

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CIVIL CASE NO. 4 OF 2020

BENJAMIN TEMUT KEREMA.....PLAINTIFF/
APPLICANT

VS

MICHAEL KIHAMBILU LUGWILI.....1ST
DEFENDANT/RESPONDENT

JEMI GROUPS OF COMPANIES LTD.....2ND
DEFENDANT/RESPONDENT

LAND REGISTRAR-KAJIADO.....3RD DEFENDANT/RESPONDENT

NATIONAL INDUSTRIAL CREDIT

BANK LIMITED (NIC).....4TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Before this Court for determination is the Notice of Motion application dated 28th January 2026, brought by the Plaintiff/Applicant, Benjamin Temut Kerema.
2. Through the said Motion, the Applicant seeks the intervention of this Honorable Court to grant, inter alia, the following principal orders;

A. THAT the order of this Court issued on 25th February 2025, which dismissed the suit for want of prosecution, be vacated and/or set aside.

B. THAT the suit be reinstated and admitted for hearing and determination on its merits.

C. THAT an order of temporary injunction be issued restraining the Defendants, their servants, agents, or any persons acting under their behest from alienating, selling, disposing of, or in any manner whatsoever interfering with the suit property, namely L.R. No. Kajiado/Kitengela/95834, pending the hearing and determination of the application.

3. The application is premised on the grounds set out on the face of the Motion and is further supported by the annexed affidavits of the Applicant, Benjamin Temut Kerema, and his counsel on record, Mr. Fred Mariaria. The gravamen of the Applicant's case is that the dismissal of the suit was fundamentally flawed, having been occasioned without the requisite service of a Mention Notice or a Notice to Show Cause upon his advocates. It is the Applicant's primary contention that both he and his counsel were entirely oblivious to the proceedings scheduled for 25th February 2025, thereby rendering their non-attendance an inadvertent mistake rather than a deliberate manifestation of indolence or lack of interest in prosecuting the matter.

4. The application is vehemently opposed by the 4th Defendant/Respondent, National Industrial Credit Bank Limited (NIC). In its Replying Affidavit sworn on 16th March 2026 by its counsel, Ms. Irene Mburu, the 4th Defendant urges the Court to dismiss the application with costs, characterizing it as misconceived, devoid of merit, and an egregious abuse of the judicial process.
5. The 4th Defendant avers that its advocates duly effected service of a Mention Notice for 30th January 2025 upon the Applicant's counsel. Consequently, the 4th Defendant posits that the failure by the Applicant and his legal representatives to attend the aforementioned mention, as well as the subsequent Notice to Show Cause proceedings, was both deliberate and inexcusably negligent. It is the 4th Defendant's assertion that the instant application is merely a dilatory tactic, calculated solely to frustrate and delay the bank in the lawful exercise of its statutory power of sale over the charged property.
6. By direction of the Court, the application was canvassed by way of written submissions, which the Court has carefully considered in arriving at this determination.

ISSUES FOR DETERMINATION

7. I have carefully considered the Applicant's Notice of Motion application, the supporting affidavits, the Replying Affidavit sworn on behalf of the 4th Defendant, and the written submissions filed by the respective parties.
8. The singular, overarching issue for determination is whether the Applicant has established sufficient grounds to warrant this Court to exercise its discretion to set aside the order of dismissal made on 25th February 2025 and to reinstate the suit.

ANALYSIS AND DETERMINATION

9. The jurisdiction of this Court to set aside a dismissal order is anchored in the Civil Procedure Rules, 2010. Specifically, Order 12 Rule 7 provides verbatim as follows;

"Where under this Order judgment has been entered or the suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

10. The power to set aside such an order is discretionary. However, it is a well-established tenet of law that judicial discretion must be exercised upon reason and principle, not capriciously or arbitrarily. The guiding principles for the exercise of this discretion were succinctly articulated in the locus classicus case of ***Shah v Mbogo (1967) EA 116***, where Harris, J. stated verbatim:

"This discretion 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."

