

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**  
**ELC NO E 1202 OF 2013**

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**SAMUEL KURIA NDUNGU** - **APPLICANT**  
**VS**  
**PAUL KIMANI** - **RESPONDENT**  
**RULING**

**(In respect of the Applicant's application dated 10<sup>th</sup> July 2025)**

1. What is before this Court is the Applicant's application dated 10/7/2025 seeking orders to set aside the dismissal orders issued on 10/5/2021, which dismissed the suit for want of prosecution. It also seeks further orders to amend the plaint dated 7/10/2023 to enable the suit to be listed for hearing on a priority basis.
2. The application is based on the grounds annexed thereto and the supporting affidavit of **Samuel Kuria Kimani**, the applicant herein sworn on the same date. He deponed that, since the filing of the suit in 2013, he has inquired numerous times about the status of the suit from his counsel, to no avail, prompting him to change Counsel to the current one. Upon taking over the matter, the current Counsel advised him that the suit was dismissed on 10/5/21 for want of prosecution, indicating that the suit was never heard or determined on its merits. That the non-attendance was not intentional but due to an oversight by his previous counsel, who failed to attend Court or inform him of the progress of the suit. That the dismissal, therefore, was occasioned by the inaction of his previous Counsel, who failed to take necessary steps to prosecute the matter.
3. He states that he has a meritorious case, being the owner of the suit land known as NBI/BLOCK65/538, formerly LR No 209/11618, and that unless the orders are granted, he is likely to suffer irreparable damage as his

rights to the property continue to be infringed. He urged the Court to reinstate the case for determination on its merits.

4. The application is opposed by the Respondent through his Replying Affidavit, sworn on 27/11/2025. He stated that the Applicant filed a suit on 8/10/2013 seeking outstanding rent of Kshs 615,000 as at October 2011. Since this was more than 14 years ago, the claim is barred by the provisions of the Limitations of Actions Act. That the fact that the claim was dismissed four years ago indicates the Applicant was negligent in pursuing it.
5. He added that the boundary dispute between the parties cannot be resolved without involving the Kenya Railways Corporation, which is the registered owner of the parcel he occupies. For this reason, he described the suit as a non-starter due to non-joinder.
6. The Respondent argued that the allegations that he leased the suit land to him are unfounded. He also stated that there is no ownership dispute between the parties in this suit and that he does not owe the Applicant the sum of Kshs 615,000/- as rent for 2021.
7. He added that the application has no merit, and the suit was properly dismissed after the Applicant failed to act eight years after it was filed. There is no justification to disturb the Court 's decision. In any event, the Applicant was duly represented by Counsel throughout, and the Court was urged to dismiss the application with costs.
8. The parties elected to file written submissions, which I have read and considered. The submissions are dated 25/11/25 and 19/1/2025 respectively.
9. The key issue for determination is whether the application is merited.
10. Order 12 rule 7 of the Civil Procedure Rules provides that;  
“Where under this order judgement has been entered or the suit has been dismissed, the Court on an application, may set aside or vary the Judgement or order upon such terms as may be just.”

11. Reinstatement of a suit is an act of exercise of discretion by a Court. The Court in *Shah v Mbogo & another* [1967] EA 116 espoused how such discretion ought to be exercised. It held thus:

“..... the principles governing the exercise of the Court’s discretion to set aside a judgment obtained ex-parte. This discretion is intended so 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 course of justice
12. The Court of Appeal stated in the case of *Murtaza Hussein Bandali t/a Shimoni Enterprises Vs P.A Willis* (1991) KLR, 469, stated that:

