

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. E003 OF 2021 (OS)

SAMWEL KIPLANGAT KIRUI.....
APPLICANT

VERSUS

KIMUTAI ARAP NGETICH.....1ST
RESPONDENT

ESTHER CHEPKOSKE KOTUT.....2ND
RESPONDENT

**(Sued in their capacity as Legal Representatives of the
Estate of ZAKAYO KIMUTAI KOTUT (Deceased))**

RULING.

Introduction.

- 1.** This ruling is in respect of the Applicant's Notice of Motion application dated 20th May, 2025. The application is expressed to be brought under **Section 3A** of the Civil Procedure Act, **Order 12 Rules 1 & 7** and **Order 51** of the Civil Procedure Rules.

- 2.** The Applicant seeks the following orders;

- a. ***That the firm of M/S J.K Kirui & Co. Advocates be granted leave to come on record for the Applicants/Defendants. (sic)***
- b. ***That this Honourable Court be pleased to set aside its orders issued on the 14th January, 2025 dismissing the Plaintiff/Applicant's suit and reinstate the same and the matter be readmitted for hearing.***
- c. ***That necessary direction be given.***
- d. ***That the costs be in the cause.***

3. The application is based on the grounds on its face and the supporting affidavit of **Samwel Kiplangat Kirui** that is sworn on 20th May, 2025.

Factual Background.

4. The Applicant commenced the present proceedings vide the Originating Summons dated 3rd March, 2021 wherein he sought the determination of the following questions;

- a. ***Whether the Applicant is entitled to the entire parcel of land measuring 11***

acres of all that land known as LR NO. Kericho/Nyamanga/325 registered in the name of Zakayo Kimutai Kotut (deceased) whose estate is administered by the Respondents herein, by virtue of the Applicant's adverse possession of the same in open, quiet and peaceful occupation for a period of over 45 years.

b. Whether the Applicant should be registered as the proprietor of all that parcel of land known as LR No. Kericho/Nyamanga/325 measuring 11 acres.

c. Whether the Respondents should be ordered to execute the transfer and all the requisite forms and perform all acts necessary to effect registration of the Applicant as the proprietor of the said parcel of land, and in default the Deputy Registrar of the Court be authorized to execute them.

d. Whether or not the Applicant is entitled to an order of permanent injunction restraining the Respondents, their agents, employees

from entering, cultivating, occupying, trespassing alienating, transferring, and/or in any other manner adversely dealing with the Applicant's aforementioned parcel of land.

e. Whether the Respondents should be ordered to pay the costs of this suit to the Applicant.

5. The Respondents did not file any response to the Originating Summons.
6. On 14th January, 2025 the present suit was dismissed for want of prosecution.
7. The application under consideration first came up for hearing on 23rd July, 2025 when the Court directed that it be served upon the Respondents.
8. On 7th October, 2025 the Court issued directions that the application be heard by way of written submissions. It was

mentioned severally to confirm filing of submissions before it was reserved for ruling on 11th December, 2025.

The Applicant's Contention.

- 9.** The Applicant contends that in the year 2023, he instructed the firm of N.C Rotich & Co. Advocates to represent him.
- 10.** The Applicant also contends that he all along communicated with an advocate in the said firm known as **Cherotich** through her phone number.
- 11.** The Applicant further contends that at some point the said advocate begun to ignore his calls and every time he went to their offices, he found them closed.
- 12.** It is the Applicant's contention that he was recently informed that the said firm of advocates closed their law firm and relocated to an unknown place.

- 13.** It is also the Applicant's contention that he personally went to the registry to inquire about this suit and was shocked to learn that it was dismissed for want of prosecution on 14th January, 2025.
- 14.** It is further the Applicant's contention that his failure to prosecute the suit was due to the communication breakdown between him and his former Advocates.
- 15.** The Applicant contends that he has been advised by his current advocates on record that mistakes of Counsel should not be visited upon an innocent party.
- 16.** The Applicant also contends that he has a strong case which he wishes to ventilate through a full trial. He goes on to state that the issue before Court is emotive as it involves a parcel of land that is his only source of livelihood and adds that he is at risk of being rendered destitute.
- 17.** The Applicant further contends that it is trite law that no one should be condemned unheard. He goes on to state that he

will be prejudiced if the suit remains dismissed as he will not be heard thereby taking away his constitutional right to a fair hearing.

