

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
HCCOMM NO. 1 OF 2016

NELLIE WANJIKU NJUGUNA.....1ST PLAINTIFF

FRANCIS NJUGUNA.....2ND PLAINTIFF

-VERSUS-

KINGS DEVELOPERS LIMITED.....1ST DEFENDANT

ALISACHER BATANWALLA.....2ND DEFENDANT

ZOHER TANERRALI DAWOODBHAI.....3RD DEFENDANT

RULING

1. The plaintiffs filed a Notice of Motion application dated 2nd October 2025 under the provisions of Order 17, Order 50 Rule 5 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1, 1A, 3A, 3B & 63E of the Civil Procedure Act, Articles 50(1) & 159(2)(d) of the Constitution of Kenya, 2010, and all other enabling provisions of the law. The plaintiffs pray for orders that this Honourable Court be pleased to reinstate the suit and direct that it be heard and determined on its merits, that the Court sets aside and/or varies the Orders issued on 12th April 2024, and enlarges the time granted to the plaintiffs to file and serve the amended plaint to 31 days from that date, and that the amended plaint filed and served on 14th May 2024 be deemed as being properly on record.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. King'ori Macharia, an Advocate of the High Court of Kenya and learned Counsel for the plaintiffs. Mr.

Macharia averred that this Honourable Court, by Orders issued on 12th April 2024, directed the plaintiffs' personal representatives to file and serve an amended plaint by 13th May 2024, failing which the suit would stand dismissed. He stated that although the amended plaint was eventually filed and served on 14th May 2024, the plaintiffs subsequently filed a Notice of Motion application dated 20th May 2024, seeking extension of time and validation of the amended plaint, but the Court dismissed that application on the basis that the suit already stood dismissed, and that reinstatement ought to have been sought first.

3. Mr. Macharia explained that before filing the said application, the plaintiffs' Advocates had lost contact with the Administrators of the deceased plaintiffs' Estate, only re-establishing communication on 10th May 2024, at which point, draft amended pleadings were forwarded for their review and execution. He deposed that it had been agreed that signed documents would be returned by 13th May 2024, but due to a nationwide internet disruption, the Administrators were only able to forward the executed documents on 14th May 2024, leading to the delay. He deposed that the omission to seek reinstatement earlier was an inadvertent error of Counsel that should not be visited upon the plaintiffs, and that the delay in filing the amended plaint was neither deliberate nor inordinate. Mr. Macharia averred that the plaintiffs are still desirous of prosecuting the suit herein.
4. In opposition to the instant application, the defendants filed a replying affidavit sworn on 13th November 2025 by Mr. Sunita Patel, the Chief Financial Officer of the 1st defendant company. Mr. Patel averred that the instant application is incompetent, as the plaintiffs are deceased. He deposed that the application herein seeks similar Orders to a previous application dated 20th May 2024, which was dismissed by this Honourable Court in a Ruling delivered on 18th September

2025, wherein the Court found that the suit stood automatically dismissed on 14th May 2024, due to non-compliance with its earlier Orders of 12th April 2024.

5. Mr. Patel stated that this suit had initially abated in 2019 following the death of the 2nd plaintiff and was later revived in 2021 by Orders of the Court which also allowed substitution by the plaintiffs' personal representatives, but despite these Orders, the plaintiffs failed to amend the plaint or progress the matter, prompting the defendants to file an application for dismissal of the suit for want of prosecution in 2023. He averred that although that application was dismissed on 12th April 2024, the Court granted the plaintiffs a final opportunity to file and serve an amended plaint within 30 days, failure to which the suit would stand dismissed. He asserted that the plaintiffs failed to comply with the said Orders and the suit was consequently dismissed on 14th May 2024.
6. Mr. Patel deposed that the plaintiffs have consistently demonstrated indolence and lack of diligence, having been afforded multiple opportunities over a span of several years to prosecute this matter without success. He asserted that the delay is inordinate and inexcusable, and has caused prejudice to the defendants, particularly, as a key witness to the subject Agreement is now deceased. He stated that timelines set by the Court are meant to ensure the ends of justice and must be adhered to, and that granting the Orders being sought herein would occasion a miscarriage of justice by reviving a matter that has long been dormant.
7. The application herein was canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Ashitiva Advocates LLP on 21st November 2025, whereas the defendants' submissions were also filed on 4th December 2025 by the law firm of Majanja Luseno & Company Advocates.

