Huyton INC & 2 others v Belayneh Kindie and Import and Export (Civil Case E125 of 2019) [2026] KEHC 4824 (KLR) (Commercial & Admiralty) (9 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4824 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

CIVIL CASE E125 OF 2019

MA OTIENO, J

APRIL 9, 2026

BETWEEN

HUYTON INC ..... 1ST APPLICANT

AGRICOM INTERNATIONAL S.A ..... 2ND APPLICANT

AGRIMPEX COMPANY LIMITED ..... 3RD APPLICANT

AND

BELAYNEH KINDIE AND IMPORT AND EXPORT ..... DEFENDANT

RULING

Introduction

1. Before this Court for determination is the Plaintiffs/Applicants' Notice of Motion dated 3rd November 2025, brought under Article 50(1) of *the Constitution*, Sections 1A, 1B, 3, and 3A of the *Civil Procedure Act*, and Order 12 Rule 7 and Order 51 Rules 1 and 3 of the Civil Procedure Rules.

2. The Application principally seeks orders setting aside the dismissal of the suit made on 19th June 2025 for non-attendance, and that the suit be reinstated for hearing and determination on its merits. The Applicants further seek an order staying the taxation scheduled for 11th November 2025.

3. The Application is supported by the Supporting Affidavit of Philippos Philippas sworn on 1st November 2025. It is premised on the ground that the suit was dismissed owing to the Plaintiffs' non-attendance on the material day.

4. The Applicants contend that their former advocates, Messrs. Kaplan & Stratton, were granted leave to cease acting on 28th November 2024, with the Court directing that future service be effected personally upon the Plaintiffs. They assert that no personal service of the hearing notice for 19th June

2025 was ever effected, and that they only became aware of the dismissal upon being served with a Taxation Notice.

5. The Applicants further aver that they have a meritorious case raising triable issues, and that they remain committed to prosecuting the matter to conclusion. They accordingly urge that the Application be allowed so that the suit may be heard on its merits.

6. The Defendant/Respondent opposes the Application and relies on a Replying Affidavit sworn on 25th November 2025 by Belayneh Kindie Mekonnen. The Respondent asserts that the Applicants were duly served with all relevant notices—initially through their then advocates, and subsequently personally—following the granting of leave for counsel to cease acting.

7. According to the Respondent, the Applicants have consistently demonstrated indolence and a lack of diligence in prosecuting their claim, and the instant application is merely an afterthought intended to delay the conclusion of a matter that has been pending since 2019.

8. The Application was canvassed by way of written submissions. The Plaintiffs filed written submissions dated March 2026. The Defendant relied on its Replying Affidavit and did not file separate submissions.

Analysis and Determination

9. Having carefully considered the Application, the affidavits, and the submissions on record, the key issue for determination is whether the Applicants have demonstrated sufficient cause to warrant the exercise of this Court's discretion to set aside the dismissal and reinstate the suit.

10. The jurisdiction to set aside a dismissal order of dismissal is anchored under Order 12 Rule 7 of the Civil Procedure Rules, which provides that:

> " 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."

11. The Court's power under this provision is discretionary, the term "may" signifying that the Court retains wide latitude to act upon sound judicial principles. This discretion must, however, be exercised judicially and in line with the objectives of substantive justice embodied in Sections 1A, 1B, and 3A of the *Civil Procedure Act*, as well as Article 50(1) of *the Constitution*, which guarantees every party the right to a fair hearing.

12. The guiding principles have been articulated in several authorities, including, in Ivita v Kyumbu [1975] KEHC 4 (KLR), where it was stated that in dealing with an application for reinstatement, the court must have in mind that the overall aim of the Court is to do justice, both to an applicant and the Respondent. The Court stated:

> " So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the

> plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed. To put it in the words of Salmon LJ in Allen v McAlpine, at p 561, as a rule, when inordinate delay is established until a credible excuse is made out, the natural inference would be that it is inexcusable. It is an all time saying, which will never wear out however often said that, justice delayed is justice denied."

13. The Court in Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C, the Court reiterated that there are no rigid limits on the Court's discretion, save that any orders varying a judgment must be made on terms that are just, with the overarching concern being the attainment of justice.

14. Similarly, in Shah v Mbogo & Another [1967] EA 116, the Court held that the discretion to set aside is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error.

15. In the present case, the Court notes that when leave was granted for the Applicants' advocates to cease acting, the Court specifically directed that service be effected personally on the Plaintiffs. The Applicants have deponed that they were not served with the Hearing Notice for 19th June 2025.

16. The Respondent relies on alleged email service. However, Order 5 Rule 22B of the Civil Procedure Rules mandates that electronic service must be accompanied by a delivery receipt, failing which service is not deemed effected. Order 5 Rule 22B(2) is explicit that:

> " Service by electronic mail shall be deemed to have been effected when the sender receives a delivery receipt."

17. Here, no delivery receipt was exhibited. The absence of proof of compliant electronic service renders such service unproven. The burden of proving service lies squarely on the party asserting it.

18. In Lihanda & Another v Bboxx Capital Kenya Ltd (Civil Appeal E092 of 2021) [2025] KEHC 11192, the Court (Mabeya J), adopting the position expressed in B.O.D County Referral Hospital Kitale & Another vs Dorcas Naliaka KTL HCCA No. E043 of 2023 UR, reaffirmed that an email delivery receipt—not merely a sent email—is required to establish valid electronic service. The learned judge stated that:

> " Returning to Order 5 Rule 22B (4) of the Civil Procedure Rules an Affidavit for service is supposed to attach an Electronic Mail Service delivery receipt as the confirmation of service. What then is an email delivery receipt? Simply put, an email delivery receipt is a notification confirming that an email message was delivered to the recipient's mailbox. It must, however, be understood that an email delivery receipt is different from an email read receipt. The latter is a notification confirming that the email message was opened and/or read by the recipient."

19. On the evidence before the Court, I am satisfied that service was therefore not properly effected. The Plaintiffs' absence on 19th June 2025 cannot be attributed to negligence or indifference, but rather to lack of proper notice.

20. The Respondent argues that reinstatement will cause prejudice, given the age of the matter. While the Court is mindful of delays, it remains the case that justice is best served by hearing matters on their merits.

21. As stated in Sebei District Administration v Gasyali [1968] EA 300, denying a party a hearing should be a measure of last resort. Any potential prejudice to the Defendant can be adequately compensated by an award of costs.

22. In light of the foregoing, the Court is persuaded that the Application is merited and that reinstating the suit accords with the interests of justice.

23. Accordingly, the Court finds the present application merited and issues the following final orders:

    i. The order of this Court dated 19th June 2025 dismissing the suit for non-attendance is hereby set aside, and the suit reinstated for hearing and determination on its merits.

    ii. Costs of this application shall be in the cause.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL 2026

HON. MR. JUSTICE MOSES ADO

JUDGE OF THE HIGH COURT

In the presence of: -

C/A – Moses

Kimani h/b for Muthui..... for the Applicants

Kimata..... for Defendant