REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ELC ORIGINATING SUMMONS NO. 6 OF 2024

(FORMERLY NAKURU ELC ORIGINATING SUMMONS E001 OF 2023)

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND REFERENCE NUMBERS: 10855/5, 10855/6, 10855/7, 10855/8, 10855/9, 10855/10, 10855/11, 10855/12, 10855/13, 10855/14, 10855/15, 10855/16, 10855/17, 10855/18, 10855/19, 10855/10, 10855/21, 10855/22, 10855/23, 10855/24, 10855/25 7 10855/26.

BETWEEN

TOMMY WAINAINA KAIRO………………………………………………1ST PLAINTIFF
JUDY NJOKI KAIRO……………………………………………………2ND PLAINTIFF
NELLIE WANJIRU KAIRO………………………………………………3RD PLAINTIFF
(Suing as the administrators of the Estate of SIMON THUO KAIRO - Deceased)

VERSUS

ABERDARE ESTATES LIMITED……………………………………… DEFENDANT

RULING.

1. Before me for determination is the Plaintiffs’ undated Application by way of a Notice of Motion, brought under the provisions of Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, & 3A of the Civil Procedure Act, Article 50(1) and 159(2) of the Constitution of Kenya 2010, and all other enabling provisions of the law, in which the Plaintiffs have sought the setting aside of the orders dated 14th July 2025 that dismissed their suit for want of prosecution, so that the suit can be reinstated and listed for hearing on the merits.

2. The Application was supported by the grounds set out therein, as well as the Supporting Affidavit of even date, sworn by Tommy Wainaina Kairo, the 1st Plaintiff herein, who deponed that it had recently come to their attention that their Suit had been dismissed on 14th July, 2025, for want of prosecution. He explained that, over the life of the Suit herein, the Plaintiffs had been represented by various law firms. Unfortunately, these representations had resulted in several lapses, miscommunications, confusion, and injustice, contrary to their core intent.
3. They instructed the law firm of M/s Willy Maina & Co. Advocates to enter appearance and replace the previously involved firms, M/s Githui & Co. Advocates and M/s Kennedy Kangethe & Mwaniki Co. Advocates. Their review of the Court's records revealed that on 9th June 2025, when the hearing was scheduled for 14th July 2025, Advocate Willy Maina was present and informed the Court he had instructions to appear on behalf of the Plaintiff. He also requested additional time to formalise the appointment.
4. That, unfortunately, owing to differences between the Plaintiffs and their former Advocates, they had not been informed of what had transpired in Court on 9th June 2025 or of the next date that had been issued by the Court. They then decided to act in person, only to discover that the suit had been dismissed on 14th July 2025 without their knowledge.
5. That they are desirous of being heard on merit, hence they were imploring the Honourable Court to give them an opportunity to prosecute their case on merit. That their former Advocates' lapses and mistakes should not be the basis for them being driven away from the seat of justice; hence it would only be fair and in the interests of justice for the instant suit to be heard on merit.
6. Reinstating the suit and granting the parties a chance to be heard on the merits would not prejudice the Defendant. Conversely, the Plaintiff would suffer great prejudice if denied this opportunity. He therefore requested that the current application be granted as prayed.

7. In response, the Defendant filed its Grounds of Opposition dated 28th January 2026 opposing the Plaintiffs' Application on the following grounds:
   i. The Applicant had filed an application for reinstatement of the instant suit on the 4th December 2024, which was allowed by the Honourable court despite their opposition.
   ii. That the application does not meet the threshold for grant of the orders sought, having failed to prosecute the case after the reinstatement.
   iii. The Applicants had an ulterior motive, and their actions are inconsistent with proper legal procedure, thus seeking to frustrate the integrity of the justice system.
   iv. That equity aids the vigilant but not the indolent, and the Applicants do not deserve the favour of this Court's discretion.
   v. That the application lacks merit, is frivolous, vexatious and should be dismissed with costs.
   vi. That the application is embarrassing and is an abuse of the process of the court.
8. Directions were issued for the disposal of the undated Application herein by way of written submissions. In their submissions dated 2nd March, 2026, in support of their Notice of Motion, the Plaintiffs/Applicants first summarised the factual background of the matter and the contents of their Supporting Affidavit, and prayed that the present Application be heard on its merits.
9. They stated that whereas the instant Application had been filed on 16th January, 2026, despite dating the Supporting Affidavit 18th December, 2025, they had erroneously failed to date the accompanying Notice of Motion which was not fatal but was curable under Order 51 Rule 10(2) of the Civil Procedure Rules. They placed reliance on the Court of Appeal's decision in the case of **Kimani v Mbogo & another (Civil Application**

E369 of 2021) [2022] KECA 147 (KLR) (18 February 2022) (Ruling).

