



**Kimeto (Suing as the Legal Representative of the Estate of Daniel Kikwai Chepkwony  
alias Kikwai Arap Chepkwony - Deceased) v Korir & 4 others (Environment &  
Land Case 3 of 2020) [2024] KEELC 6220 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6220 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 3 OF 2020  
LA OMOLLO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**ALEXANDER KIPNGETICH KIMETO (SUING AS THE LEGAL  
REPRESENTATIVE OF THE ESTATE OF DANIEL KIKWAI CHEPKWONY  
ALIAS KIKWAI ARAP CHEPKWONY - DECEASED) ..... PLAINTIFF**

**AND**

**CHARLES KORIR ..... 1<sup>ST</sup> DEFENDANT  
LEONARD LANGAT ..... 2<sup>ND</sup> DEFENDANT  
ELIJAH KIMETO ..... 3<sup>RD</sup> DEFENDANT  
ALICE KIMETO ..... 4<sup>TH</sup> DEFENDANT  
DENNIS KORIR ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the Plaintiff/Applicant's Notice of Motion application dated 14<sup>th</sup> May, 2024. The said application is expressed to be brought under Sections 3 & 3A of the [Civil Procedure Act](#), Order 12 Rule 7 and Order 51 Rule 1 of the [Civil Procedure Rules](#).
2. The Applicant seeks the following orders:
  - a. Spent.
  - b. That this Honourable Court be pleased to set aside the orders made on 14<sup>th</sup> May, 2024 dismissing the suit herein for non-attendance.
  - c. That this Honourable Court be pleased to reinstate the suit herein upon such terms as are just.



- d. That suit herein be allocated the earliest available hearing date.
  - e. That the costs of this application be in the cause.
3. The application is based on the grounds on its face and the supporting affidavit of Benard Kibet Tonui counsel for the Plaintiff/Applicant.

### **Factual Background.**

4. The Plaintiff/Applicant commenced the present proceedings vide the Plaint dated 16<sup>th</sup> January, 2020 which Plaint was amended on 1<sup>st</sup> August, 2023. He seeks the following prayers:
- a. A permanent injunction restraining the Defendants either by themselves, their servants, employees, agents, personal representatives and/or any other person acting for them and/or on their behalf from selling, disposing of, alienating, transferring and/or in any other manner whatsoever dealing with and/or intermeddling with that parcel of land known as Title Number Kericho/Ndarawetta/1048 or any portion thereof.
  - b. A declaration that any sale or disposition of that property known as Kericho/Ndarawetta/1048 or any portion thereof by the Third, Fourth and Fifth Defendants to the First and Second Defendants is null and void ab initio for want of authority or grant of representation in terms of Section 45 of the *Law of Succession Act*.
  - c. A declaration that the Defendants have contravened Section 45 (1) of the *Law of Succession Act* and are thus guilty of an offence and are each liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both.
  - d. A declaration that the First and the Second Defendants are trespassers on that parcel of land known as Kericho/Ndarawetta/1048.
  - e. General damages for trespass.
  - f. Mesne profits at the rate of Kshs. 369,600/= per annum from January 2019 till the First and Second Defendants vacate that parcel of land known as Kericho/Ndarawetta/1048.
  - g. Special damages of Kshs. 120,000/=
  - h. Exemplary, aggravated and or punitive damages.
  - i. An order compelling the First and the Second Defendants to forthwith vacate that parcel of land known as Kericho/Ndarawetta/1048, remove all fences and other structures they have erected thereon and uproot tea and other crops they have planted thereon at their own cost.
  - j. In default of prayer (e) above within thirty (30) days from the date of judgement, the First and the Second Defendants do pay the Plaintiff Kshs. 240,000/= as costs for uprooting tea and other crops planted by the First and the Second Defendants on that parcel of land known as Kericho/Ndarawetta/1048.
  - k. The OCS Silibwet Police Station do supervise the eviction of the First and the Second Defendants and provide security to facilitate the removal of fences and other structures and uprooting of tea and other crops planted by the First and the Second Defendants on that parcel of land known as Kericho/Ndarawetta/1048.
  - l. Interest on (e), (f), (g) and (h) above at Court rates from the date of judgement till payment in full.



