



**Adala v Omay & 4 others (Environment & Land Case E004 of 2021)  
[2025] KEELC 687 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 687 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E004 OF 2021  
AE DENA, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JOHN ODHIAMBO ADALA ..... PLAINTIFF**

**AND**

**MICHAEL OMAVA ..... 1<sup>ST</sup> DEFENDANT**

**WILLIAM ONYANGO ..... 2<sup>ND</sup> DEFENDANT**

**JACKSON OKETCH OGWAYO ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR-SIAYA ..... 4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The subject of this ruling is the Notice of Motion application dated 30<sup>th</sup> September 2024. The application seeks the following orders:-
  1. That an order be issued setting aside the orders issued on 26<sup>th</sup> September 2024 dismissing the 1<sup>st</sup> Defendant Application dated 4<sup>th</sup> July 2024 for want of prosecution.
  2. That an order be issued reinstating the 1<sup>st</sup> Defendant/Application dated 4<sup>th</sup> July 2024 and the same be heard to its conclusion.
  3. That the Defendants be condemned to bear the costs of this application.
2. The application is premised on the grounds set out on its face and the supporting affidavit of Maxwell O. Ogonda, counsel for the Applicant sworn on 30/09/24. It is deponed that the matter herein was coming up for hearing on the 26<sup>th</sup> September 2024 on the 1<sup>st</sup> Defendant/Applicant application dated 4<sup>th</sup> July 2024. That the deponent attended the matter in the Siaya High Court ELC court using the link <http://bit.ly/3tuQM2i>. That he was in the virtual court and there was internet fluctuation which



caused his call to drop making attendance challenging. As a result the case was dealt with in his absence and the application dated 4<sup>th</sup> July 2024 was dismissed for want of prosecution. That he was informed that the matter had been dealt with upon inquiring if he could recall the file.

3. The applicant further states that the circumstances under which the matter was dismissed were due to fluctuation in internet and power outage. That this ought not to be visited upon the 1<sup>st</sup> defendant who has all intentions to prosecute the Application to its logical conclusion. That he requested for assistance on the Siaya High Court forum for readmission back into the court after his call had dropped. Counsel prays that the orders issued on 26<sup>th</sup> September 2024 be set aside and the application dated 04 September 2024 be reinstated for determination on merit. That the events were beyond him as the Advocate and ought not to be visited on the 1<sup>st</sup> Defendant.
4. The application was set for hearing on 27/01/25. Mr. Agina counsel on record for the respondent informed the court he had not been served with the application for reinstatement. The court directed service forthwith upon confirming Mr. Aginas email address and allowed him to respond to the same within 7 days. Thereafter parties were to file their respective submissions on the application within the designated timelines set by the court. The court reserved the ruling for 20/02/2025.
5. Mr. Agina did not file any response.

### **Submissions**

6. The applicants' submissions are dated 29/01/25. Rehashing the averments in the supporting affidavit and citing the link provided and the annexure showing the WhatsApp conversation on the Siaya High court Forum Notice board seeking readmission, it is submitted that Order 10 rule 11 of the Civil Procedure Rules provides for the reinstatement of suits and applications. That where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just thus the applicants' prayers herein. Reliance was place on the case of Kenya Commercial Bank Ltd -v- Nyantange & Another (1990) KLR 443 where Bosire J, (as he then was) held that:

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”

7. That the applicant invokes the discretionary power of this court to vary and set aside the order dismissing the application dated 4<sup>th</sup> July 2024.

### **Determination**

8. I have already noted that the application is unopposed. However, it must be subjected to a merit review.
9. The only issue for determination is whether the application is merited. The application is grounded on the provisions of Order 10 Rule 11, Order 17 of the Civil Procedure Rules Sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
10. Order 10 Rule 11 is to the effect that where judgement has been entered under the said order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.
11. I think I would include the provisions of Order 12 Rule 7 of the Civil Procedure Rules and the overall objective of the court. There is no specific rule for dismissal of applications but the principles in my view apply since an order for dismissal has been made.



12. Justice Nyagaka IUR faced with an application to set aside an order of dismissal on the grounds that counsel experienced internet challenges to log into the virtual platform persuasively observed in the case of *Langat v Director of Land Adjudication and Settlement & 3 others; Sabuni & 180 others (Interested Party) (Environment & Land Petition 26 of 2014) [2023] KEELC 21588 (KLR) (17 November 2023) (Ruling)* as follows;-

‘Even where there is failure of the internet or anticipated network failure, the parties are under obligation to inform the Court as soon as practicable that they are in a problem and unable to log into the virtual session. They do this through calling other colleagues who can have stronger internet to log into the court session and hold brief or inform the court otherwise. They cannot sit back and wait for another day to move the court to set aside proceedings. Moreover, the party has to use technology to demonstrate to the Court that indeed they attempted to log into the court session but failed. For instance, they need to demonstrate through internet logs that they indeed tried to log into the session but failed.’
13. I’m persuaded by the above dictum. While Counsel deponed that they had attached a whatsapp conversation as annexure MOO1 the same was not part of the record. It was not in the CTS portal either. This is stated to show that counsel sought help and informed members on the Platform. It was then expected one of the lawyers in the platform would have brought the issue to the attention of the court that indeed counsel was having challenges logging into the court virtually. I will treat the missing annexure as an oversight on the part of counsel.
14. However, I have perused the court record and the proceedings that took place on 26/9/2024. It reveals that the court was proceeding in chambers because of power outage. The court then proceeded to open court at around 10.45 am. Mr. Agina for the Plaintiff was present though it appears he had a problem with his audio and after efforts to have him assisted the problem persisted until 11.04am. The court noting that the firm of Maxwell O. Ogonda was absent dismissed the application dated 4/07/24 for want of prosecution and awarded costs to the plaintiff.
15. Counsel states that they made an effort to have the file recalled. Moreover the foregoing review of the court record confirms that there was power outage. And just on the basis of this I would give the benefit of doubt to the counsel for the Applicant.
16. But of utmost importance the court must consider whether the grounds are reasonable, whether there will be any prejudice caused to the adverse party as well as the applicant See *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR*, cited in *Langat v Director of Land Adjudication and Settlement & 3 others; Sabuni & 180 others (Supra)*. I have already noted there was a power outage. The respondents herein have not seized the opportunity granted by the court to voice any concerns against the court allowing the application and the prejudice they are bound to suffer. Secondly the application that was dismissed seeks a stay of execution of Judgement and decree of this court pending hearing and determination of the appeal. The judgement is against the applicant. I see no prejudice that will be occasioned to the adverse party in allowing the application. In any case the adverse party will be fully heard on their objections to the application dated 4/7/2024. I think the lower risk of injustice should be to have the said application heard on its merits.
17. The upshot of the above is that I find the application dated 30/09/24 merited and it is hereby allowed in terms of prayers 1 and 2.
18. As to costs I note that the Defendants are ready to be condemned to payment of costs. Let the costs abide the outcome of the appeal.



**DELIVERED AND DATED AT SIAYA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**20/02/2025**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

No appearance for the Defendants

Mr. Agina for the Plaintiff/ Respondent

Court Assistant: Ishmael Orwa

