



Waweru & another v Faith & Hope Properties Kenya Limited (Environment and Land Case E054 of 2022) [2026] KEELC 2767 (KLR) (12 May 2026) (Ruling)

Neutral citation: [2026] KEELC 2767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E054 OF 2022**

AY KOROSS, J

MAY 12, 2026

BETWEEN

JAMES MUCHIRI WAWERU 1ST PLAINTIFF

SUSAN NTHAMBI MUSEI 2ND PLAINTIFF

AND

FAITH & HOPE PROPERTIES KENYA LIMITED DEFENDANT

RULING

1. The subject of this ruling is the defendant's notice of motion dated 23 July 2025. It states that it has been filed in accordance with the provisions of Articles 48 and 50 of *the Constitution*, Sections 1A and 3A of the *Civil Procedure Act*, Order 12 Rule 7 of the Civil Procedure Rules, and all other enabling Provisions of the Law. It seeks the following orders from this court: -
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to set aside and/or vacate the orders issued on 20th March 2025 and 10th June 2025, which closed the defence case without providing the same an opportunity.
 - d. That the suit be reinstated and restored for hearing and determination on its merits.
 - e. That this Honourable Court be pleased to issue such directions as may be necessary for the expeditious hearing of the suit.
 - f. Cost be provided for.



2. The motion is supported by the grounds therein as well as the affidavit sworn on the same date by David Kabogo. In a nutshell, he states that the last direction on 21st November 2024, directed that the matter would begin afresh before the incoming judge. A related matter, No. E058 was also to be heard alongside this one.
3. Since those directions, the defendant lost track of this matter. However, it has since taken steps to rectify the situation and is now ready and willing to prosecute the matter expeditiously. The plaintiff stands to gain unfairly through a technicality, despite serious allegations of fraud. The discretion to allow the defence an opportunity to present its case before judgment is intended to avoid injustice. Unless this application is granted, there is a real risk of injustice being occasioned against it. He also states its counsel in these proceedings was Ms. Nyang and/or Mr. Mungai Kivuti.
4. In this application, the applicant/defendant erroneously described itself as the plaintiff, and its law firm on record, Ms. Mungai Kivuti & Co. Advocates, described themselves as acting for the plaintiffs. However, the record shows that this is not the case, as it is the defendant.
5. The motion was strenuously opposed by the replying affidavit deposed on 19 September 2025 by counsel Mr. Omondi Samuel Ogutu, for the plaintiff. He succinctly states that no formal notice of change of advocates was ever filed in this matter on behalf of the defendant. Therefore, the defendant cannot claim ignorance of the proceedings, even if there was any lapse in representation. At all material times, the defendant and its representatives were fully aware of the progress and developments in this matter, making it misleading for them to claim ignorance now or suggest that the proceedings continued in their absence.
6. For instance, on 11th April 2024, the plaintiffs' case was heard in court, with the defendant's counsel, Mr. Mungai, and the defendant's Chairman present. The case was fully heard and closed in their presence. Following this, with the input and mutual consent of both parties, the court set the defence hearing for 23rd September 2024. On that date, the defendant's counsel informed the court of a bereavement and requested an adjournment, which was granted.
7. The defence hearing was rescheduled for 21st November 2024, but did not proceed, and was again set for 20th March 2025. On 20th March 2025, the court directed that the hearing proceeds at noon and instructed the plaintiffs' counsel to contact the defendant's counsel and invite them to join the online hearing. Despite the notification, the defendant's counsel declined to join. The plaintiff complied by filing and serving its submissions and a comprehensive mention notice on the defendant's counsel. The matter was mentioned on 10th June 2025 to confirm the filing of submissions, and judgment was set for 11th November 2025. All directions and dates were taken with the participation or notification of the defendant's Counsel.
8. Whenever service was required, it was properly effected upon the defendant's counsel, as the record shows. Given these circumstances, it is disingenuous for the defendant to claim ignorance of the proceedings when their counsel and chairman were present during critical stages, including the 11th April 2024 hearing. Furthermore, the defendant cannot actively benefit from adjournments and later claim that the proceedings occurred without its knowledge.
9. As directed by the court, the motion was considered through written submissions filed by the law firms of Ms. Mungai Kivuti & Co. Advocates for the defendant, dated 2 January 2026, and Ms. Omondi Ogutu & Associates for the plaintiff, dated 9 December 2025.
10. Now, turning to the substance of the matter at hand and having carefully considered the motion, its grounds, affidavits, and articulate submissions, including the provisions of the law and judicial



precedents relied upon, the sole issue for determination is whether the court should set aside its orders closing the defence case.

