



REPUBLIC OF KENYA



KENYA LAW
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Ethics & Anti-Corruption Commission v Kivisi & 2 others (Environment and Land Appeal 596 of 2014) [2025] KEELC 3903 (KLR) (7 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 596 OF 2014**

**A NYUKURI, J
APRIL 7, 2025**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

EDWARD KIVISI 1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA 2ND DEFENDANT

JAMES MACHARIA GITU 3RD DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion dated 19th December, 2024 filed by the 1st and 3rd defendants seeking the following orders;
 - a. The honourable court be pleased to review, vary and set aside the orders made on 2.10.2024 closing the plaintiff's and defence case and order the re-opening of both the plaintiffs and defence cases.
 - b. Upon prayer (a) above being granted, the plaintiff's witness be recalled for cross-examination.
 - c. The cost of this application be in the cause.
2. The application is premised on grounds on its face as well as on the affidavit sworn on 19th December, 2024 by Ondieki G. Innocent, counsel for the applicant. The applicants case is that when this matter came up on 7th May, 2024, Mr. Wafula advocate held brief for Mr. Ondieki for the applicants and that the date fixed for hearing was not written in applicants' counsel's diary, hence the matter proceeded when he was not aware.



3. Further that when the hearing notice was served on 28th May, 2024, the same was received by a pupil in Mr. Ondieki's office who also failed to diarize the same in his master diary. He stated that the matter proceeded on 2.10.2024 without his presence and that he was not aware. He sought that the plaintiff's case be opened so that the matter is heard on merit.
4. The application was opposed. Mary Kakuvi Mutuku, an employee of the plaintiff filed a replying affidavit sworn on 18th February, 2025. She stated that in the past, the 1st defendant has sought for adjournments in the matter impeding the progress of the matter which was filed in 2009. That he sought adjournment on 24th April, 2024; 21st June, 2023 and 15th November, 2023 when the plaintiff was in court and ready to proceed. She further stated that on 7th May 2024, when the plaintiff was ready to proceed, Mr. Manyoni holding brief for Mr. Ondieki sought adjournment on grounds that Mr. Ondieki was affected by floods and was not able to attend.
5. She further stated that when the matter was scheduled for 2nd October 2024, the parties were granted 21 days each to file further documents and that the court ordered her to serve hearing notice. That the hearing notice was served even when the applicants had been represented in court. That the 1st defendant's advocate were served with a hearing notice physically on 28th May, 2024 for hearing on 2nd October 2024 and that on 20th September, 2024, the plaintiff's paralegal served the 1st and 2nd defendants with substituted list of witnesses, witness statements and documents.
6. She stated that on 2nd October 2024 when the matter came up for hearing, despite service, the defendants did not turn up in court. That the plaintiff presented three witnesses closed their case and asked the court to close the defence case. That the court closed the plaintiff and defence cases and directed the plaintiffs to file and serve written submissions and the matter was fixed for mention on 10th December 2024. That on 10th December 2024, the plaintiff's counsel sought for a judgment date upon informing court that they had filed submissions. That it was on that date that the applicants' counsel informed court that he did not participate in the court's proceedings because his clerk had not diarized the matter.
7. According to her, the plaintiff did not serve the clerk, hence the same was a misrepresentation. She stated that even if the clerk were to fail to diarize the matter, that should not affect other parties as it was counsel's failure. She states that the judiciary's e-filing system also updates hearing dates for all matters and it is the duty of counsel to check the dates for his matters. She stated that the plaintiff's witnesses were government officials and that one of them travelled from Nairobi and incurred costs while they left their duties unattended so that they can be in court and that the matter cannot be opened on flimsy grounds.
8. The parties were directed to file written submissions. The applicants were ordered to file and serve their submissions by 26th March 2025 while the respondent was to file and serve its submissions by 2nd April 2025. None of the parties complied.

Analysis and determination

9. I have carefully considered the application and response thereto. The only issue that arise for this court's determination is whether there is good cause to reopen both the plaintiff's and 1st and 3rd defendants' case.
10. Order 51 Rule 15 of the Civil Procedure Rules gives this court the jurisdiction to set aside ex parte orders. The power to set aside ex parte orders is discretionary and that discretion ought to be exercised judiciously and not whimsically. An applicant seeking to set aside ex parte orders where service was done, must demonstrate reasons why they failed to attend court to the court's satisfaction



as judicial time is precious and cannot be wasted by parties who fail to attend court with no plausible reasons. Just because a matter proceeded ex parte is not reason enough to set it aside, the applicant seeking to set aside the ex parte order must demonstrate to the court that the ends of justice demands that an ex parte order be set aside.

11. In the case of *Shah v Mbogo* [1967] EA 116 the Court of Appeal of East Africa held as follows;

“This discretion (to set aside ex parte proceedings or decision) 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, whether by evasion or otherwise, to obstruct or delay the course of justice.”
12. In this case, counsel for the 1st and 3rd defendants deponed in the affidavit supporting the instant application that on the date when the hearing date of 2nd October 2024 was fixed, an advocate called Mr. Wafula held his brief sought an adjournment on his behalf but failed to inform him of the next hearing date. He added that besides having sent counsel to hold his brief, his office was also served for the hearing date for 2nd October 2024, but that the pupil in his office who was served failed to diarize the matter.
13. The applicants’ counsel did not provide evidence of the matter having been undiarized. In addition, having been served on 28th May 2024 for hearing on 2nd October 2024, and the said date being on the court’s CTS platform, counsel did not inform court why having failed to get feedback from Mr. Wafula, for over four months, he did not check the CTS to see when this matter had been fixed for hearing. Besides, before the hearing date, in September 2024, the applicants’ counsel was served with the plaintiff’s witness’ substituted statement. On the whole, I do not see any plausible reason why the applicants and their counsel failed to attend court on 2nd October 2024 when the date was taken by consent, when a hearing notice was also served; when subsequently documents in readiness for hearing were served and when the hearing date was on the CTS and could be seen by all the parties in this matter.
14. Having failed to demonstrate to this court’s satisfaction the reasons for non-attendance of court by both the applicants and their counsel, and this matter having been in court since 2009 to date, a period of about sixteen years, I find no merit in the application dated 19th December 2024, which I hereby dismiss with costs to the plaintiff.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THIS 7TH DAY OF APRIL, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ondieki for the 1st and 3rd defendants/ applicants

Ms. Omari for the plaintiffs/respondents

No appearance for the 2nd defendant

Court Assistant: M. Nguyai