10. That in any event, the instant Application has been brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and that the collective effect of the aforementioned provisions was to invoke the inherent power of the court and call on it to do justice in the circumstances an not to drive them away from the seat of justice on account of the aforementioned regrettable error. They submitted that their Application dated 18th December, 2025, was filed on 16th January, 2026, due to their unsuccessful attempt to be mapped on the Courts e-filing platform and the intervening Christmas recess.

11. The Applicants argued that the Court has the discretion to set aside its orders as provided for under Order 12, Rule 7 of the Civil Procedure Rules. The primary goal was to ensure justice for all parties involved, a goal supported by the case of **Joswa Kenyatta v Civicon Limited [2020] eKLR**, which cited the Court of Appeal of East Africa's decision in **Shah v Mbogo & Another [1967] EA 116.**

12. The Plaintiffs argued that there was sufficient reason for the Court to exercise its discretion in their favour, citing the Court of Appeal of Tanzania's decision in **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government & others, Civil Appeal No. 147 of 2006,** which was referenced in **Wachira Karani v. Bildad Wachira [2016] eKLR**. In that case, the Court discussed what constitutes sufficient cause for a party's failure to attend court on 14th July 2025, which led to the dismissal of the suit for want of prosecution. They also reaffirmed the contents of their Supporting Affidavit, explaining changes in their representations since the case began and clarifying the misunderstanding with their former Advocate on record that left them unaware of the hearing date.

13. They submitted that the Court's primary duty is to do justice to the parties involved and relied on the decision in **Wachira Karani's** case

(supra) to argue that, in exercising its discretion, the Court must do so in a way that avoids causing injustice to the Applicants. If the Orders dismissing the current suit for lack of prosecution are not overturned, the Plaintiffs were likely to suffer significant injustice, as they would be denied a hearing on the sensitive land issue. It is well-established law that no party should be condemned without a hearing, as protected by Article 50 of the Constitution. They relied on the decision in **Richard Nchapi Leiyagu v IEBC & 2 others [2013] eKLR.**

14. That no prejudice or injustice would be suffered by the Respondent if the Court were to accord them (Applicants) their constitutional right to a hearing and fair trial.

15. In conclusion, they relied on the decided case of **Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040,** where Apalo, J.A. (as he then was) held that blunders will continue to be made from time to time, and that it does not follow that, because a mistake has been made, a party should suffer the penalty of not having his case heard on the merits. They prayed that their Application be allowed as prayed.

16. The Defendant/Respondent, on the other hand, in its submissions dated 3rd March, 2026, in opposition to the Plaintiffs/Applicants' Application, framed one issue for determination, to wit, whether the application for reinstatement is merited. It first narrated the events that had led to the dismissal of the instant suit for non-attendance, the reinstatement of the same, and the dismissal of the reinstated suit on 14th July 2025 for want of prosecution. It then submitted that the Plaintiffs had now filed the undated motion seeking a second reinstatement of the instant suit unprocedurally and without filing a Notice of intention to act in person.

17. It placed reliance on the provisions of Order 9 of the Civil Procedure Rules which provides that where a party is represented by an advocate and wishes to act in person, that party must file a Notice of intention to act in person and that if the said party acting in person without the Notice

of Intention files documents or pleadings, those pleadings and or documents would be unlawful and ought to be expunged from the record. That whereas the firm of Willy Maina & Co. Advocates had come on record replacing the firm of Githui and Kangethe Advocates during the direction regarding the motion herein, the current Advocate acting for the Plaintiffs could not inherit the present application, which was unprocedurally on the court record. It was thus its submission that the undated Notice of Motion herein should be struck out with costs to the Defendant/Respondent.