- 18.** It is the Applicant's contention that the Respondents will not be prejudiced if the suit is reinstated for hearing and ends his deposition by stating that it is only fair and just that the dismissal order herein be set aside and the matter be heard on merits.

The 1st Respondent's Response.

- 19.** In response to the Applicant's application, the 1st Respondent filed Grounds of Opposition dated 30th May, 2025.

- 20.** They are as follows;

a. The Applicant/Plaintiff (sic) herein lacks locus in view of the fact that he brings the instant application/suit on behalf of (Chumo Arap Soi) now deceased.

b. The suit property comprised in Title No. Kericho/Nyamanga/325 was formally an estate of Zakayo Kimutai Kotut (deceased, who passed on intestate on 19th March, 1998. (sic)

c. The succession proceedings in respect of the suit property vide Kericho High Court Succession Cause Number 168 of 2000 as confirmed on 20th July, 2022. (sic)

d. The Applicant's objection in Kericho High Court Succession Cause No. 168 of 2000 was thrown out.

e. The Grant pursuant to the Certificate of Confirmation of Grant issued on 20th July, 2022 has been fully implemented.

f. The suit property does not exist anymore hence the instant application/suit is therefore overtaken by events.

g. In view of the foregoing reasons, the instant application is incompetent and bad in law as the

orders sought therein overstretches the inherent power of this Court.

h. That the application is incurably defective, merely academic, frivolous and vexatious and is otherwise an abuse of the process of the Court.

- 21.** The 1st Respondent also filed a Replying Affidavit sworn on 8th June, 2025.
- 22.** He deposes that the Applicant did not instruct the firm of N.C Rotich & Company Advocates as alleged.
- 23.** He also deposes that the Applicant does not have *locus standi* to file the present suit and/or application as he is doing so on behalf of the **Chumo Arap Soi** (deceased).
- 24.** He further deposes that Counsel from the firm of N.C Rotich & Co. Advocates was present in Court on behalf of the

Applicant on 28th February, 2024 when the application dated 18th January, 2024 came up for *inter partes* hearing.

25. It is his deposition that the Applicant's former advocates served his (1st Respondent) advocates with a hearing notice dated 20th February, 2024. He goes on to state that this is an indication that the said firm was still seized with the suit on behalf of the Applicant.
26. It is also his deposition that it will be a waste of the Court's precious time to reinstate a suit which has been overtaken by events and goes on to state that the suit parcel of land, i.e. land parcel No. **Kericho/Nyamanga/325** does not exist anymore.
27. It is further his deposition that the suit parcel of land forms part of the estate of **Zakayo Kimutai Kotut** (deceased) and adds that Kericho HC Succession Cause No. 168 of 2000 was filed with regard to his estate and a grant issued and confirmed on 20th July, 2022.

- 28.** He deposes that the Applicant filed objection proceedings which were dismissed.
- 29.** He also deposes that the confirmed grant has been fully implemented.
- 30.** He ends his deposition by stating that he is advised by his advocates on record that a claim of adverse possession cannot apply to the estate of a deceased person.

The Applicant's Supplementary Affidavit.

- 31.** The Applicant filed a Supplementary Affidavit sworn on 30th September, 2025.
- 32.** He reiterates the averments in his affidavit in support of the application and deposes that he has been in possession of land parcel No. **Kericho/Nyamanga/325** and he therefore seeks for orders of adverse possession in the Originating Summons. He goes on to state that his claim for adverse possession is in his personal capacity and is not on behalf of the estate **of Chumo Arap Soi** (deceased) as alleged.

- 33.** He deposes that therefore the issue of *locus standi* does not arise.
- 34.** He reiterates that his previous advocates on record failed to inform him of the hearing dates and that they closed office in late 2024 and stopped picking his calls. He goes on to state that the failure to prosecute the present suit is purely due to professional lapses and lack of communication which should not be visited upon him as a litigant.
- 35.** He also deposes that the suit parcel of land exists on the ground as he has occupied, developed and lived on it for many years.
- 36.** He further deposes that if at all the suit parcel of land was subdivided, then the said subdivision was done after he instituted the suit. He goes on to state that if the suit is reinstated, then he will seek leave to amend the Originating Summons.

