main concern of the Court is to do justice to the parties before it (See Patel -vs- E.A. Cargo Handling services Ltd (1974] E.A.75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident,***

**inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah -vs- Mbogo [1969] E.A.116)."**  
(Emphasis mine)

- 71.** The above cited judicial decision gives reasons for exercising discretion in favour of a party seeking to reinstate a suit dismissed for want of prosecution. The reasons given are so as to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. The Court also held that the discretion of the Court is not designed to assist a person who has deliberately sought to delay the cause of justice.
- 72.** In seeking that the present suit be reinstated, the Plaintiff/Applicant is appealing to the discretion of the Court.

**73.** It is evident that there has been inordinate delay in the filing of the application under consideration and also no explanation has been given for the delay in prosecuting this suit since it was filed in the year 2019.

**74.** Further, the reasons advanced by Counsel for the Plaintiff/Applicant for the Plaintiff/Applicant's failure to attend Court on 22<sup>nd</sup> January, 2025 have been disputed by Counsel for the Defendant/Respondent.

**75.** It is important to note that Counsel for the Plaintiff/Applicant has not given any explanation as to why he did not appear in open Court on 22<sup>nd</sup> January, 2025 as directed by the Court during the call over and in his presence after the suit was confirmed for hearing at 10.30 am on the said date.

**Disposition.**

**76.** No reasonable explanation has been given for the Plaintiff/Applicant's failure to attend Court given that this suit

was pending since the year 2019. Justice delayed is just denied and in my estimation, delayed justice is prejudicial to the Defendant/Respondent.

**77.** Taking the foregoing into consideration, I find that the application dated 24<sup>th</sup> January, 2025 lacks merit and it is hereby dismissed with costs.

**78.** It is so ordered.

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

**L. A. OMOLLO  
JUDGE.**

**In the presence of: -**

**Miss Chelimo for Mitei for Respondent**

**Mr. Mutai for the Applicant - Absent**

**Court Assistant; Mr. Joseph Makori.**

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