



Briston Printers Agencies & 8 others v Baringo County Government (Environment and Land Case E002 of 2023) [2025] KEELC 5456 (KLR) (18 June 2025) (Ruling)

Neutral citation: [2025] KEELC 5456 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
ENVIRONMENT AND LAND CASE E002 OF 2023**

**L WAITHAKA, J
JUNE 18, 2025**

BETWEEN

**BRISTON PRINTERS AGENCIES 1ST PLAINTIFF
KOBINO LIMITED 2ND PLAINTIFF
JOSEPH CHESIRE 3RD PLAINTIFF
EVERLYN WANGAYA 4TH PLAINTIFF
AVENUE AGENCIES 5TH PLAINTIFF
ROBERT PUKOSE 6TH PLAINTIFF
ZABLON KIPKOECH 7TH PLAINTIFF
KEVIN KIPTOO 8TH PLAINTIFF
KETES AGENCIES 9TH PLAINTIFF**

AND

BARINGO COUNTY GOVERNMENT DEFENDANT

RULING

Introduction

1. In the application dated 27th March 2025, the applicant seeks the following orders;
 - i. Spent
 - ii. That the ex-parte proceedings of 19th March 2025 be set aside;
 - iii. That the defence case be heard afresh;



- iv. That the applicant be allowed to defend the suit unconditionally;
 - v. That filing of the plaintiff's submissions be stayed pending the hearing and determination of this application;
 - vi. That costs be in the cause.
2. The application is predicated on the grounds on the face of the application and affidavit sworn in support by Judith Kaimogul, an advocate of the High court of Kenya and Principal legal officer in the office of the County Attorney on 27th March, 2025. She deposes that the matter was scheduled for defence hearing on 19th March, 2025; that during morning call over, she applied for an adjournment on the grounds that her witness was not available as he was attending an urgent meeting in Naivasha but the court declined to grant the adjournment and set down the suit for hearing at 12.00 pm ; that at 12.00 pm, she was still engaged in a hearing before the lower court but notified the court assistant and counsel for the plaintiff of her predicament. The above notwithstanding, the court proceeded with the hearing, allowed the plaintiff to produce documents, closed the defendant's case and gave directions on filing of submissions in her absence.
 3. She further deposes that the application has been made without unreasonable delay; that substantial loss will result unless the orders sought are granted; that the applicant is keen to defend the suit and shall be greatly prejudiced if the orders sought are not granted.
 4. The application is opposed vide the replying affidavit of John Chemuna Chesire, the third defendant herein, sworn on 13th May, 2025. He avers that the matter was scheduled for hearing on 19th March 2025 at 11:30 a.m but on request by counsel for the defendant, his advocate indulged her upto 12.30 pm; that the court had to close the defendant's case at 12.50 pm after the defendant's counsel failed to show up for defence hearing; that under the Environment and Land court practice directions, matters are only adjourned under exceptional circumstances which have not been demonstrated by the applicant in the instant case. Further, that the defendant had not filed and served its witness statements and documents on the date of hearing, meaning they had no witness to call.
 5. When the application came for inter parties hearing on 21st May 2025, only counsel for the applicant/ defendant was present in court. She relied on the grounds in the application, supporting affidavit, Article 159 of the Constitution and submitted that no party should be condemned unheard.

Analysis and Determination.

1. I have considered the application, the grounds advanced in support thereof and the replying affidavit in opposition. I find the issue for determination to be whether this application has met the threshold for setting aside the proceedings of 19th March 2025.
2. Order 12 rule 2 of the *Civil Procedure Rules*, empowers courts to proceed and hear cases *ex parte* when only the plaintiff attends court and if the court is satisfied that notice of hearing was duly served.
3. However, rule 7 of the same order gives the court discretion to set aside *ex parte* judgment and orders. It provides;

“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.”



4. The principles governing setting aside ex-parte judgments and orders are well settled. In *Shah v Mbogo & another* [1967] EA 116 the court held;

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgment obtained ex-parte. 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, whether by evasion or otherwise, to obstruct or delay the course of justice.”

