



REPUBLIC OF KENYA



Kamau & another v Sava Builders Limited & another (Environment and Land Case E109 of 2023) [2025] KEELC 5950 (KLR) (27 August 2025) (Ruling)

Neutral citation: [2025] KEELC 5950 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E109 OF 2023**

**CG MBOGO, J
AUGUST 27, 2025**

BETWEEN

ROBERT WACHIRA KAMAU 1ST PLAINTIFF

ROCKEY AFRICA LIMITED 2ND PLAINTIFF

AND

SAVA BUILDERS LIMITED 1ST DEFENDANT

PHANUEL B INVESTMENT LIMITED 2ND DEFENDANT

RULING

1. Before me is the notice of motion dated 12th November, 2024 filed by the plaintiffs/applicants, and it is expressed to be brought under Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* seeking the following orders: -
 1. Spent.
 2. That this honourable court does exercise its discretion in ordering for the reinstatement of the suit.
 3. That costs pursuant to this application be in the cause.
2. The application is supported by the affidavit of Alex Masake Shabaan, the learned counsel for the plaintiffs/applicants which is sworn on even date. The learned counsel deposed that while the matter was prepared for the hearing stage, the continuous damage on the suit property necessitated the amendment of the originally filed plaint. That despite the same, the court dismissed their pleas and request terming them as mere excuses. He deposed that the matter was set down for hearing on 24th October, 2024, but the court dismissed the matter for want of prosecution before the allocated time when they were denied access to the virtual hearing platform.



3. The learned counsel further deposed that during the hearing, this court did not permit the plaintiffs'/ applicants' advocate Sandra Namutebi to participate in the online proceedings through failure to admit them into the teams meeting effectively denying them the opportunity to present evidence. He deposed that the ruling or order made on 24th October, 2024 will unfairly prejudice the plaintiffs/applicants depriving them of the opportunity to seek KShs. 115,000,000/- in compensation for damages caused by the defendants/respondents ongoing construction.
4. The 1st defendant/respondent filed grounds of opposition dated 6th November, 2024 challenging the application on the following grounds: -
 1. That the application is misconceived, bad in law, incompetent, mischievous, misleading, and an abuse of the court process.
 2. That in opposition to paragraph 3 of the applicant's supporting affidavit, the 1st respondent asserts that the applicant's allegation that the continuous damage necessitating a revision and amendment of originally filed plaint capturing the estimated costs and expenses incurred as special damages is dishonest and a misrepresentation for the reason that there is no and there has not been any (proposed) amended pleadings attached in the application to support this assertion.
 3. That in response to paragraph 4 of the supporting affidavit, the 1st respondent stated that the honourable Judge in exercising their judicial discretion, meticulously considered all relevant facts, evidence, and applicable legal principles and with due regard for the circumstances reflected a reasoned and thoughtful decision, rather than a mere dismissal of the plaintiffs' assertions.
 4. That in response to paragraph 6 &7 of the supporting affidavit the 1st respondent asserts that the matter was indeed scheduled for hearing at exactly midday on the 24th October, 2024 in accordance with the clear directions by the honourable judge regarding time allocation that the same will be conducted in open court, rather than virtually as alleged by the applicants.
 5. That in further response to paragraph 7 and 8 of the supporting affidavit, the 1st respondent asserts: -
 1. That although the plaintiff's right to be heard is constitutionally guaranteed, it is not absolute and must be balanced against the corresponding right of the party who has been dragged to court to have the dispute expeditiously determined pursuant to the overriding objection encapsulated in Section 1A and 1B of the [Civil Procedure Act](#) by which parties and counsel are duty bound to cooperate with the court in furthering the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the dispute.
 2. That in this circumstance, the matter was set for hearing on the 24th October, 2024 and on such date when the honourable judge called the matter, only the respondents were ready to proceed for the hearing and the applicants further sought an unreasonable adjournment. Consequently, rightly in line with



the legal principles as outlined in Order 12 Rule 3 as read with Order 17 Rule 3 of the Civil Procedure Rules, dismissed the matter for want of prosecution.