8. Mr. Mugo, learned Counsel for the plaintiffs submitted that contrary to the defendants' assertions, this application is not similar to the earlier application dated 20th May 2024, as it now seeks reinstatement of the suit, a prayer that had inadvertently not been included previously, hence no appeal or review could have been pursued in respect of a prayer not placed before the Court. He relied on the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010, and the cases of **Okoth & another (suing as Administrators of the Estate of Geoffrey Okoth Oyoye) v Sukari Industries Limited & 4 others** [2025] KEELC 7502 (KLR) and **Shah v Mbogo & Another** [1967] EA 116, and submitted that the Court's discretion to set aside or vary a dismissal Order should be exercised to avoid injustice arising from inadvertence or excusable mistake and to advance substantive justice.
9. Counsel argued that the instant application was filed without undue delay, having been lodged on 8th October 2025 shortly after the Ruling of 18th September 2025, and that the plaintiffs have consistently demonstrated willingness to prosecute the suit, including attending Court and filing the amended plaint, albeit one day out of time. He contended that the delay was occasioned by circumstances beyond the plaintiffs' control, specifically internet disruptions caused by deep-sea fibre cuts, and not indolence. He maintained that the defendants have not demonstrated any prejudice that cannot be compensated by costs, noting that the documentary evidence remains intact and the demise of certain parties does not diminish its probative value.
10. Mr. Mugo relied on the provisions of Order 50 Rule 5 of the Civil Procedure Rules, 2010, and the case of **Eldoret Steel Mills Limited v Patrick Lumumba Likono** [2011] KEHC 3485 (KLR) and submitted that the plaintiffs have made out a case to warrant enlargement of time to file an amended plaint. He invoked

the provisions of Sections 1A, 1B, 3A & 63(e) of the Civil Procedure Act and Article 159(2)(d) of the Constitution and urged this Court to prioritize substantive justice over procedural technicalities. Counsel contended that the circumstances leading to the late filing of the amended plaint have been satisfactorily explained, and that the defendants have not adduced evidence of any irreparable prejudice.

11. Ms Musau, learned Counsel for the defendants submitted that the application herein is *res judicata* and an abuse of the Court process, as it seeks substantially similar Orders to those sought in the earlier application dated 20th May 2024, which was conclusively determined by this Court in its Ruling of 18th September 2025. She stated that in that Ruling, the Court found that the plaintiffs' personal representatives had been granted 30 days on 12th April 2024 to file and serve an amended plaint, failure to which the suit would stand automatically dismissed. She contended that upon their non-compliance by 14th May 2024, the suit ceased to exist. Counsel asserted that this Court has already pronounced itself on the issue of setting aside or varying the said Orders and enlarging time, and in the absence of any appeal or review, the matter cannot be re-litigated. To buttress these submissions, Counsel relied on the provisions of Section 7 of the Civil Procedure Act and the cases of **Sambula v County Government of Trans Nzoia & another** [2023] KEELC 48 (KLR).

12. Ms Musau cited the cases of **Titus Kiragu v Jackcksom Mugo Mathai** [2015] KEHC 8021 (KLR) and **M'Irithia v M'Kithiano; M'Raji (Applying as the Administrator of the Estate of M'Raiji M'Kithiano) (Applicant)** [2022] KEELC 2455 (KLR), and stated that this suit was filed in 2016, and both plaintiffs subsequently died in 2017 and 2018, respectively. That despite being granted multiple opportunities, the plaintiffs' legal representatives failed to file

substitution applications within the prescribed timelines, leading to the suit abating on 1st June 2019 pursuant to Order 24 Rule 3 of the Civil Procedure Rules. She submitted that no sufficient cause has been shown to warrant revival of this suit under Order 24 Rule 7(2) of the Civil Procedure Rules. She further submitted that although the Court later granted further opportunities, including the final 30-day window on 12th April 2024, the plaintiffs' representatives still failed to comply.

13. Ms Musau argued that the plaintiffs have exhibited a consistent pattern of indolence and non-compliance, despite numerous indulgences by the Court over several years, and have not provided any justifiable reason to warrant the exercise of discretion in their favour. She cited the case of **Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi)** [2018] KEHC 8750 (KLR), and emphasized that Court Orders are binding and must be obeyed. Counsel maintained that the Orders of 12th April 2024 were self-executing, resulting in automatic dismissal upon non-compliance. She asserted that the plaintiffs' legal representatives have, for over seven (7) years failed to take meaningful steps to prosecute this suit, but they have instead been filing repetitive applications while disregarding Court Orders. She urged this Court not to continue indulging an indolent party to the prejudice of the defendants, who remain exposed to prolonged uncertainty in a matter that has long abated.

