

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO. E108 OF 2022

ABDILLE ABDIAZIZ

SABRIYE.....PLAINTIFF

VERSUS

LUMUMBA MWAU NDOLO.....1st

DEFENDANT

ABDULLAHI IBRAHIM NUNI.....2nd

DEFENDANT

NUNI GENERAL TRADING COMPANY.....3rd

DEFENDANT

HUSSEIN IBRAHIM NUNI.....4th

DEFENDANT

JOSEPH NGUI MWAU NDOLO.....5th

DEFENDANT

RULING

Background

1. Before the court for determination is the Plaintiff/Applicant's Notice of Motion dated 29th October, 2025 brought pursuant to the provisions of **Article 159, 2(d)** of the **Constitution**, **Sections 1A,1B** and **3A** of the **Civil Procedure Act**, and **Order 12 Rule 6 (1)** and 7 of the **Civil Procedure Rules** seeking the following reliefs:

i. Spent

ii. THAT this Honourable Court invokes its inherent power in the interest of substantive

justice and reinstates the suit and have the matter set down for hearing forthwith.

iii. THAT this honorable court do set aside the order issued on 12th March, 2025 and reinstate the suit for hearing and determination on merit.

iv. THAT the costs of this application be in the cause.

2. The Motion is supported by the affidavit of Abdille Abdiaziz Sabriye, the Plaintiff/Applicant of an even date. He deponed that he instituted the present suit in 2022 as against the Defendants/Respondents; that the same was however dismissed for want of prosecution on 12th March, 2025; that prior to its dismissal, neither he nor his advocates had been served with a hearing notice and that they were at the time exploring a possibility of settling the matter out of court.
3. According to Mr. Sabriye, he fell ill and, as a result, his condition affected both his attendance in court and his ability to issue instructions to his advocates on record. He stated that he and his advocates only became aware of the dismissal of the suit through the Judiciary's e-filing system after the fact. He averred that he stands to suffer substantial loss unless the suit is reinstated and that its reinstatement, he urged would safeguard his interests.

4. The 1st Defendant/Respondent, Lumumba Mwau Ndolo filed a replying affidavit on the 5th day of November 2025. He deponed that the application is frivolous, vexatious, incompetent, and an abuse of the process of the court. He explained that the suit was filed in March 2022 but had remained dormant for extended periods without any meaningful effort by the Applicant to prosecute it, despite numerous mentions and directions by the court.
5. He stated that on 12th March 2025, when the matter came up for hearing, neither the Applicant nor his advocate attended court, leading to the dismissal of the suit for want of prosecution and that contrary to the Applicant's contention, the hearing date had been taken in open court and was duly reflected in both the Court Tracking System (CTS) and the Judiciary e-Filing portal, both of which were accessible to the parties.
6. He also stated that the Applicant has not produced credible evidence to show that illness prevented him from attending court or instructing counsel, arguing that the medical report annexed to the application is vague, general, and insufficient to demonstrate incapacity throughout the relevant period.
7. He added that, even if the Applicant had been unwell, his advocates remained under a duty to diligently prosecute the matter and attend court, which they failed to do without explanation. He pointed out that the present application was filed more than eight months after the

dismissal of the suit, which delay was both inordinate and unexplained.

- 8.** According to Mr. Ndolo, the alleged negotiations between the parties cannot justify the failure to prosecute the matter, particularly in the absence of any documentary evidence of settlement discussions or a proposed consent.
- 9.** The 1st Defendant further noted that although the Applicant referred to a purported consent letter allegedly signed in September 2024 for the withdrawal of the suit, no such consent was ever adopted by the court or served upon the Respondents; that the Applicant cannot now contradict his earlier position and that the the Applicant has failed to satisfy the principles for reinstatement set out in **Ivita v Kyumbu [1984] KLR 441**.
- 10.** Finally, he urged, reopening the matter after such a long and unjustified delay would defeat the overriding objective under **Sections 1A** and **1B** of the **Civil Procedure Act**, which requires courts to facilitate the just, expeditious, proportionate, and affordable resolution of disputes. He stated that he had since moved on from the litigation but continues to suffer anxiety and uncertainty whenever the Applicant attempts to revive the matter. In his view, litigation must come to an end and that the suit cannot continue to hang over him indefinitely like the proverbial sword of Damocles.
- 11.** In response to the Motion, the 2nd, 3rd and 4th Defendants/Respondents, through the 4th Respondent,