- m. Costs of this suit.
- n. Such further or other relief as this Honourable Court deems fit and just to grant.
  1. The Defendants/Respondents entered appearance on 5<sup>th</sup> February, 2020 but have to date not filed any pleadings.
6. The application under consideration first came up for hearing on 16<sup>th</sup> May, 2024 when the Court gave directions that it be served upon the Defendants/Respondents.
7. The Defendants/Respondents were served but they did not file any response to the application.
8. The Plaintiff/Applicant opted not to file any submissions. On 4<sup>th</sup> June, 2024 the application was reserved for ruling.

**Applicant's Contention.**

9. The affidavit in support of the application is sworn by one Benard Kibet Tonui; Counsel for the Plaintiff/Applicant.
10. He contends that the present suit was set down for hearing on 14<sup>th</sup> May, 2024 and that he attended Court virtually together with the Plaintiff/Applicant.
11. He also contends that after the matter was called, he informed the Court that the Defendants/ Respondents had entered appearance but had not filed any Defence but they had nonetheless served them with a hearing notice and filed an affidavit of service.
12. He further contends that he informed the Court that he was ready to proceed with the hearing and sought for time allocation. The Court after confirming service informed him that the matter would proceed for hearing at 10:30 am.
13. It is his contention that he thought that the matter would proceed virtually and had informed the Plaintiff/Applicant. It is his further contention that he logged in from his offices in Nairobi while the Plaintiff/Applicant attended Court virtually from Bomet.
14. It is also his contention that at about 10:30 am he together with the Plaintiff/Applicant logged in virtually ready for the hearing. They waited until 10:50 am without being admitted and this prompted him to inquire from his colleague on whether Environment and Land Court matters in Kericho are heard virtually or in open Court.
15. It is further his contention that his colleague gave him a phone number belonging to a clerk known as Janeth Maoga who is based in Kericho town. He instructed her to rush to Court and find somebody to hold his brief and inform the Court that they were waiting online and in the event the matter was proceeding in open Court, to take another hearing date.
16. He contends that the said Janeth Maoga informed him that when she arrived in Court at around 11:10 am she met the Court Clerk who informed her that the case had already been dismissed for non-attendance.
17. He also contends that his failure to attend open Court for hearing of the matter at 10:30 am on 14<sup>th</sup> May, 2024 was not deliberate.
18. He further contends that the Plaintiff/Applicant's claim is on trespass on land parcel No. Kericho/ Ndarawetta/1048 which belongs to a deceased person and further that the Court had granted interim



orders restraining the Defendants/Respondents from intermeddling with the suit property pending hearing and determination of the present suit.

19. It is his contention that the Plaintiff/Applicant has been keen to prosecute the suit and unless the orders sought are granted, he stands to suffer great prejudice, will be driven out of the seat of justice and condemned unheard for an inadvertent mistake which was out of his control.
20. It is also his contention that the Defendants/Respondents will continue with the trespass and destruction of the suit property and may transfer it to third parties to the detriment of the estate of the deceased whose beneficiaries will be rendered destitute.
21. It is further his contention that the Defendants/Respondents will not suffer any prejudice if the orders sought are granted as they are yet to file any Defence and that the suit was set to proceed for hearing undefended.
22. He ends his deposition by stating that the present application has been brought without undue delay and that the Plaintiff/Applicant is willing to abide by any reasonable conditions that may be set by this Honourable Court.
23. The Defendants/Respondents did not file any response to the application and the Plaintiff/Applicant opted not to file any submissions.

#### **Analysis and Determination.**

24. I have considered the Plaintiff/Applicant's application and the only issue that arises for determination is whether the orders issued on 14<sup>th</sup> May, 2024 dismissing the suit for want of prosecution should be set aside and the suit be reinstated.
25. The Court record shows that on 14<sup>th</sup> May, 2024 the Plaintiff/Applicant's suit was dismissed for want of prosecution.
26. The circumstances surrounding the dismissal were that on 14<sup>th</sup> May, 2024 this matter was listed for hearing. Counsel for the Plaintiff/Applicant appeared in Court virtually at 9:00 am and he informed the Court that he was ready was proceed.
27. The Court informed him that the matter would proceed at 10:30 am. At 11:15 neither of the parties was present and the Court made the following orders;  
  
    “ This matter was mentioned during the call over and confirmed for hearing at 10:30 am.  
  
    We have been waiting for counsel for the Plaintiff since 10:30 am and there is no contact with the Court assistant/Court. It is now 11:15 am.  
  