“This being an exercise of judicial discretion, like any other judicial discretion, must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence, but deservedly and not arbitrarily, whimsically or capriciously.”
13. The aim of exercising discretion by the Court is intended to ensure that no party suffers injustice or hardship, including, among others, excusable mistake, inadvertence, accident, or error (*CMC Holdings Ltd. - vs- Nzioki* (2004) eKLR, 173).
14. According to the pleadings on record, this suit was filed on 7/10/2013. In it, the Applicant sought orders against the Respondent for Kshs 615,000/-; an order compelling the Defendant/Respondent to avail himself for the purpose of carrying out the beacon establishment, and a declaratory order that the Plaintiff is the bona fide and lawful owner of L R No 209/11618, the suit land herein.
15. Upon service, the Respondent entered an appearance on 25/11/2013 and filed a statement of defence on 9/12/2013 denying the Applicant's claim and sought for its dismissal.
16. Subsequently, the matter was scheduled for a pretrial on 4/12/17, approximately four years later. The record does not specify the reasons

for the Applicant's inactivity in pursuing the case. On 14/5/2018, the matter was certified as ready for hearing, with a hearing date set for 31/7/2018. On the day of the hearing, the Applicant was absent, and the hearing was adjourned to 28/5/2018. Another adjournment was granted on 28/5/2018 and the hearing was rescheduled for 17/5/2018. The applicant was absent on this date and on subsequent dates, namely 30/11/2020, 15/3/2021, and 10/5/2021, leading to the suit being dismissed under Order 17 Rule 2 of the Civil Procedure Rules, and the file was ordered to be closed on the material date.

17. The primary duty of the Plaintiff to take steps to progress their cases since they are the ones who have dragged the Defendant to Court. From the litigation history set out above, it is clear that the Applicant unexplainedly delayed prosecution of the case, leading to its dismissal on 10/5/2021.
18. A party seeking reinstatement of an application or a suit dismissed for non-attendance must explain their absence on the day of the hearing, the delay in prosecuting the case and how they would be prejudiced if the application or suit is not reinstated.
19. The Applicant claims that he repeatedly tried to find out the progress of his case from his former lawyer, but in vain. However, he has not provided the Court with any correspondence with his lawyer regarding the case's progress. He has also not shown any communications with the Court registry seeking to peruse the file to understand the case status. Additionally, there is no affidavit from his lawyers explaining the delay in prosecuting the matter. It is a reasonable explanation for the delay, which opens the door to the court's discretion in favour of the Applicant. It should be noted that the application for reinstatement was filed about four years ago, a period the Court considered excessively inordinate.
20. The provisions of Article 159 (2) (b) of the Constitution, 2010, provide as follows;

“In exercising judicial authority, the Court’s and Tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

21. In the Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the Court observed as hereunder;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other Court users to assist the Court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the Appellant’s advocate. The Court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

22. Equally, the overarching objectives of our Civil Procedure Rules obligate the parties and their advocates to facilitate the achievement of the overriding objectives of the Court as far as the expedient determination of suits is concerned. It states as follows;

1A(3) ) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and Orders of the Court .

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims— (a) the just determination of the proceedings; (b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative Rev. 2010] Civil Procedure CAP. 21 9 resources; (d) the timely disposal of the proceedings, and all other proceedings in the Court , at a cost affordable by the respective parties; and (e) the use of suitable technology.

23. It has been established in many cases that a litigant must not always blame his or her counsel when wrongs occur; they are expected to be actively involved in their cases at all times. The Court aligns itself with the sentiments of Justice Kimaru[ as he then was], as have been quoted by many Courts in *Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002*, where the learned judge expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present

case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant."

24. In the present case, the Court determines that the application has been filed with excessive delay and without any satisfactory explanation provided by the applicant. It would contravene public policy to exercise discretion in favor of an indolent litigant, like the applicant herein.
25. For that reason, I do not find it necessary to address the other issues raised by the Respondent.
26. **Final order for disposal**
  - a. Consequently, the application is without merit.
  - b. It is dismissed with costs to the Respondent.
27. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12<sup>TH</sup> DAY OF MARCH 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI  
JUDGE**

**Delivered online in the presence of;**

- 1. Amelamba for Plaintiff/Applicant**
- 2. N/A for Defendant/Respondent**

**3. C/A - Ms. Yvette Njoroge**

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