Hussein Ibrahim Nuni swore a replying of affidavit on the 4th day of November 2025. They deponed that the application is a sham, frivolous, and a blatant abuse of the court process and that the Applicant is guilty of inordinate delay in pursuing the present application, given that nearly eight months have elapsed since the suit was dismissed on 12th March 2025.

- 12.** According to Mr. Nuni, the application is tainted with misrepresentation and material non-disclosure; that prior to the filing of the application, the matter had already been fixed for 6th November 2025 for purposes of confirming compliance with directions on the filing of submissions in respect of their bill of costs and for taking a ruling date and that the said date had been taken by consent of the parties.
- 13.** He termed the Applicant's allegations that neither he nor his counsel were aware of the dismissal of the matter on 12th March 2025 as untrue, noting that the court record clearly demonstrates otherwise and that following the dismissal of the matter, they filed a bill of costs dated 7th April 2025 with a taxation notice dated 25th June 2025 were duly served upon the Applicant's Counsel.
- 14.** According to the 2nd Defendant, the court record will show that on the scheduled taxation date of 1st July 2025, Mr. Wanjala, Advocate, appeared holding brief for Mr. Lakicha, Advocate for the Applicant; that Mr. Wanjala sought leave to oppose the bill of costs by way of written submissions,

which leave was granted and that consequently, the Hon. Deputy Registrar directed that the matter be mentioned on 20th August 2025 to confirm compliance and to take a ruling date.

- 15.** When the matter came up on 20th August 2025 to confirm compliance with the directions issued on 1st July 2025, it was deposed, the Applicant had not complied; that Mr. Wanjala again appeared holding brief for Mr. Lakicha and sought further time to comply, which request was granted and that the matter was then fixed for mention on 6th November 2025, to confirm compliance.
- 16.** It was contended that the present application was filed only eight days before the scheduled mention of 6th November 2025, with the sole intention of derailing the taxation proceedings and pre-empting the scheduled court appearance.
- 17.** It was contended by the 2nd Defendant that prior to the dismissal of the matter on 12th March 2025, the suit had come up for hearing and/or mention on several occasions without any appearance by either the Applicant or his counsel.
- 18.** Mr. Nuni reiterated that the alleged medical report does not indicate anywhere that the Applicant was ailing as at 12th March 2025 or on any other date that this matter was scheduled for hearing and that there is no explanation as to why the Applicant's counsel was perpetually absent on

the various dates that this matter was scheduled for hearing/mention despite having been served.

- 19.** He further stated, on the advice of counsel, that the Applicant's advocates had never written to their advocates seeking withdrawal or compromise of the matter in the manner alleged by the Applicant. He maintained that the letter annexed to the application was a fabrication and added that, if the Applicant genuinely intended to withdraw the suit, nothing prevented him from filing a formal notice of withdrawal.
- 20.** He pointed out that the Applicant, through his present advocates, had appeared and sought leave to respond to the pending bill of costs, which clearly demonstrated that he had long been aware of the dismissal of the suit.
- 21.** In his view, the Applicant instituted the suit not with any intention of prosecuting it to conclusion, but rather with the sole aim of delaying and/or derailing the taxation process and postponing the final resolution of the matter. He therefore contended that the interests of justice and fairness warrant the dismissal of the suit.
- 22.** The Applicant filed a supplementary affidavit on 1st December 2025, in which he deponed that his health condition has remained unstable throughout and has greatly affected his ability to issue instructions to his advocates on record.