37. He deposes that this is in response to paragraph 8 of the 1st Respondent's Replying Affidavit.

38. He also deposes that confirmation of grant and its implementation does not extinguish his right of possession of the suit parcel of land.

39. He ends his deposition by stating that he is advised by his advocates on record that under **Section 7** of the **Limitation of Actions Act**, the law relating to prescription not only affects present holders of title but also their predecessors and adds that a claim for adverse possession can be sustained against the estate of a deceased person.

Issues for Determination.

40. The Applicant filed his submissions on 4th November, 2025 while the 1st Respondent filed submissions on 2nd December, 2025.

41. The Applicant submits on the following issues;

a. Whether the Applicant has established sufficient cause to warrant the setting aside of the dismissal order of 14th January, 2025.

b. Whether the mistake of the Applicant's previous counsel should be visited upon the Applicant.

c. Whether the Respondents will suffer prejudice if the suit is reinstated.

d. Whether the Respondent's opposition discloses any sustainable ground to defeat the application.

e. Who should bear the costs of this application.

42. The Applicant submits that the power to set aside an order dismissing a suit for want of prosecution is discretionary.

- 43.** The Applicant relies on **Article 159(2)(d)** of the Constitution of Kenya, **Sections 1A & 1B** of the Civil Procedure Act, **Order 12** of the **Civil Procedure Rules**, the judicial decision of **Ivita vs Kyumbu [1984] KLR 441** and reiterates that the failure to prosecute the present suit is not deliberate as it was occasioned by the closure of his former Advocates offices which rendered communication impossible.
- 44.** The Applicant also submits that he was unaware that the Court had issued a notice to show cause.
- 45.** The Applicant further submits that the failure to attend Court was a mistake on the part of his previous Counsel and reiterates that mistake of Counsel should not be visited upon an innocent client.
- 46.** The Applicant relies on the judicial decision of **Philip Chemwolo & another vs Augustine Kubende [1982-88]**

KAR 103 and **Belinda Murai & Others vs Amos Wainaina [1979] eKLR** in support of his submissions.

- 47.** It is the Applicant's submissions that a claim of adverse possession can run against a registered proprietor of land and it continues to run even after death. The Applicant relies on the judicial decision of **Public Trustee vs Wanduru Ndegwa [1984] eKLR** in support of his submissions.
- 48.** It is also the Applicant's submissions that the issues raised by the 1st Respondent are matters to be determined at a full trial and not at the interlocutory stage.
- 49.** The Applicant relies on the judicial decision of **Peter Gichuki Wanjohi vs Julia Mumbi Muturi [2021] eKLR** in support of his submissions.
- 50.** The Applicant submits that he has not instituted the present proceedings on behalf of **Chumo Arap Soi** (deceased) as

alleged by the 1st Respondent and reiterates that he has instituted the present proceedings in his own capacity.

- 51.** The Applicant reiterates the averments in his supplementary affidavit and submits that his claim of adverse possession goes to the heart of property rights as provided for in **Article 40** of the Constitution of Kenya.
- 52.** The Applicant relies on **Article 50(1)** of the Constitution of Kenya and submits that the 1st Respondent has not demonstrated any prejudice that he will suffer if the application is allowed as prayed.
- 53.** The Applicant concludes his submissions by urging the Court to allow his application as prayed.
- 54.** The 1st Respondent submits on the following issues;

a. Whether the Applicant's Notice of Motion is merited.

b. Whether the Applicant's application is an abuse of the Court process.

55. The 1st Respondent reiterates that land parcel No. **Kericho/Nyamanga/325** which is the suit parcel of land was subdivided after the Certificate of Confirmation of Grant issued in Kericho HC Succession Cause No. 168 of 2000 was issued on 20th July, 2022.
56. The 1st Respondent submits that the application under consideration intends to reinstate an Originating Summons which raises issues of adverse possession over a parcel of land that no longer exists.
57. The 1st Respondent also submits that the present suit was filed on 5th March, 2021 and dismissed on 14th January, 2024 (sic).

