



Kairo & 2 others (Suing as the Administrators of the Estate of Simon Thuo Kairo - Deceased) v Aberdare Estates Limited (Environmental and Land Originating Summons 6 of 2024) [2025] KEELC 3598 (KLR) (Environment and Land) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 6 OF 2024**

MC OUNDO, J

MAY 8, 2025

BETWEEN

TOMMY WAINAINA KAIRO 1ST PLAINTIFF

JUDY NJOKI KAIRO 2ND PLAINTIFF

NELLIE WANJIRU KAIRO 3RD PLAINTIFF

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF SIMON THUO
KAIRO - DECEASED**

AND

ABERDARE ESTATES LIMITED DEFENDANT

(IN THE MATTER OF LAND REFERENCE NUMBERS: 10855/5, 10855/6, 10855/7, 10855/8, 10855/9, 10855/10, 10855/11, 10855/12, 10855/13, 10855/14, 10855/15, 10855/16, 10855/17, 10855/18, 10855/19, 10855/10, 10855/21, 10855/22, 10855/23, 10855/24, 10855/25 7 10855/26.)

RULING

1. Before me for determination is the Plaintiffs' Application dated 4th December, 2024 by way of a Notice of Motion brought under the provisions of Section 1A, 3A and Order 12 rule 7 of the Civil Procedure Rules wherein the Plaintiffs have sought for the orders of the court dismissing their suit for non-attendance be set aside and the suit be reinstated and listed for hearing.
2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of even date sworn by Githui John, an advocate of the High Court of Kenya who deponed that having had been instructed to act alongside the law firm of Kennedy Kangethe Mwaniki Advocates, he had filed his Notice of Appointment clearly indicating this position. That prior to the date set for hearing, that



is the 24th July, 2024, he had indicated to his counterpart of his unavailability on the said day hence was under the impression that his counterpart would attend the court.

3. That on the said date, when the matter came up for hearing, none of the Counsel attended court because as it turned out, Counsel from the law firm of M/s Kenedy Kangethe Mwaniki Advocates who had been asked to handle the matter was out of the country. That as a consequence of the non-attendance on the part of the Plaintiffs and their Advocates, the matter had been dismissed.
4. That he was owning up the mistake which had been occasioned by a misunderstanding between Counsel for the Plaintiff and/or a communication cross purpose. That the mistake had been inadvertent and/or an accidental slip but had not been a deliberate attempt to derail the court process. That subsequently, he had not filed the instant Application as a matter of right but was pleading to the court to exercise its discretion to reinstate the suit and grant the Plaintiffs and their Advocates a second chance.
5. That he was now committed to expedite the hearing and determination of the matter herein, that the instant application be allowed as prayed.
6. In response to and in opposition to the application, the Respondent vide its Replying Affidavit dated 14th February, 2024 (sic) sworn by Ibrahim Karanja, the Defendant's Director deponed that he had been present in the open court on 24th July, 2024 when the trial in the instant matter had been set to commence. That the Plaintiffs' Advocates had been aware of the hearing date, the same having been taken by consent in court.
7. That the mistake that had been made by the Plaintiffs' Counsel should not be posted to the Defendant who had been present in court and ready to proceed with its case as the Defendant would stand to suffer prejudice were the application herein granted. That it was in the interest of justice that the said Application be dismissed.
8. Directions were issued for the disposal of the Application dated 4th December, 2024 by way of written submissions, wherein Plaintiffs/Applicants vide their submissions dated 26th February, 2025 in support of their Notice of Motion first summarized the factual background of the matter before hinging their reliance in the decided case of *Shah v Mbogo and Another* [1967] EA 116 to submit that it was trite that the power of the court to set aside proceedings taken in default of appearance or defence was discretionary.
9. That the order dismissing the instant suit had been regular and where the court was invited to exercise its discretion to set aside a regular judgement, the only consideration that it ought to take into consideration was the need to do justice to the parties. Reliance was placed on the decisions in the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) and *Githui v Thiongo & 2 others (Environment & Land Case E002 of 2024)* [2025] KEELC 574 (KLR) (Environment and Land) (13 February 2025) (Ruling) to submit that the main consideration for the court was the need to do justice and that the court do fetter its otherwise unfettered discretion.
10. That their Application was merited, as it was not in dispute that the Plaintiffs had been represented by two law firms where the firm of Githui Advocates LLP had come into the matter much later. That indeed, Mr. Githui Advocate had explained that on the day that the matter was to be heard, he had been under the impression that his counterpart would attend court. That the situation obtaining herein had been a normal human error which could not be attributed to negligence or any attempt to subvert judicial process or waste the court's time.