    Consequently, the suit is dismissed for want of prosecution.”
28. Counsel for the Plaintiff/Applicant argues that he had presumed that the matter would proceed virtually and he had therefore logged into Court at 10:30 from his offices in Nairobi while the Plaintiff/Applicant logged in from Bomet.
29. Counsel also argues that they waited to be admitted to virtual Court and when they were not admitted, he inquired from his colleague and was informed that the Court proceeds for hearing in open Court.
30. Counsel alleges that he sent someone to find an Advocate to hold his brief and inform the Court that he was waiting to be admitted online but she arrived in Court soon after the suit had been dismissed for want of prosecution.



31. Counsel submits that both his and the Plaintiff/Applicant's failure to attend Court on 14<sup>th</sup> May, 2024 was inadvertent and he therefore seeks that the orders dismissing the suit be set aside and the same be reinstated.
32. Order 12 Rule 1 of the [Civil Procedure Rules](#) provides as follows;
- “1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, neither party attends, the court may dismiss the suit.”
33. Order 12 Rule 7 of the [Civil Procedure Rules](#) provides as follows on setting aside dismissal orders issued under Order 12 of the Civil Procedure Rules;
- “7. 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.”
34. In the judicial decision of [Martin L Barasa v Giza Systems Smart Solutions Ltd](#) [2022] eKLR the Court held as follows;
22. It is within the general discretion of the Court to set aside any order issued by it *ex parte*. This should be subject to the Applicant adducing sufficient cause for the exercise of such discretion. Discretion should also be exercised judiciously.
23. The law regarding exercise of the Court's discretion is now settled. I will draw guidance from the holding of Judge Harris (as he then was), where he had this say on the case of *Shah v Mbogo* [1967] EA 116 and 123B:-
- “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
24. The Claimant has attributed his non-attendance to Court, to network challenges. He also states that as a lay person acting for himself, he was not conversant with issues of procedure.
25. Applying the principles set out in the case of *Shah v Mbogo* (*supra*), I do find that the Applicant's failure to appear in Court on the date of the hearing as inadvertent hence falling within the room for grant of discretion. Besides, the Applicant instantaneously filed the Application. This supports his assertion that he is desirous to prosecute the main suit.
26. To buttress this position, I gather support from the holding of the Court in [CMC Holdings Limited v Nzioki](#) [2004] 1 KLR 173, thus: -
- “In law, the discretion that a Court of law has, in deciding whether or not to set aside *ex-parte* order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant



out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

27. This is therefore a perfect case for the Court to exercise discretion in favour of the Applicant.”
35. As was held in the above cited judicial decision, this Court has the discretion to set aside any orders issued *ex parte*. The Court exercises this discretion to avoid an injustice resulting from an accident, error or inadvertence.
36. As has been stated in the preceding paragraphs, Counsel for the Plaintiff/Applicant argues that he together with the Plaintiff/Applicant failed to attend the hearing of the matter in open Court as they thought that the matter was proceeding virtually.
37. He also argues that after he became aware that the matter was proceeding in open Court he sent someone to look for Counsel to inform the Court that he was logged in virtually but she unfortunately arrived after the matter was dismissed.
38. The circumstances of this case in my view warrant this Court to exercise its discretion in favour of the Plaintiff/Applicant as his failure to attend Court was clearly inadvertent. It is equally important to note that the Plaintiff/Applicant filed the application under consideration the same day the suit was dismissed.
39. I find that it is in the interest of justice that the orders issued on 14<sup>th</sup> May, 2024 dismissing the Plaintiff/Applicant’s suit be set aside and the suit reinstated.

#### **Disposition.**

40. Consequently, the application dated 14<sup>th</sup> May, 2024 is hereby allowed in the following terms:
- a. The orders issued by this Honourable Court on 14<sup>th</sup> May, 2024 dismissing the suit herein for non-attendance are hereby set aside.
  - b. The suit is hereby reinstated.
  - c. The Plaintiff shall set up the suit for hearing within 7 days of the date hereof.
  - d. The costs of this application shall abide the outcome of this suit.
41. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 26TH DAY OF SEPTEMBER 2024.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

Mr. Tonui for the Plaintiff/Applicant.

No appearance for the Respondent.

Court Assistant; Mr. Joseph Makori.