ANALYSIS AND DETERMINATION.

14. Upon consideration of the application herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the defendants and the written submissions by Counsel for the parties, the issues that arise for determination are:-

- i) Whether the instant application is *res judicata*;**
- ii) Whether this suit should be reinstated, be heard and determined on its merits; and**
- iii) Whether the Orders of 12th April 2024 should be varied and/or set aside, and time be granted to the plaintiffs to file and serve an amended plaint or time be enlarged to 31 days from 12th April 2024.**

Whether the instant application is *res judicata*.

15. The doctrine of *res judicata* is provided for under the provisions of Section 7 of the Civil Procedure Act, which states that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

16. In Order for the doctrine of *res judicata* to be effectively invoked, the party raising it must satisfy the doctrine's five (5) essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that: –

- i) The suit or issue raised was directly and substantially in issue in the former suit;***
- ii) That the former suit was between the same party or parties under whom they or any of them claim;***
- iii) That those parties were litigating under the same title;***

iv) That the issue in question was heard and finally determined in the former suit; and

v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

17. The doctrine of *res judicata* ousts the jurisdiction of a Court to try any suit or issue which had been determined in finality by a Court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. The Supreme Court in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others** [2021] KESC 39 (KLR), addressed itself on the doctrine of *res judicata* as hereunder –

“Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, [2010] eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

18. The plaintiffs filed an application dated 20th May 2024 seeking Orders for this Court to set aside and/or vary its Order issued on 12th April 2024 and extend time for the plaintiffs to file and serve the amended plaint to 31 days from 12th April 2024, and for the amended plaint filed and served on 14th May 2024 to be deemed as being properly on record.

19. The Court record shows that the said application was determined in a Ruling delivered on 18th September 2025, where it was struck out on the ground that it had been filed in a suit that no longer existed, the same having stood automatically dismissed as at 14th May 2024. In striking out the application dated 20th May 2024, this Court did not determine the issues raised therein on merits. Further, while there is some overlap in the reliefs sought in this application and in the one dated 20th May 2024, the prayer for reinstatement of the suit was not placed before the Court in the earlier application, and failure to include the said prayer formed the basis upon which the previous application was struck out. More importantly, the previous application was not heard and finally determined on its merits.

20. That being so, this Court finds that the prayers being sought in this application have not previously been conclusively heard and determined by this Court or any other Court of competent jurisdiction.

21. I therefore find that the doctrine of *res judicata* cannot be effectively raised and upheld in this case.

Whether this suit should be reinstated, heard and determined on its merits.

22. This Court's jurisdiction to set aside or vary dismissal Orders is anchored under the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010, which states as hereunder -

“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.”

23. The jurisdiction of Courts to review and set aside its decisions is wide and unfettered. The East Africa Court of Appeal addressed this issue in the case of **Shah v Mbogo and Another** [1967] EA 116, and held that as follows: -

“This discretion (to set aside ex parte proceedings or decision) 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.”

24. In determining an application such as the one herein, the Court has to establish whether the applicant has demonstrated sufficient cause to warrant the Court to exercise its discretion in his favour. Sufficient Cause was defined by the Court in **Wachira Karani v Bildad Wachira** [2016] KEHC 6334 (KLR) as follows -

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

25. On 12th April 2024, the plaintiffs were granted a final opportunity to file and serve an amended plaint within 30 days, failure to which the suit would stand automatically dismissed. The record shows that the plaintiffs failed to comply within the stipulated timeline, as they filed the amended plaint one day out of time, on 14th May 2024. Counsel for the plaintiffs averred that the delay was as a result of the fact that their Counsel had temporarily lost contact with the Administrators of the deceased plaintiffs’ Estates, and that upon re-establishing communication, execution and transmission of documents was delayed due to a nationwide internet disruption.

