



**Chesang v Chesang & another (Environment & Land Case 10 of 2017)
[2023] KEELC 20229 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 10 OF 2017
EO OBAGA, J
SEPTEMBER 28, 2023**

BETWEEN

REUBEN CHEPKAW CHESANG PLAINTIFF

AND

TEBEKE CHESANG 1ST DEFENDANT

ROSE JEROTICH KANGOGO 2ND DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 25/5/2023 in which the Defendants/Applicants seek setting aside of the ex-parte proceedings of 23/5/2023 and that the court re-opens the defence case to enable the Applicants to call the remaining four witnesses before closing the defence case.
2. On the 18/4/2023, the defence started giving evidence. The 1st Defendant testified and completed his evidence. The case was adjourned to 23/5/2023 for further defence hearing. Come 23/5/2023, neither the Defendants nor their counsel were present. As the date had been taken by consent, counsel for the Plaintiff/Respondent asked the court to close the defence case and give directions on filing of written submissions.
3. The court proceeded to close the defence case and gave directions on filing of written submissions. The Applicants' counsel filed an application seeking to set aside the proceedings of 23/5/2023. The counsel contends that non appearance in court was as a result of mis-diarisation of the date in her diary. Ms. Luseria stated that when she was in court on 18/4/2023, she diarized the date as 25/5/2023 instead of 23/5/2023.
4. The counsel further depones that her clients called her on 22/5/2023 and informed her that hearing was due on 23/5/2023 but that she insisted that according to her diary, the case was coming up for hearing on 25/5/2023. She contends that the mistake should not be visited upon her clients. She pleads that the case be re-opened so that the four remaining witnesses can testify.



5. The Applicants' application was opposed through a replying affidavit sworn on 6/6/2023. The Respondent's counsel contends that the Applicants' counsel and her clients were in court on 18/4/2023 when the case was adjourned to 23/5/2023. The Applicants' counsel and her clients were not in court. The Respondent's counsel contends that the Applicants' application is made in bad faith and if it was allowed, it will prejudice the Respondent.
6. I have carefully considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the oral submissions during the hearing. The only issue for determination is whether the Applicants have shown sufficient reason to warrant the court to exercise its jurisdiction to set aside the orders of 23/5/2023.
7. The reason given for non attendance in court is that the advocate for the Applicants mis-diarized the date in her diary. The Advocate has provided copies of her diary for both 23/5/2023 and 25/5/2023. It is clear that this case was diarized for 25/5/2023 instead of 23/5/2023. The Applicants' counsel was called by her clients on 22/5/2023 who informed her that the case was due for hearing on 23/5/2023 but she insisted that according to her diary, the case was slated for 25/5/2023.
8. It is common knowledge that courts prepare causelist for the entire month. The counsel should have been keen to confirm her clients' assertions by sending her clerk to the court to confirm the position or check in the causelist of 23/5/2023. She did not do this. This was a mistake on her part for failing to carry due diligence. However, this notwithstanding, I find that the Applicants deserves a chance to be heard, I therefore allow the application with the result that the proceedings of 23/5/2023 are hereby set aside. The defence case which had been closed is hereby reinstated. The Applicants' advocate should personally pay the Respondent costs assessed at Kshs 15,000/= before the next hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 28TH DAY OF SEPTEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Cheptarus for Plaintiff/Respondent.

Ms. Luseria for Defendants/Applicants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

28th SEPTEMBER, 2023

