



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELC CIVIL SUIT NO. 13 OF 2019

**CONTEFOUR PROPERTY CONSULTANTS
LIMITED.....PLAINTIFF/RESPON
DENT**

VERSUS

**KAMAU MBUGU.....1ST
DEFENDANT/RESPONDENT**

**PETER MUIGAI KIHARA.....2ND
DEFENDANT/RESPONDENT**

**HOSEA MWANGI KIRAGU.....3RD
DEFENDANT/RESPONDENT**

**DANIEL WANDETO.....4TH
DEFENDANT/RESPONDENT**

CHIEF LANDS REGISTRAR

**CENTRAL REGISTRY-NAIROBI.....5TH
DEFENDANT/RESPONDENT**

RULING

1. This application is brought under Article 159 of the Constitution, Order 51 Rule 1, Order 50 Rule 5, Order 46 Rule 2, and Order 12 Rule 7 of the Civil Procedure Rules, as well as Sections 1A and 3A of the Civil Procedure Act, and all other enabling provisions of the law.

2. The Applicant seeks the following orders:

- 1) Spent.
- 2) **THAT** this Honourable Court be pleased to grant leave to the Applicant to set aside the Court Order dated **8/10/2024** (issued on 23/10/2024) directing that the Notice of Motion dated 7/08/2024 be dismissed for want of prosecution/non-attendance.
- 3) **THAT** the Court be pleased to allow the reinstatement of the aforesaid Notice of Motion Application dated **7/08/2024** for prosecution purposes in the interest of justice.
- 4) **THAT** the Court be pleased to order a stay of execution of the Court Order dated **8/10/2024** pending the hearing and determination of this Application.
- 5) **THAT** this Honourable Court be pleased to make, review, or issue any such further orders as it may deem fit and necessary to safeguard the interests of justice and fairness to the Applicant.
- 6) **THAT** the costs of this application be provided for.

3. The application is based on the annexed Affidavit sworn by **HOSEA MWANGI KIRAGU** and on the following grounds:

- a) The Honourable Court misdirected itself by delivering the Court Order dated 8th October 2024 in the absence of the Applicant/3rd Defendant and the 1st, 4th, and 5th Defendants, despite the Court having

informed Counsel on 8th October 2024 to serve all parties for a hearing scheduled for 14th October 2024.

- b) All parties were duly served as directed by the Court, and an Affidavit of Service was filed on record.
- c) On 11th October 2024, when the matter was mentioned, the Court confirmed that the Application dated 7th August 2024 was fixed for hearing on 14th October 2024.
- d) On 14th October 2024, the Applicant's Counsel logged into the virtual Court link, but the Court system abruptly went off-air without explanation, leaving several Counsels stranded until 1:00 PM with no response from the virtual platform.
- e) The absence of the Applicant on 14/10/2024 was unintentional and occasioned by technological issues emanating from the Thika Land and Environment Court system itself.
- f) The Applicant was previously misled by the 2nd Defendant's Advocate into believing he did not need to participate actively as he was merely a land broker in the transaction.
- g) The Applicant has a meritorious defense to the main suit which he seeks to file out of time to ensure a fair determination of the case.

- h) The Plaintiff's suit discloses no cause of action against the Applicant as his role was strictly limited to brokerage.
- i) The Order dated 8/10/2024 contains apparent errors as it did not allow the Defendants to explain their absence despite their clear interest in prosecuting the 7/10/2024 application.
- j) Re-instatement is necessary to unmask hidden facts and correct uncertainties on the record in the interest of justice.
- k) The Order contravenes the Applicant's constitutional right to be present and to challenge evidence produced against him.
- l) The Court failed to consider the Applicant's consistent interest in the suit, evidenced by the filing of the 7/08/2024 application.
- m) The Order causes extreme prejudice to the Applicant due to factors (technological failure) beyond his personal control.
- n) The Order adversely affects the Applicant's right to realize justice and must be set aside to allow the matter to be heard on its merits.
- o) No prejudice will be suffered by the Plaintiff/Respondent if the orders sought are granted.
- p) This application has been brought expeditiously and it is in the interest of justice that it be allowed.

4. In the Supporting Affidavit, **HOSEA MWANGI KIRAGU**, the Applicant and 3rd Defendant, depones that while the Plaintiff initiated this suit in January 2019, resulting in a Judgment dated 2/11/2023, he and the 1st Defendant were absent throughout the trial. He attributes this non-attendance to being misled by the 2nd Defendant's Advocate, who advised him that as a mere land broker in the transaction, the case did not concern him, leading him to believe he need not participate.
5. The Applicant further depones that the Court misdirected itself by proceeding to Judgment without ascertaining the reasons for his absence, especially since no Statement of Defence had been filed. He maintains that he has a meritorious defense, asserting that the Plaintiff's suit discloses no cause of action against him. He contends that the Judgment and subsequent orders are marred by apparent errors, as he was never served with mention or hearing dates by the Plaintiff, which he argues constitutes a contravention of his constitutional right to be present and challenge evidence.
6. Regarding the dismissal of his previous application dated 7/08/2024, the Applicant explains that on the scheduled hearing date of 14/10/2024, his absence was neither intentional nor malicious. He depones that his Counsel was present on the virtual platform from 9:00 am, but the Court system abruptly went off-air due to technological hitches

emanating from the Thika Environment and Land Court's own system. Despite waiting until 1:00 pm, the connection was not restored.

