REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CAUSE NO. 38 OF 2018

(FORMERLY ELDORET ENVIRONMENT & LAND COURT CASE NO. 428 OF 2015)

KIBIRECH ARAP CHEMIRON…….....1ST PLAINTIFF/APPLICANT
NICHOLAS KIPCHIRCHIR CHEMIRON……2ND PLAINTIFF/APPLICANT

VERSUS

CO-OPERATIVE BANK KENYA LIMITED.....DEFENDANT

RULING

1. The Application the subject of this Ruling is the Plaintiffs' Notice of Motion dated 30/09/2025 filed through **Messrs Kenei & Associates Advocates, LLP**. The Application basically seeks reinstatement of this suit which I dismissed on 15/07/2025 for non-attendance.

2. The Application is supported by the Affidavit sworn by the 2nd Plaintiff who deponed that although the further hearing of the suit was fixed for 15/07/2025, their Counsel inadvertently diarized the date as 15/09/2025 and informed the Defendants of this wrong date. He deponed that this was the reason for their non-attendance on 15/07/2025, and contended further that it is when they attended on 15/09/2025 as advised by their Counsel that they were referred to the Court Registry for inquiry. He deponed that it however took the Registry about a week to trace the file, and it was therefore only on 22/09/2025 that their Counsel, upon accessing the file, learnt of the dismissal of the suit. He contended further that under the above circumstances, the dismissal was due to an inadvertent mistake for which the clients should not be penalized, that the Court should take cognisance of the fact that making a wrong entry in a diary is a conceivable human error hence excusable when weighed against the fundamental right to be heard, and that there would be no logical reason why the Plaintiffs would abandon the case after much effort and the time that had been drained into it. He also implored the Court to note that he has been attending Court zealously hence there can be no indolence on his part. He made further similar statements, and then averred that the 1st Plaintiff is a sickly senior citizen aged about 100 years hence the need to fast-track the matter, that the dismissal has opened the window for the sale of their properties, which illegal sale will cause feuds within their families, and cause irreparable harm. He also deponed that the Application

was filed without delay noting that they only discovered the dismissal on 22/09/2025, barely 8 days earlier.

3. The Application is opposed by the Defendant by way of the Replying Affidavit filed through **Messrs KOMM Advocates**, sworn on 27/10/2025 by one **Zedekiah Ombajo**, who introduced himself as a Business Banker at the Defendant. He deponed that the Plaintiffs have had no interest in prosecuting the suit claiming that the Plaintiffs have embarked on a spree of causing unnecessary adjournments totalling to 17 adjournments so far. He referred to several successive letters written to their Advocates by the Plaintiffs' Advocates close to hearing dates and seeking adjournments on several dates on various grounds such as that their witnesses were sick. Regarding the non-attendance on 15/07/2025 when the suit was dismissed, he referred to the Affidavit of Service confirming that the Plaintiffs' Advocates were served on 13/06/2025. He also stated that on the said 15/07/2025 when the matter was called out and the Plaintiffs' Counsel did not show up, the Defendant's Counsel took it upon himself to send his clerk to the Plaintiffs' Advocate's office to inform them that the Judge was waiting for them, and that when the Clerk did so, the Plaintiff's Counsel informed him that he would be heading to Court physically in a short while, but that when the Court again called out the file after about 30 minutes, Counsel for the Plaintiffs still did not appear. He also contended that the Plaintiffs have inordinately delayed in filing the Application considering that it was filed 3 months and 7 days after the dismissal.

4. With leave of the Court, the Plaintiffs filed the Further Affidavit sworn by their Counsel, **Mr. Henry Kipkogei Kenei** on 16/12/2025. Counsel refuted the allegation that the Defendant's Advocates' Clerk went to his offices in the morning of 15/07/2025 to inform them that the Judge was waiting for him in Court, and he pointed out that the Advocate whom the Clerk is alleged to have spoken to is not even revealed. Regarding the delay to prosecute the suit, he deponed that the same was initially caused by the fact that the parties were engaged in out of Court settlement discussions. Regarding the 1st Plaintiff's poor health, he deponed that this is a matter beyond human control. In the end, he deponed that the Court is bound, under **Article 48** and **50** of the **Constitution** to grant any party an opportunity to be heard and should not unnecessarily drive a party away from the seat of justice

5. Considering the straight-forwardness of the Application, Counsels agreed with the Court that there would be no need to file written Submissions.

Determination

6. The issue herein is "**whether this suit, dismissed for non-attendance, should be reinstated**".

7. The Court possesses a wide discretion in determining whether to allow an application for setting aside of an order dismissing a suit for non-attendance. This discretion must however be exercised judiciously as was stated in the case of **Shah vs Mbogo (1979) EA 116** as follows:

> **"..... this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."**

8. For the Court to exercise its discretion in favour of an Applicant, it must therefore be satisfied that there is "***sufficient cause***" to warrant reinstatement, which term was explained by **Musinga, JA** in the case of **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (UR)**, in the following terms:

> **"28**. "**Sufficient cause**" or "**good cause**" in law means:
>
> ***"….. the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused".*** *See* ***BLACK'S LAW DICTIONARY****,* ***9th Edition****,* ***page 251.***
>
> **Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."**

9. In this case, the Plaintiffs attribute blame for their non-attendance on 15/07/2025 when the suit was dismissed, to their Counsel whom it is alleged, inadvertently mis-diarized the correct date.