- 23.** He explained that the delay in concluding the matter cannot be attributed solely to him, as it was also occasioned by the numerous interlocutory applications filed by all the parties, which had to be determined before the main suit could proceed.
- 24.** According to the Plaintiff, the court record reflects at least five such applications, namely those dated 21st March 2022, 23rd June 2022, 17th November 2022, 14th December 2022, and 25th January 2023. He added that, although the suit was filed in March 2022, the deponent of the first affidavit only came on record on 9th November 2022, more than eight months later.
- 25.** He further stated that the other parties were fully aware of his medical condition, as the same had been communicated to them by his former advocates through a letter dated 11th June 2024, which had also been copied to the court. He explained that his advocates could only effectively represent him if he was able to give them proper instructions, which had been difficult due to his ill health.
- 26.** He added that the parties had been engaged in negotiations aimed at resolving the dispute and that the only outstanding issue was that no consent had yet been formally adopted. In those circumstances, he contended that it would be in the interests of justice to afford the parties more time to pursue an amicable settlement.

27. He further deponed that he visited his advocates' offices on or about 21st October 2025, when he was briefed on the status of the matter and instructed them to file the present application, as he remained keen on prosecuting his case. He reiterated that his medical condition had significantly affected his ability to communicate with his advocates from the time they came on record on 20th August 2024 until his visit in October 2025.
28. He maintained that any failure by his advocates to attend court ought not to be visited upon him, as the circumstances were beyond his control. He added that his advocates informed him that they had never been served with the notices referred to by the Respondents. He therefore urged that the interests of justice and fairness warrant reinstatement of the suit.
29. Both parties filed submissions and a list of authorities which I have considered.

Analysis and Determination

30. Having considered the pleadings and submissions, the sole issue that arises for determination is whether the order issued on 12th March 2025 should be set aside and the suit reinstated.
31. The Civil Procedure Rules outline two primary provisions for the dismissal of suits. **Orders 12** and **17**. **Order 12** deals with attendance at hearings and the consequences of non-attendance. In particular, **Order 12 Rule 3** gives the court power to dismiss a suit where the Plaintiff fails to

attend court on the hearing date, and where the Defendant is present and admits no part of the claim.

- 32. Order 17**, on the other hand, deals with the prosecution of suits and is intended to ensure that matters proceed expeditiously once set down for hearing. Under **Order 17 Rule 1**, adjournments are not to be granted as a matter of course, and a party seeking one must satisfy the court that there is a good reason to do so.
- 33. Rule 2** empowers the court to dismiss a suit where no step has been taken for one year, after issuing notice to show cause, and further provides that a suit stands dismissed automatically after two years of inactivity. The rule also permits dismissal for non-compliance with court directions and allows a party to apply for dismissal.
- 34.** Further, **Rule 3** provides that where parties fail to attend court on a hearing date, the court may proceed in the manner provided under **Order 12** or make any other appropriate order. **Rule 4**, on the other hand, allows the court to proceed with and determine the matter where a party fails to produce evidence, secure witnesses, or take any other step necessary for the further progress of the suit despite having been granted time to do so.
- 35.** Turning to the facts of the present matter, the record shows that on 12th March, 2025, the suit was scheduled for hearing. There was no appearance for the Applicant or his counsel. Counsels for the Respondents urged the court to

dismiss the matter noting that the matter had come up for hearing severally and the Applicant had been granted a last adjournment.

36. The court upon confirming that the Applicant had been duly served with the hearing notice, dismissed the suit for non-attendance and want of prosecution.

37. In view of the foregoing, it is apparent that the decisive factor leading to the dismissal of the suit was the Applicant's absence on the hearing date. The matter therefore falls squarely within the ambit of **Order 12** of the **Civil Procedure Rules**, as read together with **Order 17 Rule 3**.

38. **Order 12, Rule 7** states:

“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.