7. The Applicant depones that he has consistently shown an interest in prosecuting the matter and that the order of 8/10/2024 causes him grave prejudice. He moves the Court to set aside the dismissal and reinstate his application to ensure that justice is not sacrificed at the altar of expedition, but rather that the matter is determined on its merits in adherence to the overriding objectives of the Court.
8. There was no response filed to the Application by any other party and so the Application is unopposed. But be as it may the Court is obligated to satisfy itself that the application is meritorious and supported by a prima facie case, rather than granting it automatically.
9. Further despite the Applicant being given 21 days to file their written submissions to the application on 23/07/2025, by the time of writing this Ruling the Applicant had not filed any submissions. On 3/12/2025 when the matter came up for mention to confirm filing of submissions, the Plaintiff/Respondent informed the Court that they had filed their submissions but the Applicant had not filed theirs and they sought for a Ruling date.
10. I have scanned the CTS and I have not come across any submissions relating to the Application dated 28/01/2025 neither from the Applicant nor the Respondents.

11. I have considered the record of the Court regarding this case.
12. Firstly, I find that this is a very old case filed in 2019. It is 16 years old. It has been handled by four Judges. The Counsel for the 2nd and 3rd Defendants a Mr Njoroge on after the 2nd Defendant testified in Court and he had re-examined Mr Peter Muigai Kihara who testified as DW1, he indicated that it was the close of the 2nd and 3rd Defendant's case.
13. It is therefore not clear at what point the 3rd Defendant considered that he had not presented his case at the hearing. His own Advocate Mr Njoroge participated in the hearing.
14. If I were to take the averment of the 3rd Defendant that he never participated in the hearing. I would add the old adage that Courts have previously held that a case belongs to a party and not to his Advocate. In the instant circumstances if Mr Hosea felt that his Counsel did not present him well he had all since 14/11/2022 when the Advocate closed his case to hire a different Counsel to prosecute his cause.
15. The Applicant, the 3rd Defendant herein, seeks the setting aside of the Court Order dated 8/10/2024 which dismissed his previous application dated 7/08/2024 for want of prosecution, and further seeks the reinstatement of the said application for hearing on its merits. The Applicant

pleads a litany of technological mishaps and claims to have been led astray by the legal Counsel of a co-Defendant.

16. The gravamen of the Applicant's case, as deponed in the Supporting Affidavit of Hosea Mwangi Kiragu, is that his non-attendance on the scheduled hearing date of 14/10/2024 was neither intentional nor malicious. He attributes the default to a total collapse of the Court's virtual link system, a technological hitch he claims was beyond his control. He further laments that the underlying Judgment of 2nd November 2023 was rendered *ex-parte* after he was allegedly misled by a co-Defendant's Counsel.
17. It is noteworthy that this application is unopposed, as the Respondents filed no Replying Affidavit. Furthermore, despite being granted leave to file written submissions, the Applicant failed to do so within the stipulated timelines. The Respondents orally indicated they had filed submissions, yet a fastidious scan of the Court Tracking System (CTS) yields no such records.
18. As already stated even in situations where the applications are unopposed the Court is duty bound to ensure that the claim has been proved on a balance of probabilities, or that the application is merited, regardless of the lack of opposition. In short, an unopposed motion is not automatically granted; the Court must ensure that the Applicant is legally entitled to the orders sought. See the case of **Logistics Link Limited v Yalelo (U) Limited &**

Another (Civil Suit E067 of 2021) [2023] KEHC 27381 (KLR) (14 December 2023) (Ruling).

19. In **Alice Mumbi Nganga vs Danson Chege Nganga & Another (2006) eKLR**. Kimaru J (as he then was) stated thus;

“This Court has unfettered discretion to set aside any order which was entered ex parte. This discretion however, has to be exercised judicially. The Applicant must satisfy this Court that she has good reasons why she failed to attend Court when the said application for dismissal was heard and determined in her absence. In the first place, she cannot blame her Counsel who was then on record for failing to attend Court when the said application was listed for hearing. This Court has ruled in several cases that a civil case once filed, is owned by a litigant not his Advocate. It behoves the litigant to always follow up his case and check its progress. He cannot come to Court and say that he was let down by his Advocate when a decision adverse to him is made by the Court due to lack of diligence on the part of his Advocate. I think it has been ruled by the Court of Appeal that where

an Advocate fails to prosecute a case to the satisfaction of his client then such a litigant has an option of suing such an Advocate for professional negligence. The mistake of Counsel will not, per se, make this Court to exercise its discretion in favour of an aggrieved litigant.”

