



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kyungu & 4 others v Atangwa Clan & 10 others (Environment & Land  
Case 3 of 2021) [2024] KEELC 6911 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6911 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 3 OF 2021  
A NYUKURI, J  
OCTOBER 16, 2024**

**BETWEEN**

**CHRISTINE KANINI KYUNGU ..... 1<sup>ST</sup> PLAINTIFF  
JANET NZILANI KYUNGU ..... 2<sup>ND</sup> PLAINTIFF  
CAROLINE MUKONYO KYUNGU ..... 3<sup>RD</sup> PLAINTIFF  
IRENE MUTHEU KYUNGU ..... 4<sup>TH</sup> PLAINTIFF  
KELVIN MWOLOLO KYUNGU ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**THE ATANGWA CLAN ..... 1<sup>ST</sup> DEFENDANT  
SIMON M NTHIANI ..... 2<sup>ND</sup> DEFENDANT  
SAMSON MUSYIMI ..... 3<sup>RD</sup> DEFENDANT  
PAUL KANGA SILAS ..... 4<sup>TH</sup> DEFENDANT  
FRANCIS KYUNGU ..... 5<sup>TH</sup> DEFENDANT  
NDUKU KYUNGU ..... 6<sup>TH</sup> DEFENDANT  
LAWRENCE MUSYOKI KYUNGU ..... 7<sup>TH</sup> DEFENDANT  
MATHEW M MUTOMBI ..... 8<sup>TH</sup> DEFENDANT  
FRANCISCA KIMANI ..... 9<sup>TH</sup> DEFENDANT  
AGNES MUMBUA ..... 10<sup>TH</sup> DEFENDANT  
ABEDNEGO MUTUA MAITHYA ..... 11<sup>TH</sup> DEFENDANT**



## RULING

1. Before court is a notice of motion application dated 3<sup>rd</sup> April 2024 filed by the plaintiffs seeking for orders that the defendants' case be reopened to allow for cross examination of the witnesses. The application is supported by the affidavit of Christine Kanini Kyungu the 1<sup>st</sup> plaintiff. The applicant's case is that when the defence case came up for hearing on 24<sup>th</sup> January 2024, the case proceeded *ex parte* as the plaintiffs and their advocates were not in court, and there was no cross examination of the defendants' witnesses.
2. She deposed that the plaintiffs' advocate's absence in court on the hearing date was not intentional as it occurred due to an honest oversight from the support staff of the advocate who misdiarized the matter. That mistakes of an advocate should not be borne by the client. They urged the court, in the interests of justice to grant the orders sought.
3. The application was opposed. The defendants' advocates filed grounds of opposition. They stated that the motion was fatally defective for having been filed by a stranger to the proceedings because no notice of change of advocates has been filed. They also stated that the supporting affidavit was defective. They stated further that it is the plaintiffs' advocate who fixed the matter for hearing and served the defence. According to them, failure to diarize a matter is not a mistake by counsel but the same is negligence and cannot be the basis to reopen a case. They stated that the advocate did not swear the affidavit and no evidence of non-diarization was annexed to the application. They further averred that the application had been brought after inordinate delay.
4. In a rejoinder, the plaintiff filed further affidavit sworn on 23<sup>rd</sup> May 2024. She stated that a notice of change of advocates was filed on 18<sup>th</sup> January 2024 and that failure to diarize the matter was an inadvertent and excusable mistake by counsel, and that that should not deny her opportunity to prosecute her case to its logical conclusion. She also stated that no prejudice would be suffered by the defence if the application is allowed as the defendants have not alleged any prejudice and that any prejudice suffered shall be compensated.

### Analysis and determination

5. The court has carefully considered the application as well as the response thereto and the only issue that arise for determination is whether the applicant deserves the orders sought.
6. Order 51 Rule 15 of the Civil Procedure Rules grants the court jurisdiction to set aside *ex parte* orders and provides as follows;

The court may set aside an order made *ex parte*.
7. Setting aside an *ex parte* order is discretionary and the court ought to exercise its discretion judiciously and not whimsically.
8. In the instant matter, the applicant's reason for failure to attend court on 24<sup>th</sup> January 2024 was that their support staff misdiarized the hearing date. They argued that that was an inadvertent mistake on the part of the advocate, which mistake should not be borne by the plaintiffs. In response, the defendants argued that there was no evidence of misdiarization and that if that occurred, the same amounted to negligence on the part of the counsel for the applicant.



9. Having considered the record, it is clear that the plaintiffs were represented by the firm of O. N. Makau & Mulei Advocates until 18<sup>th</sup> January 2024 when the firm of Kithuka and Nafula Advocates took over the matter. The plaintiffs and their advocates have always been in attendance when the matter came up for hearing save on 24<sup>th</sup> January 2024; when both the plaintiff and their advocate were not in court. The record shows that when this matter came up for hearing on 24<sup>th</sup> January 2024, counsel for the defendant informed court that he had been served by the plaintiffs' counsel. The record shows that on 12<sup>th</sup> October 2023, the firm of O. N. Makau & Mulei Advocates fixed the matter for hearing of defence case on 24<sup>th</sup> January 2024. The firm of Kithuka & Nafula Advocates came on record on 18<sup>th</sup> January 2024. Having considered the plaintiff's position that her advocate misdiarized the hearing date, I have no reason to doubt this position in view of the fact that the law firm that fixed the matter for hearing is a different firm from the advocates now representing the plaintiff. The right to be heard is a Constitutional right and the plaintiff is entitled to be heard. However, as the granting of the orders sought will occasion delay and additional cost to the defendant's counsel and witnesses, it is in the interests of justice that the defendants are compensated by way of costs.
10. In the premises, I find and hold that the plaintiffs' application dated 3<sup>rd</sup> April 2024 is merited and the same is allowed as prayed. The plaintiffs' counsel to pay the defendants thrown away costs of Kshs. 15,000/- within 30 days.
11. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16<sup>TH</sup> DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Ms. Musau for plaintiffs/applicants

Mr. Mbindyo for defendants/respondents

Court assistant – Josephine