26. This Court notes that the defendants have maintained that the plaintiffs have been indolent and have enjoyed numerous indulgences from the Court over several years. That may be so, I have however note that the record shows that the delay

in question was minimal regarding the filing of an amended plaint, being a single day, and it was satisfactorily explained by production of a press release from the Communications Authority of Kenya informing the public of deep sea fibre cuts on 13th May 2024 affecting internet services in Kenya. I am therefore satisfied that the failure to file the amended plaint within the prescribed timelines was not deliberate, but arose from circumstances beyond the applicants' control.

27. The defendants deposed that they will suffer prejudice, due to the passage of time and the demise of their key witness. This Court notes that while this concern is not without merit, no specific prejudice has been demonstrated that cannot be mitigated by an award of costs. To the contrary, declining to reinstate this suit would permanently shut out the deceased plaintiffs' Estates from ventilating their claim, thereby offending the constitutional imperative under Article 50(1) on the right to a fair hearing.

28. In the circumstances, this Court finds that the plaintiffs have made out a case to warrant reinstatement of their suit for hearing and determination on merits.

Whether the Orders of 12th April 2024 should be varied and/or set aside, and for the time granted to the plaintiffs to file and serve an amended plaint to be enlarged to 31 days, from 12th April 2024.

29. The plaintiffs seek an extension of time up to 31 days from 12th April 2024 to file and serve an amended plaint, and for the amended plaint filed and served on 14th May 2024 to be deemed as being properly on record. They contended that their failure to comply with this Court's directions issued on 12th April 2024 was not deliberate but as a result of a temporary loss of contact with the Administrators of the deceased plaintiffs' Estates and a widespread internet outage across the country.

30. The defendant on the other hand averred that the personal representatives of the plaintiffs' Estates have repeatedly been indulged by this Court to regularize these proceedings by substituting the plaintiffs with their personal representatives and filing an amended plaint, but have consistently failed to comply with the Court's Orders within the stipulated timelines.

31. The Court's discretion to extend time is derived from the provisions of Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules, 2010. The letter states: -

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by Order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be Ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any Order made thereon shall be borne by the parties making such application, unless the court Orders otherwise.”

32. The guiding principles when it comes to extension of time were laid down by the Supreme Court in the case of **Salat v Independent Electoral and Boundaries Commission & 7 others** [2014] KESC 12 (KLR) as hereunder –

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in exercise of such discretion: -

1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

2. ***a party who seeks... extension of time has the burden of laying a basis to the satisfaction of the Court;***
3. ***whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;***
4. ***[where] there is a reasonable [cause] for the delay, the delay should be explained to the satisfaction of the Court;***
5. ***whether there will be any prejudice suffered by the respondents if the extension is granted;***
6. ***whether the application has been brought without undue delay; and,***
7. ***whether in certain cases, like election petitions, public interest should be a consideration for extending time.”***

33. This Court has already found that the one-day delay in filing the amended plaint was minimal, being a single day and it has been satisfactorily explained by production of a press release from the Communications Authority of Kenya informing the public of deep sea fibre cuts on 13th May 2024 affecting internet services in Kenya. I am therefore satisfied that the failure to file the amended plaint within the prescribed timelines was not deliberate, but arose from circumstances beyond the applicants' control. This Court further finds that the first application for extension of time was filed approximately six (6) days after the suit was dismissed, whereas the instant application was filed approximately 20 days from the date when the Ruling dismissing the application dated 20th May 2024 was delivered.

34. Given the Court's finding that the delay in filing the amended plaint was neither inordinate nor inexcusable, and bearing in mind that the delay was only by a day, this Court is satisfied that sufficient cause has been shown to warrant

enlargement of time. Consequently, the amended plaint filed on 14th May 2024 is in the interests of substantive justice, deemed as being properly on record.

35. In the result, this Court finds that the application herein is merited and it is allowed in the following terms: –

- i) I hereby reinstate the dismissed suit, for hearing and determination on its merits;**
- ii) This Court hereby varies the Orders made on 12th April 2024, by enlarging the time granted to the plaintiffs for filing and serving the amended plaint to 31 days from 12th April 2024;**
- iii) The amended plaint filed and served on 14th May 2024 is hereby deemed as being properly on record; and**
- iv) The plaintiffs shall pay the defendants thrown away costs in the sum of Kshs.30,000/= within twenty-one (21) days from today.**

It is so ordered.

DATED, SIGNED and DELIVERED at KIAMBU on this 10th day of APRIL, 2026. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:-

Mr. Mugo for the applicants

Mr. Mutunga h/b for Ms Mercy Musau for the defendants

Ms Julia - Court Assistant