11. In resolving this matter, the court will examine the pertinent legal provisions that authorise the re-opening of closed suits and will also review established jurisprudence regarding this issue. Concerning the law, the relevant legal framework for hearings and the consequences of non-attendance are set out in our Order 12 of the CPR. Of particular interest is Rule 7 of that Order, which stipulates that where a judgment has been entered, or the suit dismissed, the court, upon application, may set aside or vary the judgment or order on such terms as are just.
12. The jurisprudence that guides this court in the exercise of judicious discretion in dealing with such motions is settled, and the decision of *Shah v Mbogo and Another* [1967] EA 116 Limited [2020] eKLR, which was cited with approval in the case of *John Waweru Njenga & 5 others v Motor Botique*, detailed the guiding principles as follows: -

“This discretion (to set aside ex parte Court decisions) is intended 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.”

13. These criterion is also restated in the long-cited decision of *Ivita v Kyumbu* [1975] KEHC 4 (KLR), whereby in this case, the court held that the tests to be applied are whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. In this decision, the court stated thus: -

“So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may be dismissed.”

14. This court has dedicated considerable time to thoroughly reviewing the record. It has come to the court’s attention that the defendant has substantially misrepresented the facts of these proceedings. In fact, the deposition provided by the plaintiff’s counsel accurately reflects the court record, and it appears that, faced with plaintiff’s counsel’s assertions, the defendant was compelled to refrain from submitting a supplementary affidavit to counter them.
15. Specifically, at no time did this court direct the matter to proceed de novo, or has any application ever been made by the parties in this regard. Furthermore, there has never been any basis for this court to issue such an order suo moto. As a matter of fact, the defendant has consistently been represented by counsel. According to the records, Ms. Anyang of Ms. S.J. Nyang & Co. Advocates consistently represented the defendant and attended court sessions from 27 September 2022 to 4 September 2023.



16. Subsequently, either Mr. Kivuti or Mr. Mungai (the court remains uncertain whether these are the same counsel, as the names are used interchangeably) attended court sessions from 6 December 2023. Importantly, there was no notice of any change; however, counsel informed the court that he was on record for the defendant. Mr. Kivuti or Mr. Mungai participated in the scheduling of hearing dates on several occasions and proceeded with the plaintiff's case.
17. After the closure of the plaintiff's case, defence counsel provided various reasons for the defendant's absence in court. On 11 April 2024, counsel requested another date for the defence hearing. On 23 September 2024, the court was informed that the defence witness was unwell. On 2 November 2024, the court was again informed of the defence witness's ill health. The plaintiff and the court accommodated these requests on all such dates, and a hearing date of 20 March 2025 was subsequently set by mutual consent.
18. On the scheduled date of 20 March 2025, the defence counsel was absent, and the court scheduled the matter for hearing at 11:00 am. It urged the plaintiff's counsel, Mr. Momanyi, to contact the law firm on record, which he did, and he was informed that the defendant's representative had visited their chambers and collected its file. They informed counsel that they expected the defendant to engage new legal counsel and it appears that this new law firm was Ms. Mungai Kivuti & Co Advocates, which had represented the defendant continuously since Ms. Nyang ceased attending court. This law firm filed its notice of appointment, dated 18 October 2023, with the court on 23 July 2025.
19. At no time was there a gap in the attendance of the defendant's counsel, the hearing date of 20 March 2025 was taken by consent and having failed to prosecute its case on several occasions and significantly made misrepresentations of facts, that are incredible, all of which appear to have been orchestrated by deliberate attempts to mislead the court into granting the relief sought, the defendant cannot fault anyone but itself.
20. Moreover, Articles 50 and 159 of *the Constitution* cannot come to the aid of a party that has been given an opportunity to prosecute its case, which it failed to do. Guided by established precedents and our law, it is essential in the interests of justice that trials are concluded with reasonable expedition. This court finds that the defendant has not provided sufficient and justifiable reasons to justify exercising discretion in its favour. Re-opening the suit would cause significant difficulty, injustice, and prejudice to the plaintiffs.
21. In conclusion, this court finds that the notice of motion dated 23 July 2025 has not met the legal requirements and is therefore dismissed, with costs being in the cause. A mention date shall be given before Hon. Lady Justice A. Nyukuri for purposes of issuing a judgment date. Defendant is at liberty to file its submissions within 21 days hereof.

It is so ordered.

DELIVERED AND DATED AT MACHAKOS THIS 12TH DAY OF MAY, 2026.

HON. A. Y. KOROSS

JUDGE

12.05.2026

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant



Mr. Momanyi for Mr. Oguttu for respondent.

Mr. Kivuti for applicant.

