



**Papu v Waweru & another (Environment & Land Case
263 of 2017) [2025] KEELC 1209 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 263 OF 2017**

**MD MWANGI, J
MARCH 13, 2025**

BETWEEN

KEREBU KASARO PAPU PLAINTIFF

AND

RICHARD NGATIA WAWERU 1ST DEFENDANT

PATRICK GUKURIA MURAYA 2ND DEFENDANT

RULING

(In respect of the Notice of Motion dated 15th March 2024 brought under the provisions of Sections 1A, 2, 3A and 63, (e) of the [Civil Procedure Act](#), Order 51 rule 1 and Order 18 rule 10 of the [Civil Procedure Rules](#))

Background.

1. The Notice of Motion dated 15th March 2024 is by the Plaintiff in this case. The Plaintiff prays for orders that the court be pleased to set aside the ex parte proceedings of 4th March 2024 and that the court be pleased to re-open his case and allow him to lead additional evidence by calling additional witnesses.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Donald Rabala, the advocate for the Plaintiff/Applicant sworn on 15th March 2024. In a nutshell, the deponent states that he wrongly diarized the date scheduled for the further hearing of the case. In the absence of the Plaintiff, the Plaintiff's case was ordered closed and the court proceeded to hear the defence case on the material date. The Plaintiff terms this mistake as inadvertent and excusable.
3. The deponent further states that on the date that he had mis-diarized, 14th March 2024, he actually travelled to court and the Plaintiff's additional witnesses had actually availed themselves for the further



hearing of the case only to realize that the matter had proceeded to hearing on 4th March 2024 and parties directed to file written submissions.

4. The application was filed on 15th March 2024. The Applicant pleads with the court to exercise its jurisdiction in his favour and allow his application.

Responses by the Defendants.

5. The application is opposed by the Defendants herein. The 1st Defendant's response is by way of a replying affidavit sworn by Charles Njenga, the advocate representing the 1st Defendant.
6. The deponent deposes that this case has been in court for 12 years and the delay for the most part has been occasioned by the Plaintiff. The court has been more than lenient to him giving him more than enough time to prosecute his suit but the Plaintiff has not been keen thereby prejudicing the Defendants. The deponent enumerates in his affidavit the numerous occasions when the matter has been adjourned at the instance of the Plaintiff.
7. The deponent avers that the hearing date of 4th March 2024 was taken by consent of all the parties way back on 28th September 2023. However, the Plaintiff failed to attend. The court then marked the Plaintiff's case as closed and proceeded to hear the Defendant's case. The matter was concluded on the said date.
8. The 1st Defendant pleads with the court not to entertain the Plaintiff's application for the reason that the Plaintiff has not provided a valid explanation for the non-attendance on his part and is therefore underserving of the court's discretion. The setting aside of the proceedings at this juncture will be prejudicial to the Defendants. It will further not be in the interests of justice to set aside the proceedings and re-open the case as sought by the Plaintiff.
9. The 2nd Defendant on his part filed grounds of objection dated 9th October 2024 and a replying affidavit sworn by Kanyi Ndurumo, the advocate for the 2nd Defendant, in opposition to the Plaintiff's application under consideration. He termed the Plaintiff's application as misconceived, incompetent, bad in law, frivolous and vexatious and without merits. He further affirms that the application is an abuse of the process of court meant to delay the final determination of the matter. The replying affidavit by Kanyi Ndurumo Advocate affirms the depositions in the affidavit of Charles Njenga on behalf of the 1st Defendant.

Court's directions

10. On 17th December 2024, the court directed that the Plaintiff's application be canvassed by way of written submissions. The Plaintiff/Applicant did not however file submissions as directed by the court. No explanation has been offered for the non-compliance. It is only the 1st Defendant who filed written submissions dated 3rd March 2025 which the court has had an opportunity to read through and consider in writing this ruling.

Issues for determination

11. Having considered the Plaintiff's application and the responses by the Defendants, the sole issue for consideration is whether the Plaintiff's application is merited to warrant the grant of the orders sought.



Analysis and determination

12. The Plaintiff prays for the setting aside of the proceedings of 4th March 2024 and further that the court be pleased to re-open the Plaintiff's case and allow him to call additional evidence. The 2nd prayer is off course dependent on the grant of the 1st prayer.
13. The locus classicus in setting aside is *Shah –vs- Mbogo & another* 1967 E.A. 116 cited by the 1st Respondent, where the Court of Appeal of East Africa stated that,

“This 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 a person who has deliberately sought out to, whether by evasion or otherwise to obstruct or delay the cause of justice.”
14. It is therefore upon the Applicant in an application seeking to set aside an order of the court or proceedings, as in this case to demonstrate a proper justification for setting aside by showing that there is sufficient cause why he/she failed to attend court and that his/her application is made in good faith and not meant to subvert and delay the course of justice.
15. The 1st Respondent in his submission has cited the case of *Wachira Karani –vs- Bildad Wachira* (2016) eKLR, where the court rightly held that ‘sufficient cause’ is thus the cause for which the Applicant could not be blamed for his absence.
16. The Supreme Court of India in *Parimal –versus- Veena Bharti*, (2011), on its part stated that sufficient cause means that the Applicant has not acted in a negligent manner or there was want of bona fide on his part in view of the facts and circumstances of the case or the party cannot be blamed for not having acted diligently.
17. The Respondents herein in their replying affidavits deposed that the Plaintiff has not been diligent in prosecuting his case. They detailed the instances when this matter has been adjourned at the instance of the Plaintiff. They assert that the Plaintiff is not therefore deserving of this court's discretion.
18. The Plaintiff did not bother to respond to the assertions by the Defendants in their respective replying affidavits. I too note that the Plaintiff has not demonstrated any keenness even in pursuing this application. He did not bother to file submissions as directed by the court yet he was to prosecute his application by way of written submissions.
19. Article 159 of *the Constitution* commands this court in exercising its judicial authority to amongst other things do justice to all and uphold the principle that justice shall not be delayed. I interpret the phrase “do justice to all” to mean that the court is obligated to do justice to the Plaintiff as well as to the Defendants.
20. In making my determination on the application before me, I must consider the interests of both sides, the Plaintiff on the one side and the Defendants on the other side.
21. This is a case that has been in court for well over 12 years now. We cannot afford to delay it any further especially so without sufficient and justifiable cause. The Plaintiff/Applicant has not offered any such sufficient and justifiable cause. I agree with the Defendants that the Notice of Motion dated 15th March 2024 is not merited.
22. I hereby dismiss the Plaintiff's application with costs to the Defendants/Respondents and direct the parties to file their final written submissions as directed by the court.



It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 13TH DAY OF MARCH 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Swaka for the 1st Defendant/Respondent

Mr. Ndurumo for the 2nd Defendant/Respondent

N/A for the Plaintiff/Applicant

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

