Kungu & 3 others v Equity Bank (Kenya) Limited & another (Commercial Civil Suit 328 of 2019) [2026] KEHC 4950 (KLR) (Commercial & Admiralty) (9 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4950 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND ADMIRALTY

COMMERCIAL CIVIL SUIT 328 OF 2019

MA OTIENO, J

APRIL 9, 2026

BETWEEN

MOSES KUNGU & 3 OTHERS & 3 OTHERS & 3 OTHERS ..... PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED ..... 1ST DEFENDANT

STEPHEN KIARIE ..... 2ND DEFENDANT

RULING

Introduction

1. Before me for determination is the Plaintiffs/Applicants' Notice of Motion dated 30 July 2025 brought under Order 12, Rules 2 and 7 of the Civil Procedure Rules, Order 40, Section 3A of the *Civil Procedure Act*, and all enabling provisions of the law. The Applicants seek the following substantive orders:

    i. That the proceedings and orders issued on 30 July 2025 dismissing the suit for non-attendance be set aside.

    ii. That the suit be reinstated for hearing on the merits.

    iii. That a temporary injunction do issue restraining the 1st Defendant from transferring or interfering with property Githunguri/Kimathi/2164 pending determination of the application.

    iv. Costs of the application.

2. The application is supported by several affidavits sworn on 30 July 2025 by each of the four Applicants.

3. The Applicants contend that on the scheduled hearing date of 30th July 2025, all key witnesses were physically present in open court and ready to proceed. Their advocate had logged into the virtual court system at 9:00 a.m.

4. It is deponed that the matter was called out and dismissed for non-attendance despite their presence in the court building. The Applicants argue that the dismissal was a procedural occurrence beyond their control and that it is in the interest of justice to hear the case on its merits.

5. The 1st Defendant opposed the application through the Replying Affidavit sworn on 8 October 2025 by Jackline Kamau, Advocate. It was the Respondent's case that the Plaintiffs have shown a consistent lack of interest in prosecuting the case since its inception in September 2019.

6. The Respondent highlighted a history of adjournments sought by the Plaintiffs, including on 27th January 2020, 12th May 2020, and 31st August 2020. They further contend that on the day of dismissal, the matter was called out several times with no response from the Plaintiffs or their counsel, leading the court to rightly exercise its discretion to dismiss for non-attendance.

7. The Application proceeded by way of written submissions. The Applicants, through the law firm of C.M. Ongoto & Co. Advocates, filed their submissions dated 31 October 2025, whilst the Respondent filed their submissions dated through the 12 November 2025 through Mukiri Global Advocates LLP.

Analysis and Determination

8. I have carefully considered the application, the affidavits, and the rival submissions. The singular issue for determination is whether the Applicants have demonstrated sufficient cause to warrant the setting aside of the dismissal order.

9. The Court's jurisdiction to set aside an 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."

10. This provision grants the Court discretionary power, which must be exercised on sound judicial principles and in accordance with the overriding objective under Sections 1A and 1B of the *Civil Procedure Act*.

11. The guiding principles were aptly stated in Ivita v Kyumbu [1975] KLR, where the courts emphasized that reinstatement aims to prevent injustice arising from inadvertence or excusable mistake, not to assist litigants who deliberately obstruct or delay justice. The Court stated that:

> " 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."

12. From the evidence, it is undisputed that the matter was scheduled for hearing on 30 July 2025. The Applicants were physically present by 8:30 a.m., while their counsel was logged into the virtual platform by 9:00 a.m.

13. The Applicants assert that the matter was called earlier than expected, and before their counsel could be admitted into the virtual courtroom, the suit was dismissed for non-attendance. Subsequently, when counsel was eventually admitted, the Court acknowledged the presence of the Applicants and directed them to file the present application.

14. The Respondent, while not disputing the Applicants' presence, contends that the Applicants have a long history of adjournments, indolence, and disinterest in prosecution of the suit.

15. Upon careful consideration of the record, the Court finds that the non-attendance was neither deliberate, negligent, nor contumelious. It arose from the hybrid virtual-physical set-up and call-over sequence, a factor which was outside the Applicants' control.

16. The Respondent places heavy emphasis on the Applicants' historical conduct. The record indeed reflects several adjournments. However, the impugned dismissal occurred on a day when the Applicants were fully present and allegedly ready. The Court itself acknowledged their presence and advised them to bring this application.

17. The governing law requires the Court to focus on the circumstances leading to the specific dismissal, not the broader case history. While the 1st Defendant points to a long history of indolence and over twenty case management appearances, the overriding objective under the *Civil Procedure Act* is to ensure the just and effective disposal of proceedings.

18. In Ivita v Kyumbu (supra), Chesoni J, as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Similarly, in Shah v Mbogo [1967] EA 116 at 123B Harris J held:

> " The discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the course of justice."

19. In balancing the competing interests and taking into account the existing judicial precedence, the court observes that while the delay since 2019 is significant, driving a party out of the seat of justice without a hearing on the merits should be a last resort, especially where the party claims to have been present for the hearing, as in the present situation.

20. In the result, the Notice of Motion dated 30th July 2025 is hereby allowed on the following terms:

    i. The orders of dismissal issued on 30th July 2025 are hereby set aside, and the suit is reinstated for hearing on its merits.

ii. This reinstatement is conditional upon the Plaintiffs paying the 1st Defendant's costs of this application, assessed at Kshs. 50,000/- before the next hearing date.

iii. The matter shall be set down for a mandatory Case Management Conference within 14 days of this Ruling to fix a final hearing date, which shall not be adjourned.

21. It is so ordered.

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

HON. MR. JUSTICE MOSES ADO

JUDGE OF THE HIGH COURT

In the presence of: -

C/A – Moses

Ms. Simiyu.....for the Applicant

Ms. Kokwon h/b for Mukiri.....for the 1st Defendants

Njoroge.....for the 2nd Defendant