10. In respect to this nature of "excuse", **Kimaru, J** (**as he then was**), in the case of **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCC No. 397 of 2002**, 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. ……..."**

11. The background to the dismissal is that this suit was filed in 2015 to challenge the Defendant's move to exercise its statutory power of sale by auctioning the Plaintiff's 3 parcels of land in recovery of loans advanced to the Plaintiffs. The suit was filed at the **Environment & Land Court (ELC)** which then possessed jurisdiction to determine it, before it was subsequently transferred to this Court after new developments on jurisprudence on jurisdiction. The trial of the suit eventually commenced before me on 29/05/2025, 10 years after it was filed, on which date, in the absence of the 1st Plaintiff who was said to be unwell, the 2nd Plaintiff testified as **PW1** and concluded his testimony. I then fixed the suit for further hearing for 29/05/2025. On 29/05/2025 however, neither the Plaintiffs nor their Counsels attended Court but the Defendant's Counsel attended. Although the Defendant's Counsel confirmed his readiness to proceed, I adjourned the hearing as the Court was engaged in the Service Week for Succession cases. I therefore rescheduled the further hearing to 15/07/2025, on which date however, again, neither the Plaintiffs nor their Counsel attended Court.

12. When the Plaintiffs did not appear in Court on 15/07/2025 as aforesaid, the Defendant's Counsel informed the Court that such non-attendance was despite his office having served the Plaintiffs' Advocates, and he also brought it to the Court's attention that the Plaintiffs had been enjoying interim orders of injunction for 10 years. It is then that he applied for dismissal of the suit, and it is upon perusing the Court file and considering the history thereof that I agreed and dismissed the suit for non-attendance. The Plaintiffs cannot therefore be heard to allege that the dismissal was made capriciously or without proper exercise of discretion.

13. Indeed, it is true that since I took over presiding over this case in March 2023, the Plaintiffs and/or their Advocates have not given me the impression that they have been keen to prosecute the suit timeously. From the record, it is evident that the Plaintiffs have consistently looked for the slightest excuse to have the hearing adjourned. It is also evident that, rather than the Plaintiffs, it is the Defendant's Advocates who have been regularly going out of their way to take out mention and hearing dates. In fact, the hearing that eventually conducted on 27/03/2025 simply took off because I had, on previous dates, put my foot down and threatened to dismiss the suit for want of prosecution should the Plaintiffs fail to avail a witness. Coupled with the fact that the Plaintiffs have been enjoying interim injunctive orders since 2015, there is justification in accusing the Plaintiffs of abuse of the Court process.

14. Despite the above however, and strictly in the interest of justice, I am prepared to give the Plaintiffs the benefit of doubt on their allegation that the reason they failed to attend Court on 15/07/2026 was because their Advocates mis-diarized the hearing date and therefore communicated to them the wrong date. Although I agree that a case belongs to litigants, not to their Advocates, and that litigants have the obligation to follow-up and ensure progress and/or prosecution of their cases, this is one case where inaction by the litigants may be attributable to perhaps ignorance and the client's reliance on their Advocate.

15. In the case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040**, **Apaloo, J.A.** (**as he then was**), held as follows:

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."**

16. Further, the Court of Appeal, in the case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, held that:

> **"22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."**

17. Similarly, the Court of Appeal, in the case of **CMC Holdings Ltd vs James Mumo Nzioka (2004) KLR 173**, guided as follows:

> **"The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."**

18. Lastly, **C.B. Madan, JA** (**as he then was**) in the case of **Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38**, pronounced himself in the following manner:

> **"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule."**

19. Applying the above principles, while I cannot excuse the Plaintiffs' omissions and evident deliberate conduct meant to delay the determination of this matter, the nature of the dispute and the broad equity approach, justifies reinstatement of the suit. This is therefore one case where I find it apt to apply the principle that a litigant should not always be made to suffer for the mistakes of his Advocate. I believe the omission can be put right by payment of costs. I will however not reinstate the interlocutory orders of

injunction earlier granted to the Plaintiffs in this matter.

Final Orders

20. In view of the foregoing, I order as follows:

i) The Plaintiffs' Notice of Motion dated 30/09/2025 is hereby allowed.

ii) The consequently, the orders made herein on 15/07/2025 dismissing this suit for non-attendance, is hereby set aside, and the same is reinstated to be heard and determined on merits. The suit shall therefore be mentioned before the incoming Judge (now that I have proceeded on transfer) for fixing of a date for further hearing of the Plaintiff's case.

iii) The interim or interlocutory injunctive order earlier in force in this matter is not however reinstated.

iv) I award thrown away costs of the Application to the Defendant which I assess at a sum of Kshs 35,000/-, to be paid by the Plaintiffs within a period of 45 days. The order reinstating the suit shall lapse and stand vacated should the Plaintiffs fail to comply with this condition.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Chelogoi for the Plaintiffs-Applicants

Mr. Onyango for the Defendant

Court Assistant: Brian Kimathi