39. From the wording of **Order 12 Rule 7**, it is evident that the court's power to set aside a dismissal order is discretionary in nature. That discretion must, however, be exercised judiciously and on the basis of the circumstances of each case. As explained by the Court of Appeal of East Africa in **Shah vs Mbogo & Another (1967) EA 116**:

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or

excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

40. More recently, the Court of Appeal in **Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR** stated that:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

41. The court in **Wachira Karani v Bildad Wachira [2016] eKLR** appreciated that the threshold to be met by an Applicant seeking to have the court set aside its orders as aforesaid is the demonstration of sufficient cause.

42. As to what constitutes sufficient cause, the Court of Appeal in **BML v WM [2020] KECA 186 (KLR)** observed that the question depends on the circumstances of each case and calls for the exercise of judicial discretion. The court,

citing **The Hon. Attorney General v The Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** stated that sufficient cause must be rational, plausible, logical, convincing, reasonable, and truthful, and should not leave unexplained gaps in the sequence of events.

43. By way of brief background, the Applicant instituted this suit on the 21st March, 2022 seeking *inter-alia* permanent injunctive reliefs restraining the Respondents from any interference with Block 36/133 situate in Eastleigh, 1st Avenue, 5th Street, Nairobi County (the *suit property*), general damages for emotional stress and trauma, general damages for trespass.
44. Simultaneously with the Plaint, the Applicant filed an application seeking injunctive orders. Thereafter, several other interlocutory applications were filed and canvassed by the parties until sometime in 2024, when the matter came up for pre-trial directions to confirm readiness for hearing. In that regard, on 6th February 2024, the court granted the parties who had not complied with the pre-trial requirements additional time within which to do so.
45. The matter was next in court on 3rd September, 2024 wherein the hearing was scheduled for 20th November, 2024. On this date, there was no appearance by the Applicant or his counsel. The court noted that it was granting the Applicant the last opportunity to prosecute his case.

- 46.** The matter was thereafter scheduled for 4th December 2024. On that date, there was no appearance by the Applicant. However, the court noted that the Applicant had not been served with a hearing notice and directed that the matter be mentioned before the Deputy Registrar on 10th December 2024 for further directions.
- 47.** There was again no appearance by either the Applicant or his counsel on 10th December 2024, and the matter was consequently scheduled for mention before this court on 30th January 2025. Once again, there was no appearance by the Applicant on that date, following which the matter was fixed for hearing on 12th March 2025. On the hearing date of 12th March 2025, the Applicant again failed to attend court, leading to the dismissal of the suit.
- 48.** The Applicant urges the court to reinstate the suit on two principal grounds. First, he contends that neither he nor his advocates were served with the hearing notice preceding the dismissal of the suit. Secondly, he maintains that he had been unwell for a considerable period, which substantially impaired his ability to properly instruct counsel and actively participate in the prosecution of the matter.
- 49.** According to the Applicant, his ill health made it difficult for him to attend court, communicate consistently with his advocates, and obtain the documents necessary to effectively respond to the allegations raised in the suit.

- 50.** In opposition, the 1st to 4th Respondents maintain that the Applicant has at all times been duly served with the relevant hearing and mention notices, including the date when the matter was dismissed, and that the court record, including affidavits of service, clearly demonstrate this position.
- 51.** They contend that the Applicant's alleged illness has not been substantiated by sufficient medical evidence showing incapacity on the material dates, and in any event does not explain the repeated absence of his advocates despite service.
- 52.** The Respondents further argue that the Applicant had long been aware of the dismissal of the suit, particularly through his participation in the taxation proceedings, and that the present application is merely an afterthought intended to delay the taxation process and the final conclusion of the matter.
- 53.** In an effort to explain the delay, the Applicant relied on a medical report dated 9th October 2025 indicating that he has been on long term psychiatric care for schizoaffective disorder and depression.
- 54.** The report describes the symptoms for his sickness to include forgetfulness, confusion, insomnia, self-isolation, restlessness, poor sleep, and abnormal behaviour, and further notes that he had at one point travelled abroad for neurological assessment and later relocated temporarily to

Tanzania to stay with his brother. It also states that, by September 2025, he had shown some improvement, although he had reportedly run out of medication in the preceding month.