11. Applying these legal parameters to the factual matrix of this case, the Applicant, through the affidavit of his counsel, Mr. Fred Mariaria, contends that the non-attendance on 25th February 2025 was an inadvertent mistake. He depones that they were not served with the requisite Notice to Show Cause or a Hearing Notice for the date the suit was dismissed. Consequently, the Applicant, relying entirely on his advocates to monitor the case, was kept in the dark and only jolted into action by a Redemption Notice dated 14th January 2026 threatening the auction of his ancestral property.

12. Conversely, the 4th Defendant opposes the application, asserting through Ms. Irene Mburu that the Applicant's counsel was served with a Mention Notice for 30th January

2025, and that the subsequent absence was a deliberate ploy to frustrate the Bank's statutory power of sale.

13. Having weighed these competing factual assertions, I note a glaring gap in the 4th Defendant's case. While the 4th Defendant emphatically depones to having served a Mention Notice for 30th January 2025, no conclusive evidence has been placed before me demonstrating that the Applicant or his advocates were duly served with a specific Hearing Notice or Notice to Show Cause for the actual date of dismissal, being 25th February 2025. It is a cardinal principle of natural justice that a party must be given an opportunity to be heard before an adverse action, such as the draconian step of dismissing a suit, is taken against them.

14. Even if the Court were to assume, for the sake of argument, that the Applicant's counsel was negligent in failing to follow up on the matter after the January mention, the law is clear that the mistakes of counsel should not be rigidly visited upon an innocent litigant, particularly where the consequences are as severe as the loss of ancestral land. In the case of *Belinda Murai & Others v Amos Wainaina [1979] eKLR*, the Court of Appeal held verbatim:

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might be more sympathetic in accordance with the principle that a litigant should not be defeated in his cause because of his advocate's mistake."

15. Furthermore, I am guided by the constitutional imperative under Article 159(2)(d) of the Constitution of Kenya, 2010, which commands verbatim that:

"justice shall be administered without undue regard to procedural technicalities."

16. Tying the law to the facts, the subject matter of this suit—L.R. No.

Kajiado/Kitengela/95834—is pleaded to be the Applicant's ancestral land where he resides and where his deceased relatives are buried. The Applicant alleges fraud on the part of the 1st and 2nd Defendants in the charging of this property to the 4th Defendant. Shutting the Applicant out at this stage without a hearing on the merits would result in a grave injustice and disproportionate hardship. The 4th Defendant's grievance regarding delay is purely commercial and can be adequately assuaged by an award of costs.

17. The Court finds that the Applicant's non-attendance was the result of an excusable mistake and inadvertence on the part of his counsel, rather than a deliberate attempt to obstruct the course of justice.

18. In the upshot, I find that the Notice of Motion dated 28th January 2026 is merited. To balance the scales of justice and compensate the 4th Defendant for the inconvenience caused by the Applicant's counsel's lapse in monitoring the registry, I grant the application subject to the payment of throwaway costs to the 4th Defendant who has actively pursued the matter assessed at Kshs. 30,000.

19. Accordingly, I make the following final orders:

a) THAT the order of this Court issued on 25th February 2025 dismissing the Plaintiff's suit is hereby set aside.

b) THAT this suit in ELC Case No. 4 of 2020 is hereby reinstated for hearing and determination on its merits.

- c) *THAT pending the hearing and determination of the reinstated suit, an order of temporary injunction is hereby issued restraining the Defendants, either by themselves, their agents, or anyone acting on their behalf, from selling, transferring, or alienating L.R. No. Kajiado/Kitengela/95834.*
- d) *THAT the Applicant shall pay throw-away costs of Kshs. 30,000/= to the 4th Defendant within 30 days of this ruling.*
- e) *THAT the reinstated suit shall be mentioned on a date to be fixed for pre-trial directions.*

Ordered accordingly.

Dated, Signed and Delivered Virtually this 13th Day of May, 2026.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mbiro h/b for Ms. Mburu for the 4th Defendant/Respondent

N/A by the Plaintiff/Applicant and the 1st – 3rd Defendants

Court Assistant: Alex

M.D. MWANGI

JUDGE