18. However, in the event that the court is not persuaded to strike out the Notice of Motion, it submitted that the Notice of Motion lacks merit. That, because the orders sought by the Plaintiffs are discretionary, the burden lies with the Plaintiffs to show sufficient cause for the court to exercise its discretion for the second time to reinstate the suit. That the provisions under which the motion was brought, including Article 159 of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act, are underpinned by the conclusion of matters in a timely manner and place a duty on the court, the Advocate and the Litigants to ensure that matters are concluded expeditiously without unreasonable delay.

19. It is trite law that a case belongs to the litigants and not to the Advocates acting on their behalf. Subsequently, a litigant has a duty to pursue the prosecution of his case, yet in the present case it is apparent that the Plaintiffs had been very indolent. Indeed, the Plaintiffs themselves had never appeared before the court either during the mentions or the hearings. They were absent on the hearing date despite having knowledge that the hearing was taking place in open court. They had clearly demonstrated a pattern of ignorance and negligence; thus, the instant motion should be denied. They did not take seriously the seriousness with which the court had treated the matter when it reinstated the suit for the first time.

20. It was its submission that every suit must come to an end and that litigants cannot be in court to and fro forever. It thus sought that the court

invoke the principle of finality and deny the motion. It submitted that while the court may be lenient, gross negligence on the part of the advocate should lead to the dismissal of the second reinstatement application. Reliance was placed on the decided case of **Wafula –vs- Wepukhulu & 5 others in Bungoma Civil Suit No. 55 of 2010.**

21. It prayed that the costs in any event be awarded to the Respondent.

Determination.

22. I have considered the Applicants' undated application herein, which seeks the setting aside of the orders of the court dismissing the instant suit for want of prosecution, so that the suit may be reinstated and set for hearing on the merits. I have also considered the Defendant/Respondent's Grounds of Opposition, the submissions, the authorities cited and the applicable law.

23. One of the Respondent's Grounds of Opposition is that the Applicants have an ulterior motive and that their actions are inconsistent with proper legal procedure, thereby seeking to frustrate the integrity of the justice system. The Respondent has not expounded on the said proper procedure in its Grounds of Opposition but has alluded to it in its Submissions. Whilst I am aware that submissions are not pleadings, to save precious judicial time, it is prudent that, before I consider the merits and/or demerits of the application, a determination be made as to whether the Plaintiffs, first acting in person at the time of filing the instant Application and now represented by the firm of M/S Karuga & Company Advocates, are properly on record, given that the instant suit had been dismissed for want of prosecution, meaning that there was no active suit.

24. Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

> *"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or*

intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be"

25. It is evident therefore that the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates or for a party to act in person **after judgment** has been entered to be affected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.

26. It is well established that the Plaintiffs/Applicants' case was dismissed due to lack of prosecution, as neither the Plaintiffs nor their counsel appeared when the matter was scheduled for hearing on 14th July 2025, despite the date being agreed upon by the parties' counsel. I have considered whether such a dismissal for want of prosecution qualifies as a judgment for the purpose of applying Order 9 Rule 9 of the Civil Procedure Rules.

27. Indeed, in the case of **Njue Ngai v Ephantus Njiru Ngai & another [2016] KECA 805 (KLR),** the Court of Appeal sitting in Njeri had at paragraph 18 observed as follows:

"Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of ***Peter***

Ngome vs Plantex Company Limited [1983] eKLR. *stating:*

"Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The Civil Procedure Act does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:

"Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."

Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See

Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8." [Emphasis added].

28. Predicated on the fact that the dismissal of the suit for want of prosecution culminated in the Judgment of the Court, it was incumbent upon the Plaintiffs/Applicants to first seek and procure leave of the court prior to filing the Notice of Intention to act in person and before filing the substantive Application herein seeking to set aside the dismissal order. The reasoning behind the provision was well articulated in the case of **S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR** where the judge had observed as follows:

"…In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him…."

29. In the case of **Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR** the Court held as follows:

"A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."

30. The court went further to quote with approval the holding by Hon. Sitati Judge, in **Monica Moraa –vs- Kenindia Assurance Co. Ltd. [2010] eKLR** where the court held as follows:

> *"……there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the Applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached………"*

31. In the present case, the Plaintiffs/Applicants herein had been represented by the firm of M/S Willy Maina & Co. Advocates, which came on record, replacing the firm of M/S Githui and Kangethe Advocates, and M/S Koech Advocate, on 9th June 2025, when a hearing date had been set for 14th July 2025 by consent of the parties' advocates. When the matter came up for hearing on 14th July 2025, there was no representative on the part of the Plaintiffs/Applicants and/or their advocate; thus, the instant suit was dismissed for want of prosecution pursuant to the provisions of Order 12 Rule 3 of the Civil Procedure Rules.