- 58.** The 1st Respondent further submits that the Applicant has always been represented and the suit was dismissed after the Court was satisfied that the Notice to Show Cause had been served upon him (Applicant).
- 59.** It is the 1st Respondent's submissions that the application under consideration was filed on 20th May, 2025 which was after a period of almost one and a half years had lapsed and adds that the said period is inordinate and inexcusable.
- 60.** It is further the 1st Respondent's submissions that the closure of the Applicant's former advocates offices did not disconnect him from Court.
- 61.** The 1st Respondent submits that the Applicant had the option of going to Court to check on the progress of the suit.
- 62.** The 1st Respondent relies on **Articles 50 & 159** of the Constitution of Kenya, **Sections 1, 1A** and **3A** of the **Civil Procedure Act, Section 3(1)** of the Environment and Land

Court **Act, Order 12 Rule 7** of the Civil Procedure Rules, the judicial decision of **Ivita vs Kyumbu [1984] eKLR** as was cited in **Olumbe vs Mbanyi (Civil Appeal E014 of 2024) 2025 [KEHC 5386 (KLR)]**, the judicial decision of **Duale Mary Anne Gurne vs Amina Mohammed Mhamood & another [2014] eKLR** and while reiterating the averments of his Replying Affidavit urges the Court to dismiss the Applicant's application.

Analysis and Determination.

- 63.** After considering the Applicant's application, the response thereto, the supplementary affidavit and the rival submissions, it is my view that the only issue that arises for determination is whether the application dated 20th May, 2025 has merit.
- 64.** Prayer (1) of the application under consideration seeks that the firm of J.K Kirui & Co. Advocates be granted leave to come on record for the Applicant.

65. Order 9 Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

66. The Applicant contends that previously he was represented by the firm of N.C Rotich & Company Advocates who were on record when the suit was dismissed for want of prosecution. The firm of J.K Kirui & Co. Advocates now seeks leave to come on record on his behalf.

67. An order of dismissal for want of attendance is in the nature of a final judgment. This was held by the Court of Appeal in **Thomas K.Sambu v Paul Chepkwony (2108) KECA 2009 (KLR)**. It is as follows;

We have considered the decision in the Salem Ahmed Hassan Zaidi case (supra) in the light of the provisions of order 12 Rule 3 (1) (CPR), and are in agreement that order 12 Rule 13(1) is couched in similar terms as Rule 178 as it was then. It therefore follows that the Judge after considering the record before him in the light of order 12 Rule 3(1) which was couched in similar terms as Rule 178 of the rules of the court, as it was then arrived at the correct conclusion that an order of dismissal for non-attendance is in the nature of a final Judgment. We adopt the same position in this appeal and hold that the order of dismissal for non-attendance made by C.M. Waithaka,

J on the 29th day of May, 2011
amounted to a final Judgment.

(Emphasis mine)

- 68.** It is for this reason that the firm of J.K Kirui & Co. Advocates have sought leave to come on record on behalf of the Applicant. I see no reason to decline.
- 69.** Under prayer (2) of the application under consideration, the Applicant seeks that the Court sets aside the orders issued on 14th January, 2025 and reinstate the suit.
- 70.** The Applicant contends that he was represented by the firm of N.C Rotich & Company Advocates, that there was a communication breakdown between him and his former advocates and that he later discovered that the suit was dismissed for want of prosecution.
- 71.** The Applicant further contends that mistake of Counsel should not be visited upon him.

72. In response, the 1st Respondent contends that the Applicant did not have the *locus standi* to commence the present proceedings as he instituted the suit on behalf of the estate of **Chuma Arap Soi** (deceased).

73. The 1st Respondent also contends that the Applicant has always been represented but he still had a duty to follow up and find out the progress of his suit.

74. The 1st Respondent further contends that the suit parcel of land no longer exists as it was subdivided after the grant issued in Kericho HC Succession Cause No. 168 of 2000 was confirmed on 20th July, 2022.

75. The 1st Respondent submits that Counsel for the Applicant was served with the notice to show cause why the suit should not be dismissed before the suit was dismissed.