20. Also see **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002.**

21. In the case of **Peter Kinyari Kihumba vs Gladys Wanjiru Migwi & Another C.A Civil Application No. NAI 121 of 2005 (6/05NYR)** (unreported) Waki J.A, held that;

“With respect, I think the Applicant and his Counsel adopted a casual attitude to this litigation and they have no one but themselves to blame if no further indulgence is extended to them. The plea they made is that this is a land matter, but the simple answer is that even in land matters there must be an end to litigation”

22. In the case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, it was stated thus;

“From past decisions of this Court, it is without doubt that Courts will readily excuse a mistake of Counsel if it affords a

justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of Counsel should not be visited on a client, it should be remembered that Counsel's duty is not limited to his client; he has a corresponding duty to the Court in which he practices and even to the other side."

23. I wholly associate myself with the holding in these decisions.

What is clear is that the Court's discretion is not automatically exercised in favour of a litigant who has been let down by his Advocate.

24. The oxygen principle enshrined under Section 1 A and 1 B of the civil procedure Act are indeed double-edged sword. They cut both ways. Applicant did not attempt to mitigate his situation by tendering evidence when his Advocate apparently failed him.

25. The oxygen principle was meant to breathe life into civil cases so as to have them concluded expeditiously. Allowing the application goes against this principle.

26. The law on setting aside orders of dismissal for non-attendance is well-settled. While the Court exercises a wide discretion under Order 12 Rule 7, such discretion is judicial and must be exercised on sound principles. As the **Supreme**

Court of Kenya held in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, the overriding objective (Oxygen Principle) is to facilitate the just, expeditious, and cost-effective determination of disputes. However, this is not a panacea for professional negligence or a license for procedural laxity. The Supreme Court laid down the bedrock principles for the exercise of such discretion, emphasizing that:

"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."

27. A fastidious examination of the record reveals a disturbing pattern of perennial lethargy and procedural indolence on the part of the Applicant. By his own admission, the Applicant sat idly by from the inception of the suit in 2019 until a Judgment was rendered in November 2023. His excuse is that he was advised by a co-Defendant's Advocate not to attend is not only legally tenuous but an affront to the diligence expected of a party to litigation. In **Black's Law Dictionary (11th Ed.)**, the *maxim Vigilantibus et non dormientibus jura subveniunt* is a Latin legal maxim meaning the law assists those who are vigilant, not those who sleep over their rights. It emphasizes that legal remedies are for proactive individuals who pursue their rights in a timely manner, rather than those who neglect their legal interests

the laws aid those who are vigilant, not those who sleep upon their rights is the standard by which such conduct must be measured.

28. The Applicant's behavior did not improve post-judgment. After filing the application of 7/08/2024, he failed to attend Court on the scheduled date, citing a system collapse. While this Court acknowledges that technological hitches can occur, it cannot ignore the fact that the Applicant failed to file any written submissions even after being granted 21 days to do so on 23/07/2025. To date, the CTS remains devoid of any effort by the Applicant to comply with the Court's directions.

29. The Court of Appeal in **Ivita v Kyalo [1984] KLR 441** held that the test for whether a suit should be dismissed for want of prosecution is whether the delay is inexcusable and whether it gives rise to a substantial risk that a fair trial of the issues will not be possible. In the present case, the Applicant's perennial failure to adhere to timelines or even attend proceedings is the very definition of an inexcusable delay.

30. Courts have held and aptly noted that the "Oxygen Principle" contained in **Sections 1A and 3A of the Civil Procedure Act** was never intended to assist a party who is chronically delinquent.

31. There must be an end to litigation. The Plaintiff/Respondent has a judgment in their favor from 2023. To continue

reinstating applications for an Applicant who consistently flouts Court directions and treats judicial timelines as mere suggestions would be to sacrifice the Plaintiff's right to the fruits of their Judgment at the altar of the Applicant's whims. Substantive justice under Article 159 does not mean the wholesale abandonment of procedural order. As held by the Supreme Court in **Raila Odinga & 5 Others v IEBC & 3 Others [2013] eKLR**, procedural rules are the handmaidens of justice, and they must be respected to ensure the orderly administration of the law.

32. I find that the Applicant is a perennial defaulter who has demonstrated a total lack of interest in the expeditious conclusion of this matter. His conduct is an abuse of the Court process. To grant the orders sought would be to encourage a culture of impunity where parties believe they can engage the Court's gears only when it suits them.

33. In the result, the Court finds no merit in the application and makes the following orders:

i) The Notice of Motion dated 28/01/2025 is hereby dismissed in its entirety.

ii) The dismissal order dated 8/10/2024 shall remain in force.

iii) The costs of this application are awarded to the Plaintiff/Respondent.

Orders Accordingly.

**DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA
VIDEOLINK THIS 27TH DAY OF APRIL, 2026.**

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**MOGENI J
JUDGE**

In the presence of:

Mr. Opole holding brief for Ms Muthee for the Plaintiff

Defendant - Absent

Mr. Melita - Court Assistant

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**MOGENI J
JUDGE**