3. That the basis for the dismissal of suits for want of prosecution is founded on the principles that litigation must be expedited, and conclude by parties who came to court for seeking justice and to further assist in clearing backlogs in court and the ever-increasing over-loads therefore upon filing of cases parties should efficiently and effectively be seen to fast track their hearing and determination.
 4. That in that regard, the honourable judge rightly exercised his discretion in line with the above-mentioned legal principles.
 5. That further, the applicants at various instances have demonstrated their willingness to expeditiously and effectively conclude this suit through their express refusal and unwillingness to comply with the consent order occasioning unnecessary delays demonstrating blatant disregard to the expeditious disposal of the matter therefore the intervention by the honourable Judge was rightly warranted.
 6. That in response to paragraph 9 of the supporting affidavit, the 1st respondent asserts that it is the litigant's duty to pursue or otherwise take active and effective steps to ensure the timely prosecution of his or her claim therefore it would be a travesty of justice to reinstate this suit.
5. The learned counsel filed a replying affidavit in response thereto sworn on 28th January, 2025. The learned counsel reiterated the contents of his supporting affidavit and deposed that the application is sound, and legally valid, competent and made in good faith. He deposed that it was unreasonable to require the parties to appear in open court by midday given that the matter was originally set for a virtual hearing. He deposed that the plaintiffs/applicants constitutional right to heard and to receive a fair trial is of paramount importance and must be upheld.
 6. The 1st defendant/respondent filed its replying affidavit sworn on 30th January, 2025 by Jayadev Kuniyil. The 1st defendant/respondent reiterated the issues contained in its grounds of opposition. I need not reproduce the same.
 7. The application was canvassed by way of written submissions. The plaintiffs/applicants filed their written submissions dated 25th February, 2025 where they raised five issues for determination as follows:-
 1. Whether the honourable judge's decision to dismiss the plaintiff's request for amendments to the pleadings including the addition of special damages and changes in company directorship was fair.
 2. Whether temporary injunction orders should be issued against the respondents to prevent further accrual of charges arising from ongoing construction.



3. Whether the court's insistence on physical attendance despite the matter being set for a virtual hearing, created an unreasonable procedural burden, potentially undermining the plaintiff's right to a fair trial and access to justice.
 4. Whether procedural technicalities or strict adherence to formal rules take precedence over the plaintiff's substantive right to seek justice, particularly in light of the necessity of amendments to properly reject the plaintiff's claims.
 5. Whether the grounds of opposition of the notice of motion dated 12th November should be dismissed by this court.
8. On the first issue, the plaintiffs/applicants submitted that the decision to deny amendments was not in line with the principles founded on Section 1A and 1B of the *Civil Procedure Act*. To buttress further, they relied on the cases of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] KECA 799, *Osborn v Bank of United States*, 22 U.S 738 [1824] and *Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR.
 9. On the second issue, the plaintiffs/applicants submitted that given the ongoing damage on the suit property, an injunction is necessary to preserve the status quo and prevent further destruction. Reliance was placed in the cases of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] KEELC 2424 (KLR) and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
 10. On the third issue, the plaintiffs/applicants submitted that the insistence on a physical attendance at the hearing despite the clear directive for a virtual hearing deprived them of their right to be heard. On the fourth issue, and while relying on the cases of *Kenya Commercial Bank Ltd v Wanjiru Ng'ang'a* [2005] eKLR, *Telkom Kenya Limited v John Ochanda* [2014] KECA 600, and *Raila Odinga v IEBC and 4 others*, Petition No. 5 of 2013, the plaintiffs/applicants submitted that the interest of justice requires the court to allow their amendment and to disregard procedural formalities that would hinder substantive resolution of this matter.
 11. On the fifth issue, the plaintiffs/applicants submitted that the court must exercise discretion to ensure fair disposal of matters and to allow the cure of procedural technicalities under Article 159 of *the Constitution*.
 12. The 1st defendant/respondent filed its written submissions dated 26th February, 2025 where it raised five issues for determination as listed below: -
 - i. Whether the honourable judge's decision to dismiss the plaintiffs' request for amendments to the pleadings, including the addition of special damages and changes in company directorship was fair.
 - ii. Whether the temporary injunction orders should be issued against the respondents to prevent further accrual of charges arising from the ongoing constructions.
 - iii. Whether the court's insistence on physical attendance, despite the matter being set for a virtual hearing created an unreasonable procedural burden potentially undermining the plaintiff's right to a fair trial and access to justice.
 - iv. Whether the procedural technicalities or strict adherence to formal rules take precedence over the plaintiff's substantive right to seek justice, particularly in light of the necessity of amendments to properly reflect the plaintiffs' claims.