76. In the judicial decision of **Autosprings Manufacturing Limited v Kioko (Suing as the Legal Representative of**

the Estate of S. K. Mangeli) [2023] KEELC 21680 (KLR)

the Court held as follows;

“Setting aside orders dismissing a suit for want of prosecution is not a right of any party. It is a discretionary order which can only be granted where the interests of justice so demand. It is an equitable remedy and it is upon an applicant for such prayer to demonstrate sufficient cause for the Court to exercise its discretion in their favour, as the Court’s discretion ought not be exercised whimsically or capriciously but judiciously. As was held in the case of Shah v Mbogo [1968] EA 93, discretion should be applied to avoid hardship caused by accident, inadvertence or excusable mistake or error and not for assisting a party who deliberately seeks to obstruct

or delay the course of justice.”

(Emphasis mine)

77. A perusal of the Court record shows that on 14th January, 2025, the matter came up for the Applicant to show cause why the suit should not be dismissed for want of prosecution.

78. Counsel for the 1st Respondent was present while Counsel for the Applicant was absent.

79. The Court issued the following orders;

***“The matter was filed on 5th March, 2021. On several instances i.e. 25th July, 2022, 7th December, 2022, 18th September, 2023, 8th February, 2024, 6th March, 2024, 9th April, 2024 the matter has come up before Court and the Applicant has remained absent in the same manner that they are also absent today.*”**

Consequently, this suit is dismissed for want of prosecution with cost (sic) to the 1st Respondent.”

- 80.** The application under consideration was filed on 27th May, 2025 and fixed for hearing on 23rd July, 2025. Therefore, the application was filed about four months after the suit was dismissed for want of prosecution.
- 81.** A further perusal of the Court record shows that the firm of Vincent Cheruiyot & Co. Advocates was appearing for the Applicant before the firm of N.C Rotich & Co. Advocates filed a Notice of Change of Advocates on 8th February, 2023.
- 82.** The said firm of Advocates appeared in Court on 9th February, 2023, 9th March, 2023 and 18th July, 2023.
- 83.** In the year 2024, the said firm of Advocates did not appear in Court.

- 84.** A further perusal of the Court record shows that a Notice of Dismissal of a Suit for Want of Prosecution was issued to N.C Rotich & Co. Advocates and Oyugi Ombui & Co. Advocates. The Notice was issued on 31st December, 2024 and it summoned Counsel to appear in Court on 14th January, 2025.
- 85.** Attached to the said notice is an email sent on 2nd January, 2025 from elckerichocourt@gmail.com to oyugiombuicoadvocates@gmail.com and victorlule33@gmail.com.
- 86.** A perusal of the Notice of Change of Advocates filed by N.C Rotich & Company Advocates shows that the said firm of advocates did not provide its email address.
- 87.** It is therefore not clear whether the email address of victorlule33@gmail.com belongs to Counsel previously on record for the Applicant.

88. This information would have aided the Court in making a finding whether Counsel was served with the said notice.
89. That notwithstanding, the Applicant contends that there was a communication breakdown between him and his former advocates on record after they closed their law firm and relocated.
90. 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)

- 91.** In the above cited judicial decision, it was held that the Court exercises its discretion to set aside an order or judgment 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.
- 92.** In seeking that the present suit be reinstated, the Applicant is appealing to the discretion of the Court. Taking into consideration the circumstances of this suit, it is my view that it is in the interest of justice that the orders issued on 14th January, 2025 be set aside and the suit be reinstated for hearing.

93. The 1st Respondent has not demonstrated any prejudice he is likely to suffer if the said orders are set aside and the suit reinstated for hearing.

94. Before penning off, I note that the 1st Respondent has raised an issue that the Applicant does not have *locus standi* to file the present suit and he also contends that the suit parcel of land no longer exists. These issues go to the merit of the suit and they can be raised and shall be addressed at the hearing.

Disposition.

95. Taking the foregoing into consideration, the application dated 20th May, 2025 is allowed in the following terms;

a. The firm of J.K Kirui & Co. Advocates is hereby granted leave to come on record for the Applicant.

b. The orders issued on 14th January, 2025 dismissing the Applicant's suit

***for want of prosecution are hereby set
aside.***

***c. The Applicant's suit is hereby
reinstated for hearing.***

***d. Costs of the application shall be in the
cause.***

96. It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 19TH DAY OF MARCH, 2026.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Miss Kirui for the Plaintiff/ Applicant.

The firm of Oyugi Ombui for respondent- Absent

Court Assistant; Mr. Joseph Makori.

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