32. Having been dismissed, the instant suit culminated in a judgment, and the provision of Order 9 Rule 9 of the Civil Procedure Rules then became applicable. Subsequently, the correct procedure in the present case was that the Plaintiffs ought to have sought leave of the court to act in person,

then filed and served the Notice of the Intention to Act in Person before filing the application seeking the orders stated above.

33. Instead, the Plaintiffs/Applicants, without leave of the Court, filed their Undated Notice of Motion herein seeking to have the court set aside its dismissal order and reinstate the instant suit to be heard and determined on the merits, which clearly offends the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

34. I have perused the record and found that indeed, on 4th February 2026, upon the Court being informed that the instant undated Application had been filed by the Plaintiffs, the court had noted that there was a counsel who sought to come on record for the Plaintiffs but was yet to file their notice. Subsequently, in the spirit of a fair hearing, the Plaintiffs were granted a 7-day leave to put their house in order, during which the matter was slated for directions on the said undated application.

35. Interestingly, when the matter had come up for mention for purposes of direction on 16th February 2025, the Plaintiffs' current advocates on record, Mr. Waiganjo of M/S Karuga & Co. Advocates had acknowledged that there was a pending undated application that had been filed on 16th January 2026 by the Plaintiffs who had been acting in person and sought that the same be disposed of by way of written statement. That neither the Plaintiffs nor their current Advocate had sought to regularize the representation prior to the filing of the undated Notice of Motion herein.

36. I am in agreement with the Defendant/Respondent's submissions that the current Advocate acting for the Plaintiffs could not inherit the present application, which was unprocedurally on the court record, even if he had come on record procedurally. I am persuaded by the holding of Hon. Justice Oguttu Mboya in the case of **Mwangi v Ndungi & another; Wambui & 2 others (Interested Parties) (Cause 240 of 2017) [2022] KEELC 15576 (KLR) (10 November 2022) (Ruling)** where he observed as hereinunder at paragraphs 43 to 48:

"43. Secondly, it is not lost on the Honourable court that the substantive Application seeking variation and setting aside of the dismissal orders was filed and lodged before the court on July 20, 2022. ***Clearly, same was lodged and filed before leave was procured and obtained.***

44. Without Leave having been procured and obtained, it is common knowledge that the impugned Application could not have been filed. ***For clarity, the procurement of leave was a pre-condition to the filing of the substantive Application.***

45. In any event, it is also imperative to state that leave having been procured and obtained on the 18th of October 2022, ***same cannot operate retrospectively and retroactively, to validate an Application that was (sic) filed on the 20th of July 2022.***

46. In a nutshell, I come to the conclusion that the current advocates for the Plaintiff/Applicant did not file the requisite legal document to confer upon same the legal capacity to act for and on behalf of the Plaintiff/Applicant….

48. Consequently and in the premises, ***the Application dated July 20, 2022 was stillborn and nullity ab initio." [Emphasis added].***

37. That whereas the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice or to act in person, it does set out the procedure to be adhered to when a party wants to change Counsel after judgment has been delivered so as to avert any undercutting and/or chaos more so like in the present case where the Plaintiffs have left a trail of Advocates. Thus, a party so wishing to change its counsel or act in person after judgment had been passed must notify the Court and other parties.

38. Although the Applicants have a Constitutional right to be represented or act in person, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 of the Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality.

39. Having found that the procedure envisaged above was not followed by the Plaintiffs, all the pleadings herein filed by the Plaintiffs acting in person ought to and are hereby struck out. The fact that the Plaintiffs are now represented by the firm of M/S Karuga & Co. Advocates does not cure the defect, since the Plaintiffs/Applicants' new advocates were aware of the necessity and legal requirement to seek and obtain leave of the court.

40. Consequently, and in the absence of the leave of court as provided by the law, the application by undated Notice of Motion filed by the Plaintiffs is hereby struck out with costs to the Respondent.

Dated and delivered via Microsoft Teams at Naivasha this 30th day of April 2026.

M.C. OUNDO

ENVIRONMENT & LAND COURT – JUDGE