- 55.** The Applicant also annexed correspondence in which his counsel informed the other parties and the court of his condition.
- 56.** The court has carefully considered the evidence and the surrounding circumstances. While it does not doubt that the Applicant may have experienced genuine health challenges, the medical report placed before the court does not satisfactorily account for the entire period of delay, both in the prosecution of the suit generally and in the period between the dismissal of the suit on 12th March 2025 and the filing of the present application on 29th October 2025.
- 57.** The medical report is broad and general in nature and does not provide precise timelines from which the court can determine the exact periods during which the Applicant was incapacitated. Indeed, the report itself indicates that there were periods when his condition improved and he was able to interact with family members, take walks, and function more normally.
- 58.** The Applicant also annexed correspondence showing that, owing to his condition, he had granted a power of attorney to his sister and son to manage his affairs. While this lends

some support to his claim that he experienced health difficulties, it equally undermines the explanation for the prolonged inactivity in the matter. If the Applicant had indeed appointed his sister and son to act on his behalf, no explanation has been given as to why no steps were taken through them to follow up on the suit, issue instructions to counsel, or make inquiries regarding the repeated mention and hearing dates.

- 59.** Further, even if the court were to accept that the delay in bringing the present Motion and the earlier absences leading to the dismissal of the suit were attributable to the Applicant's illness, there remains the undisputed fact that, after the suit had been dismissed, the Applicant's advocates actively participated in the taxation proceedings.
- 60.** On 1st July 2025, when the bill of costs came up for taxation, counsel for the Applicant appeared and sought time to file a response to the bill of costs. On the subsequent mention date of 20th August 2025, counsel again appeared and was granted a further fourteen days within which to file submissions. Thereafter, the taxation matter was fixed for mention on 6th November 2025, but before that date, the present Motion had already been filed.
- 61.** That representation by counsel in the taxation proceedings has not been disputed. It therefore significantly undermines the Applicant's contention that he only

became aware of the dismissal of the suit when he visited his advocates' offices on or about 21st October 2025 and was informed of the progress of the case. In light of the participation by his advocates in the taxation proceedings several months earlier, that explanation cannot be sustained.

- 62.** As regards the Applicant's contention that neither he nor his advocates were served with the hearing notice for 12th March 2025 and the earlier mention dates, the court record contains several affidavits of service sworn by Vincent Maiga, including an affidavit dated 30th January 2025 relating to service of the hearing notice for 12th March 2025. Those affidavits indicate that the Applicant's advocates were duly served with the relevant notices for the various mention and hearing dates.
- 63.** Significantly, beyond the bare denial of service, no specific challenge has been mounted against those affidavits of service. There has been no allegation that the addresses used were incorrect, that the persons served were unknown, or that the affidavits were false, defective, or otherwise unreliable. No application was made to cross-examine the process server, nor was any material placed before the court to rebut the presumption of regularity attaching to the affidavits of service. In the circumstances, the court is satisfied that the Applicant and his advocates were duly served.

64. Ultimately, the court is not persuaded that this is a proper case for the exercise of its discretion in favour of the Applicant. The present Motion appears, at best, to be an afterthought brought only after the Respondents had taken steps towards taxation of their bill of costs.

65. In the end, the Motion dated 29th October, 2025 is found to be unmerited, and the suit stands dismissed. Consequently, the application is dismissed with costs.

Dated, signed and delivered in Nairobi virtually this 30th day of April, 2026.

O. A. Angote
Judge

In the presence of:

Mr. Muchoki for 2nd, 3rd and 4th Defendants

Mr. Wanjala for SC Lakichi for Plaintiff/Applicant

Mr. Siwolo holding brief for Ondieki for 1st Defendant

Court Assistant: Tracy