- v. Whether the grounds for opposition of the notice of motion dated 12th November, should be dismissed by this court.
13. On the first issue, the 1st defendant/respondent submitted that the law on amendments is clear that such changes should be sought in good faith and without causing prejudice to the opposing party. The 1st defendant/respondent relied on the cases of *Eastern Bakery v Castellino* [1958] EA 461, and *Institute for Social Accountability & Another v Parliament of Kenya & others* [2014] eKLR.
 14. On the second issue, the 1st defendant/respondent submitted that the plaintiffs/applicants have failed to meet the threshold for injunctive reliefs, as their demand for KSh. 15,000,000/- contradicts their request for a temporary injunction confirming that monetary compensation would be sufficient. Reliance was placed in the cases of *National Bank of Kenya Ltd & 2 others v Sam-Con Ltd* [2003] eKLR, and *Malewa Raching Company Limited v Ng'anga & 146 others (Civil Case E007 of 2021)* [2024] KEHC 2780 (KLR).
 15. On the third issue, the 1st defendant/respondent submitted that the claim that the plaintiffs/applicants were denied a fair hearing due to technical failures on the virtual platform is unsubstantiated, and that there is no evidence to show that they attempted to alert the court of any difficulties in accessing the session. On the fourth issue, it was submitted that the plaintiffs/applicants' failure to prosecute their case cannot be excused, and that they have not demonstrated any legal basis for seeking to reopen the matter after dismissal for want of prosecution. To further support this issue, reliance was placed in the cases of *Ivita v Kyumba* [1984] KLR 441, *Rowlands Ndegwa and 4 Others v County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR and *Gladys Boss Shollei v Judicial Service Commission & Another* [2018] eKLR.
 16. On the fifth issue, the 1st defendant/respondent submitted that the plaintiffs/applicants have not demonstrated any legal basis for dismissing the grounds of opposition. Further, that they have raised pertinent legal and factual issues that require the court's consideration.
 17. I have considered the application, the grounds of opposition, the replies thereof and the written submissions filed by the parties herein except the 2nd defendant/respondent. It is trite law that a party is bound by its pleadings, the same being founded on the application and grounds thereof. In this case, the crux of the application is on the reliefs sought and it follows that the grounds forming the basis of the application, the facts and evidence ought to be drafted and pleaded in such a way that it would lead to grant of the prayers sought. The plaintiffs/applicants are seeking an order for reinstatement of the suit. However, they took a detour and from the issues for determination in their written submissions, it is clear that they were displeased with the decision of the court in rejecting their oral plea to amend pleadings. Equally, the 1st defendant/respondent dwelt on the same issues which this court cannot entertain simply because there are no prayers sought pointed towards their averments.
 18. To a great extent, the plaintiffs/applicants are in fact asking this court to sit on an appeal of the position taken by this court and determine whether the same was fair. Unfortunately, this court cannot heed to such an invitation. Be that as it may, this court will confine itself to the main issue for determination which in my view is whether the orders issued on 24th October, 2024 can be set aside.
 19. This matter was slated for hearing on 24th October, 2024. Ms. Wamuheri was on record for the plaintiffs/applicants. Mr. Tanni was holding brief for Mr. Kagiri for the defendants/respondents. It is thus clear that parties were represented by their advocates at this stage and more importantly on the hearing date. The plaintiffs/applicants were not ready to proceed and sought an adjournment on the grounds that she needed time to acquaint herself beforehand, amongst other issues. The defendants/respondents were ready to proceed with the hearing, and from the record, the plaintiffs/applicants



were determined to seek an adjournment. The court went to pronounce itself on the refusal to grant an adjournment and directed that the matter to proceed for hearing at 12 noon in open court. Later on at 12 noon and in open court, there was no appearance by both parties and their advocates. The court noted that they were present in court in the virtual morning session. As a result, the court dismissed the suit for want of prosecution pursuant to the provisions of Order 17 Rule 4 of the Civil Procedure Rules, and marked the matter as closed.

20. The court record bears witness that the plaintiffs/applicants counsel was in virtual session in the morning, and it has not been shown that she was denied audience to present their case.
21. Order 17 Rule 2 (6) of the Civil Procedure Rules provides that; “A party may apply to court after dismissal of a suit under this Order.” Bearing in mind that the suit was dismissed pursuant to Order 17 Rule 4 of the Civil Procedure Rules, a party may approach the court for setting aside of the order. Further, Order 12 Rule 7 of the Civil Procedure Rules provides; “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.”
22. Bearing in mind the overriding objective of this court which is to ensure substantive justice, and being mindful of the rights of parties to properly ventilate their claims before the court, I find it necessary that the plaintiffs/applicants are granted a chance to present themselves in court. For this reason, I am inclined to exercise discretion and allow the notice of motion dated 12th November, 2024 and I hereby set aside the orders dismissing the suit issued on 24th October, 2024. Further mention on 21st October, 2025 for further directions. I make no orders as to costs.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 27TH DAY OF AUGUST, 2025.

HON. MBOGO C.G.

JUDGE

27/08/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Ms. Namutebi holding brief for Mr. Onyango for the Plaintiffs/Applicants

No appearance for the Defendants/Respondents