11. They submitted that the court's unfettered discretion was meant to address the situations like the instant case. That it was thus in the interest of justice that the Plaintiffs/Applicants be given an opportunity to ventilate their case in court. That any loss that the Defendant may have suffered could be compensated by way of costs. That the scales of justice hence tilted in favour of allowing the Plaintiffs/Applicants Application.
12. The Respondent on the other hand vide its submissions dated 7th March, 2025 and in opposition to the Plaintiffs/Applicants' Application reiterated that the suit herein had been set down for hearing by consent. That whereas the Plaintiffs/Applicants had been represented by two law firms namely Kennedy Kangethe & Co. Advocates and Githui Advocates LLP, Mr. Kennedy Kangethe had been present in court when the hearing date had been fixed. That indeed, the deponent in the Plaintiff's Application herein had not denied that he had been informed by the firm of Kennedy Kangethe & Co. Advocates save that he had been under the impression that Mr. Kangethe would attend the hearing.
13. That whereas the Defendant's witnesses had been in court when the matter had been called out, the Plaintiffs had not been present to prosecute their case thus the court had been entitled to dismiss the Originating Summons. That the purpose of hiring two firms was to complement each other hence if no Advocate had been available to attend the court for any reason then it had been incumbent for either of the firms to instruct Counsel to seek for an adjournment.
14. That whereas there were 3 Plaintiffs who were destined to testify on the 24th July, 2024, none of them were present in court and none of them had sworn any affidavit as to their whereabouts and whether they had knowledge that their case was to be heard on that date. That apart from the mistake that had been owned up by their Counsel, the Plaintiffs themselves had been indolent and not interested in the instant case at all.
15. That secondly, the delay in filing the instant Application had been inordinate and a second thought. That the court should not assist litigants who were not vigilant as to do so would highly prejudice parties who had been in court and ready for the hearing. It thus submitted that the application was devoid of merit and the same should be dismissed with costs.

Determination.

16. I have considered the Applicants' application herein dated the 4th December, 2024 which seeks for the setting aside of the orders of the court dismissing the instant suit for non-attendance, so that the same could be reinstated and listed for hearing. I have also considered the Respondent's Replying Affidavit in opposition, the submissions, the authorities cited and the applicable law.
17. Order 12, Rule 7 of the Civil Procedure Rules grants the court discretion to set aside any *ex parte* orders upon such terms that it deems fit and just. It provides as follows: -

“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”.
18. The Plaintiffs herein instituted the instant suit vide an Originating Summons dated 7th July, 2023 seeking for the determination of the question as to whether the deceased and the Plaintiffs were entitled under Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya to be registered as the absolute proprietors of land parcel numbers 10XX5/5-26.
19. The Court had directed that the Originating Summons dated the 7th July, 2023 proceed by way of viva voice evidence and that the same be deemed as the Plaintiff and the Supporting Affidavits be deemed as the witness statements. Parties had further been directed to comply with the provisions of Order 11 of



the Civil Procedure Rules. A site visit by the Deputy Registrar had also been ordered, which site visit had been conducted wherein the Report on the same had duly been filed in court.

20. However, when the matter came up for hearing on 24th July, 2024, there had been no appearance on the part of the Plaintiffs. The Court having been satisfied that the Plaintiffs had been served with the hearing notice, dismissed the Plaintiffs' suit with costs pursuant to the provisions of Order 12 Rule 3 (1) of the Civil Procedure Rules.
21. Having laid down a summary of the history of the matter in question, I find that the issue that arises for my determination herein being; whether the Application is merited.
22. The jurisdiction of the court to review or set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“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.” (emphasis added)
23. The legal threshold to consider before exercising the said discretion is whether the Applicants have demonstrated a sufficient cause warranting setting aside of the ex-parte orders.
24. In this case, the reason given by the Applicants in their Application seeking to have the dismissal order of the 24th July, 2024 set aside was that since they had appointed two firms of Advocates to represent them, there had been a miscommunication between the law firms such that on the date set for hearing of the matter, none of the Counsel appeared for them on the presumption that the other law firm would be in court. That it had turned out that the Counsel from the law firm of Kennedy Kangethe Mwaniki Advocates who had been asked to handle the matter was out of the country and as a consequence, none of them attended wherein the matter had been dismissed.
25. That the mistake had been inadvertent and/or an accidental slip and was not a deliberate attempt to derail the court process. That court grants the Applicants' and their Advocates a second chance as they were now committed to expedite the hearing and determination of the matter.
26. The application was opposed by the Respondent on the grounds that the hearing date had been taken by consent. That the Plaintiffs' Counsel's mistake should not be posted to the Defendant who had been present in court and ready to proceed with its case. That the Defendant stood to suffer prejudice were the application granted. That there had been no explanation by the Applicants why they themselves were not in court, and lastly that there had been a delay in the bringing of the application hence it was an afterthought and ought to be dismissed with costs in the interest of justice.
27. The court is alive to the fact that it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court however in the case of *Muthaiga Road Trust Company Ltd vs Five Continents Stationers Ltd & 25 Others* (2003) KLR 714, the Court of Appeal had held that: -

“In an application for setting aside, the main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules”.
28. The decision whether or not to set aside ex parte orders is discretionary, but must be guarded to avoid injustice and hardship resulting from inadvertence or excusable mistake or error but not to obstruct



or delay the course of justice. Importantly, the court should not be in a rush to remove a litigant from the seat of justice as denial of the right to be heard should always be the last resort.

29. Indeed, I would restate the words of Apaloo, JA in the case of Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103 that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

30. I find that the explanation given by the Applicants’ Counsel is plausible. Despite the Respondent’s submission that it would suffer irreparable loss if the application was allowed, it had not demonstrated what loss, if any that they would suffer. I shall therefore exercise my discretion, allow the application with no costs, set aside the dismissal orders of July 24, 2024, and reinstate the Plaintiffs’ suit for hearing and determination on merit.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 8TH DAY OF MAY 2025.

M.C. OUNDO

