



**Odhiambo v Mwangi (Environment and Land Case 475 of 2015)
[2025] KEELC 5382 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5382 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 475 OF 2015**

JG KEMEI, J

JULY 17, 2025

BETWEEN

LUKE OUKO ODHIAMBO PLAINTIFF

AND

WAITHAKA MWANGI DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated 6/5/2025. However, to put the application in context I will give the chronology of events informing the application. This is an old matter instituted back in 2015. Judgment was initially delivered on 11/10/2022 in favour of the Plaintiff after hearing the case in the absence of the Defendant. However, the Defendant filed an application seeking to set aside the said Judgment and be granted a chance to be heard and present his case. The application was allowed and the said Judgment was set aside on 10/05/2023.
2. Subsequently, parties were granted leave to file their documents and the matter set down for hearing. When the matter came up for hearing on 16/02/2024, Counsel for the Plaintiff sought an adjournment on the basis that the Plaintiff was not available and further sought Witness Summons to issue against Nairobi County Government and the Chief Land Registrar. The adjournment was granted and the Witness Summons issued. The matter was then slated for hearing on 10/7/2024 and an order of last adjournment issued. On the said date, the Plaintiff was ready to proceed virtually but due to unstable network at the Court, the hearing was stood-over to 9/10/2024.
3. On 9/10/2024, the Court stated that it was on transfer hence the hearing was again stood over to 11/2/2025. The hearing commenced on the 11/2/2025 but the Plaintiff, testifying as PW 1 was stood down for non-filing of his second witness statement. Consequently, the hearing was re-scheduled for 5/5/2025. The Plaintiff or his counsel failed to attend Court on the 5/5/2025 hence the suit was dismissed for non-attendance.



4. With the above background in mind, the instant application by the Plaintiff which is expressed to be brought under Article 50(1) of *the Constitution*, Sections 3A of the *Civil Procedure Act* and Order 12 Rule 1 & 7 of the Civil Procedure Rules, seeks the following orders that:
 - a. The dismissed orders of 5/5/2025 be set aside, stayed, varied and or vacated and all the other consequential orders.
 - b. The date be fixed for hearing of the full case before this Honourable Court.
 - c. The case be determined on merit after hearing of the evidence of the parties as land matters are sensitive.
 - d. Costs of the Application be provided for.
5. The application is premised on the grounds on the face of it and further supported by the Affidavit of Alice Jonathan Gulenywa, Advocate dated 6/5/2025. Counsel avers that the matter was scheduled for hearing on the 5/5/2025. That the hearing was to proceed in open Court after allocation of time virtually by the Court. She avers that unfortunately, on the said date, their office devices including mobile phones were unable to access the Court link system completely.
6. The deponent deposes that they called the Court registry and were informed that the Court system was slow and they were working on it. She states that upon coming to open Court, they were already late and were not able to proceed with the hearing. She states that the non-attendance was not intentional. That it is for the said reason that she prays for the Court to reinstate the suit and allow the hearing to proceed.

The Defendant/Respondent's Replying Affidavit

7. The Defendant, Waithaka Mwangi, opposed the application vide the Replying Affidavit dated 23/05/2025. The Defendant contends that the reasons for non-attendance are not convincing; that no written evidence of any communication between the Plaintiff and the Registry have been adduced. That the assertion that the CTS was slow is baseless as the Defendant was able to log in. He argues that in the absence of official communication from the Court that it was not sitting, the non-attendance is not justifiable. He states that in any event, none of the Witnesses listed on the Plaintiff's List of Witnesses was present in Court ready to proceed with the hearing.
8. He argues that the application is not convincing at all. That the non-attendance to Court may have been deliberate probably due to the Plaintiff's non-preparedness to proceed with the hearing in view of the orders of last adjournment. He urges the Court to dismiss the application with costs.

Court's Directions

9. The Court directed that the application be canvassed by way of written submissions. Both parties complied. The Plaintiff/Applicant filed submissions dated 17/6/2025. The Defendant/Respondent filed submissions dated 24/6/2025. The Court has had occasion to read through the submissions by parties and considered them in its determination.

Analysis and Determination

10. I have considered the application, the responses made, and the rival submissions. I have also looked at the Court record. The issues that commend themselves to me for determination, are:
 - (a). Whether the Court should reinstate the suit as prayed



(b) Who should bear the cost of the application?

Whether the Court Should Reinstate the Suit as Prayed

11. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide as follows;

“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.”

12. Reinstatement of a suit is discretionary. Section 3A of the *Civil Procedure Act* gives the Court inherent power to make such orders as may be necessary for the ends of justice to be met. What the Court is to consider while exercising discretion was emphasized in the case of *Esther Wamaitha Njihia & 2 Others v Safaricom Ltd* [2014] eKLR where the Court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see *Patel vs E.A. Cargo Handling Services Ltd.*) the discretion 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah vs. Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court.... It also goes without saying that the reason for failure to attend should be considered.”

13. This Court is guided by the holding in the above in regard to how to apply the discretion it has. It should exercise it judiciously and for purposes of avoiding injustice and hardship which may result from an excusable error.

14. In the instant case, Counsel for the Plaintiff/Applicant deponed how she tried to virtually attend Court for time allocation on the material date. That all her gadgets were not able to be logged into the Teams Platform. She averred in the submissions that there was power failure in their offices. That by the time she made her way to open Court, the matter had already been dismissed. The Respondent on the other hand argues that non-attendance was probably due to the Plaintiff's unpreparedness to proceed with the hearing.

15. From the chronology of events leading to the striking out of the suit, I note that the applicant has been diligent in prosecuting his suit. Relying Applying the principle established in the case of *Shah vs Mogo* (1979) EA 116 cited above, I am persuaded that the reason given by the Plaintiff's Counsel for her failure to attend Court on 5/5/2025 is plausible. More so, since technological challenges are a common phenomenon in the era of virtual Court sessions.

16. I also note that the Plaintiff filed the instant application without any inordinate delay. The application having been filed just a day after the dismissal of his suit. In light of the foregoing reasons, I find that this is a case that merits the exercise of the Court's discretion in favour of the Plaintiff. More so, since the Court is mandated to serve substantive justice in view of the Constitutional provisions of Article 159 (2) (d).

17. It is also not lost to the Court that dismissal of a suit is a draconian act that drives a litigant away from the seat of justice and as such, discretion ought to be exercised judiciously. This position was amplified



in the case John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR as follows: -

“Courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the Plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial ‘Sword of the Damocles’ which should only draw blood where it is absolutely necessary.”

18. Therefore, and in the interests of justice I am inclined to allow the application dated 6/5/2025. Subsequently, the order of 5/5/2025, dismissing the Plaintiff’s suit in its entirety for non-attendance is hereby set aside and the suit is reinstated on condition that the Plaintiff pays the Defendant throw-away costs of Kshs. 30,000/= in the next 30 days.

19. It is so ordered

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF JULY, 2025
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered Online in the Presence of;

Ms. Jonathan Galenywa for the Plaintiff

Ms. Gachuna for the Defendant

CA – Ms. Yvette

