



**Mungai v Ndie & another (Environment and Land Case
E020 of 2022) [2026] KEELC 2726 (KLR) (7 May 2026) (Ruling)**

Neutral citation: [2026] KEELC 2726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND CASE E020 OF 2022**

EC CHERONO, J

MAY 7, 2026

BETWEEN

DENNIS MUNGAI PLAINTIFF

AND

ANTONY NDIE 1ST DEFENDANT

THE LAND REGISTRAR KIRITIRI LAND REGISTRY 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant moved this Court vide a Notice of Motion dated 22nd July 2025 seeking, inter alia, the setting aside of the orders made on the same date dismissing the suit for non-attendance, reinstatement of the suit for hearing on the merits, and maintenance of the status quo in respect of the suit property.
2. The application is premised on the grounds set out on its face and is supported by the Applicant's affidavit sworn on even date. The Applicant deposes that he was unable to attend Court on the hearing date due to illness, as evidenced by a medical chit annexed to his affidavit. He further attributes his absence to a breakdown in communication with his former advocate, who, according to him, had become unavailable owing to engagement in political activities within Kimilili Constituency. The Applicant contends that he only received communication regarding the hearing on the morning of the hearing date, which was too late to make alternative arrangements.
3. He avers that he attempted to access the virtual court session without success and made efforts to instruct another advocate to hold brief, but by the time the said advocate arrived, the suit had already been dismissed. The Applicant further asserts that he later discovered that the hearing date had been fixed in his absence and without proper service of a hearing notice. He maintains that his suit raises serious triable issues, including allegations of fraudulent transfer of land, which are currently under



investigation by the Directorate of Criminal Investigations. He urges the Court not to shut him out from being heard, contending that any mistake on the part of counsel should not be visited upon him.

4. The application is opposed. The 1st Respondent filed a replying affidavit sworn on 21st October 2025 contending that the application lacks merit and is an abuse of the court process. He deposes that the Applicant has been indolent and has consistently delayed the matter. He disputes the Applicant's explanation for non-attendance, terming it contradictory and untruthful, and maintains that there was proper service of the hearing notice as evidenced by an affidavit of service on record. He further contends that the Applicant, being an advocate and a former judicial officer, fully understands the importance of attending court and cannot hide behind the alleged mistake of counsel.
5. The 2nd Respondent filed Grounds of Opposition dated 11th November 2025 asserting that the application is incompetent, lacks sufficient cause, and is brought after inordinate delay. It is further contended that the Applicant has demonstrated a pattern of indolence, and that reinstatement would undermine the principle of finality in litigation and the overriding objective of expeditious disposal of cases.
6. The parties filed written submissions and cited various authorities which the Court has duly considered.

Legal Analysis And Determination

7. The issue for determination is whether the Applicant has made a case for setting aside the order dismissing the suit for non-attendance and for reinstatement of the suit.
8. The Court's discretion in such matters is anchored under Order 12 Rule 7 of the Civil Procedure Rules. This discretion is wide but must be exercised judiciously. The guiding principles were set out in *Shah v Mbogo & Another* (1967) EA 116, where it was held that the discretion is intended to avoid injustice resulting from accident, inadvertence or excusable mistake, but not to aid a litigant who deliberately seeks to obstruct or delay the course of justice. Similarly, in *Philip Chemwolo & Another v Augustine Kubende* (1982–88) KLR 103, the Court underscored that errors should not necessarily shut a party out from being heard, unless there is evidence of fraud or intention to overreach.
9. From the record, it is not in dispute that the suit was dismissed on 22nd July 2025 for non-attendance. It is also evident that the present application was filed on the same date. In the Court's view, this demonstrates promptitude on the part of the Applicant. The argument by the 2nd Respondent that the application was brought after inordinate delay is therefore not supported by the record.
10. On the reason for non-attendance, the Applicant has attributed the same to illness and failure by counsel to communicate the hearing date in good time. He has annexed a medical chit and correspondence to support these assertions. While the Respondents challenge the veracity of this explanation and maintain that service was duly effected, the Court notes that the explanation offered discloses a combination of factors, including illness and a breakdown in communication between advocate and client.
11. The Court has also considered the contention that the Applicant is guilty of indolence. While there are allegations of delay in prosecuting the matter, there is no clear evidence that the Applicant deliberately failed to attend Court on the material date with the intention of obstructing justice.
12. On the issue of mistake of counsel, the law is settled that such mistake may, in appropriate circumstances, be excusable. However, as held in *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* (2015) eKLR, a litigant must demonstrate diligence. In the present case, the Applicant has shown that upon learning of the dismissal, he acted promptly by filing



the present application and changing representation. This, in the Court's view, demonstrates a measure of diligence.

13. The Court has also taken into account that the dispute involves allegations of fraudulent transfer of land. Such allegations are serious and warrant determination on the merits. To shut out the Applicant without affording him an opportunity to be heard would be a draconian step, particularly where the explanation for non-attendance, though contested, is not wholly implausible.
14. On prejudice, the Respondents have not demonstrated any specific prejudice that cannot be compensated by an award of costs. On the other hand, the Applicant stands to suffer substantial prejudice if denied the opportunity to ventilate his claim.
15. Balancing all the foregoing considerations, and guided by the constitutional imperatives of the right to a fair hearing under Article 50 and the need to administer substantive justice, the Court is persuaded that this is a proper case for the exercise of its discretion in favour of the Applicant.

Orders

16. Accordingly, the Court makes the following orders:
 1. The order made on 22nd July 2025 dismissing the suit for non-attendance is hereby set aside.
 2. The suit is hereby reinstated for hearing and determination on the merits.
 3. The status quo obtaining in respect of the suit property as at 22nd July 2025 shall be maintained pending the hearing and determination of the suit.
 4. The Plaintiff/Applicant shall pay thrown away costs to the Respondents assessed at Kshs. 20,000/= within thirty (30) days.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT EMBU THIS 07TH DAY OF MAY, 2026

HON. E.C CHERONO

ELC JUDE, EMBU

In the presence of;

Mr. Kivuti H/B Wamboi Shedrack for the Plaintiff

Mr. Muriithi H/B for Mr. Kiongo for the 2nd Defendant

M/S Ruth C/A.

