



**Thomas v Aiyabei & another (Environment & Land Case  
E020 of 2022) [2025] KEELC 2906 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2906 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E020 OF 2022**

**CK YANO, J  
MARCH 27, 2025**

**BETWEEN**

**MARTHA MARUKO THOMAS ..... PLAINTIFF**

**AND**

**TITUS AIYABEI ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT, ELGEYO MARAKWET ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of motion dated 10<sup>th</sup> February, 2025, the Plaintiff/Applicant is seeking orders that the orders issued by this Honourable court on 27<sup>th</sup> January, 2025 dismissing the suit for non-attendance be reviewed and set aside and the suit be reinstated and heard on merit, as well as costs. The application is based on the grounds thereof and supported by the Affidavit sworn on 10<sup>th</sup> February, 2025 by David Rioba Omboto, an advocate in conduct of the matter on behalf of the Applicant.
2. It is the counsel's contention that when the matter was coming up for mention for directions on 27<sup>th</sup> January, 2025, he was in mistaken believe that the link posted in the cause list of the day was meant for this Honourable court. That the suit was previously before Hon. Justice Obaga, and while opening the link to attend court, due to the confusion of the posted link, he was unable to access the court's new link.
3. Counsel averred that his mistake ought not be visited upon an innocent litigant. That the application has been made in good faith and promptly, and that it is in the interest of justice that the instant application be granted to allow the matter be ventilated and heard on merit. Further, that since the filing of this matter, he has always attended court without fail.
4. That application was opposed by the 1<sup>st</sup> Defendant/Respondent who filed grounds of opposition dated 6<sup>th</sup> March, 2025 on the grounds that there was inordinate delay in filing this application, that the new link was provided by the registry, but the applicant was not diligent enough, that there was



- no evidence provided by the applicant to prove that he tried to log in, and that the respondent will be prejudiced if the matter is reinstated.
5. This court has considered the application, supporting affidavit and grounds of opposition. The only issue arising for determination is whether the Applicant has made out a case for setting aside the orders made on 27<sup>th</sup> January, 2025 to warrant the grant of the orders sought.
  6. The grounds for setting aside ex-parte orders are now well settled. The court in determining whether or not to grant an order of setting aside and reinstatement ought to exercise such powers judiciously, taking into account the circumstances of each case.
  7. Order 12 Rule 7 of the Civil Procedure Rules provides that:-

“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.”
  8. The Court of Appeal in *Richard Ncharpi Leiyagu Vs. Independent Electoral Boundaries Commission & 2 others* (2013) eKLR while emphasizing the factors to consider and the need to exercise discretionary powers judiciously in setting aside ex-parte orders, held that:-

“We agree with those noble principles which go further to establish that the court’s discretion to set aside an ex-parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10<sup>th</sup> June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10<sup>th</sup> June, 2013, constituted an excusable mistake, an error of judgement regarding counsel’s failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”
  9. In *CMC Holdings Limited –vs- Nzioki* (2004) 1 KLR 173, it was held that:-

“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.”
  10. Guided by the above decisions, it is important to note that the discretionary nature of the orders sought herein ought not to be exercised based on sentiments or sympathy or arbitrarily in favour of an underserving party. The reason for non – attendance must qualify as a sufficient cause and must amount to a reasonable, excusable mistake and the same does not impute negligence, inaction and bad faith aimed at defeating the course of justice on the part of the applicant. The question that follows is whether the reason given by the applicant’s counsel for non-attendance qualifies as such.
  11. The applicant’s counsel contends that when the matter came up on 27<sup>th</sup> January, 2025, he mistakenly believed that the link in the cause list which was previously used by Hon. Justice Obaga was meant



for use by this court. That while opening the said link to attend the court, he was unable to access the court through the new link, and due to that confusion, the suit was dismissed for non-attendance. The applicant's counsel argued that his mistake ought not be visited upon the applicant who was an innocent litigant. That the application was made in good faith and promptly and ought to be allowed in the interest of justice so that the matter can be heard on merit.

12. On his part, the Respondent was of the view that the application was filed after an inordinate delay, that the new link was provided by the registry and the applicant was not diligent enough and that the respondent will be prejudiced if the application is allowed.
13. I have critically considered the rival positions taken by both parties. It is my finding that the reason advanced by the applicant's counsel for non-attendance is sufficient and reasonable. I will therefore give him the benefit of doubt. It is common knowledge that this court had just taken over the matter from the previous judge who was transferred. There is a likelihood that there was confusion over the court's link as alluded to by the applicant. In my view, the non-attendance was not deliberate or intentional or aimed at defeating the course of justice. I am also not persuaded that the respondent will be prejudiced if the application is allowed. Articles 48 and 50 of the Constitution provide the right to access to justice and the right to have any dispute decided in a fair hearing before a court. I do therefore find that there is need to give the parties an opportunity to be heard and ventilate their cases for the court to decide the matter on merit. The right to be heard is a well protected right in our constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by a stroke of a pen where sufficient cause has been shown.
14. The upshot is that I find the Notice of motion dated 10<sup>th</sup> February, 2025 to be merited and I proceed to allow the same in the following terms:-
  - a. The orders issued on 27<sup>th</sup> January, 2025 dismissing the suit be and are hereby set aside.
  - b. The suit is hereby reinstated for hearing and determination on merit.
  - c. Costs of the application shall be in the cause.
15. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 27<sup>TH</sup> DAY OF MARCH, 2025 VIDE MICROSOFT TEAMS.**

**HON. C. YANO**

**ELC, JUDGE**

In the presence of;

Ms. Kosgei for the Plaintiff/Applicant.

Mr. Muhoro for the Defendant/Respondent.

Court Assistant - Laban.