5. In *Osolo (Suing as an Administrator of the Estate of the Late Gerorge William Khamala Osolo alias George Wilson Khamala Osolo) v Ochola & 7 others* (Environment & Land Case 67 of 2018) [2024] KEELC 350 (KLR) (30 January 2024) Olao J stated;

“Reinstatement of a dismissed suit is therefore left to the discretion of the Court. Such discretion must of course be exercised judiciously on sound grounds. It is not available to a party as a matter of course because the dismissal of a suit must have been for good reasons. It is therefore the duty of the party seeking the reinstatement of a dismissed suit to demonstrate good reasons why the same should be reinstated. And in exercising that discretion, the Court will no doubt consider all the relevant surrounding circumstances of each individual case. The Court will no doubt also consider Articles 48 and 50 (1) of the *Constitution*. They provide that:48: “The Court shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”50(1): “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.” This Court will also be guided by the words of Chesoni J (as he then was) in the case of *Ivita v Kyumba* 1984 KLR 441 where he said the following on reinstatement of a suit: “The test is whether the delay is prolonged and inexcusable and if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the Court that it will be prejudiced by the delay or even the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise it’s discretion in his favour and dismiss the action for want of prosecution. Thus even if delay is prolonged, if the Court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest available time.” I must also bear in mind, as was stated in the case of *Sebei District Administration v Gaysyali* 1968 EA 300, that to deny a party a hearing should be the last resort of a Court.

6. In applying the law and the cited decisions to the circumstances of this case, the record bears witness that the defendant was given sufficient time to attend court and defend their case. Defence hearing was set down for 19th March 2025 in the presence of counsels for both parties. During morning call over, Ms Kaimogul counsel for the defendant, applied for an adjournment which was denied. Time was allocated for defence hearing at 12.00 p.m. By 12.50 pm, Ms Kimogul and her witness were still absent and the court was prompted to close the defendant’s case and give directions on filing of submissions.



7. It is not lost to this court that the conduct of counsel for the defendant has been very casual. I say this because Ms Kaimogul filed witness statements and documents the morning of the hearing without leave of court and after the plaintiffs had closed their case. Secondly, she did not inform the court and counsel for the plaintiff in advance that her witness would not be available to attend court. After the application for adjournment was denied, she ignored the directions of this court and chose to attend a hearing in the lower court instead of defending her client's case before this court. For the above reasons, I am not satisfied with the explanation given by the defendant's counsel for failure to attend court.
8. However, there are specific subject matters which are so solemn which can tilt exercise of the discretionary power of courts like land and fraud if refusal to grant the order sought will occasion grave injustice and hardship to the aggrieved party. In *Philip Kimutai Langat P/A Kiplangat Maina v Job Kibet Maina* [2007] eKLR, Kimaru J (as he then was) invoked the same precautionary principle and stated; "However, I have taken into consideration that the subject matter of the suit is land. The Court of Appeal has directed Courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits and not on technicalities. In the present case, the fact that the Plaintiff did not plead the time which he discovered the fraud is not fatal to his case. He can plead such a time after amending his pleadings. As earlier stated in this ruling, the Plaintiff's suit is predicated on allegations of fraud. It is imperative that the Plaintiff be allowed to ventilate his case by establishing or otherwise the allegations of fraud against the Defendant. In the circumstances of this case therefore, I hold that the preliminary objection lacks merit and is hereby dismissed with costs. Although the Plaintiff's suit is for the recovery of land, the substance of the suit is the allegations of fraud raised by the Plaintiff. Those allegations should be heard and determined on merits."
9. This being a land matter and the statement of defence dated 4th October 2023, having raised allegations of fraud, I am of the view that this case should be heard on merits. It is crucial that in a matter such as this, substantive justice be served to all parties and that any prejudice occasioned, be compensated in form of costs.
10. Consequently, I exercise my discretion and allow the application in the following terms:
 - i. The ex-parte proceedings of 19th March 2025 are hereby set aside as well as all other consequential orders on fulfilment of condition (vi) below first.
 - ii. The witness statements and documents filed on 20th March 2025 are admitted and deemed as properly filed.
 - iii. The plaintiffs and defence cases are reopened.
 - iv. This matter to be set down for hearing on a priority basis.
 - v. The hearing to start afresh.
 - vi. The plaintiffs are awarded costs of the application and thrown away costs in the sum of Kenya shillings fifty thousand (KShs 50,000.00) to be paid within thirty (30) days from the date hereof, failure of which the orders in (i), (ii), (iii), (iv) and (v) shall automatically lapse without any further reference to this court.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 18TH DAY OF JUNE, 2025

L. N. WAITHAKA



JUDGE

In the absence of the parties;-

N/A for the Appellant

N/A for the Respondent

Court Assistant: Lilian

