



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimemia & another v Bulemi & 26 others (Environment and Land Case E007 of 2022) [2025] KEELC 6836 (KLR) (1 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 6836 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND CASE E007 OF 2022**

**A NYUKURI, J**

**OCTOBER 1, 2025**

**BETWEEN**

**ANNE KIMEMIA & ANOTHER ..... PLAINTIFF**

**AND**

**PASHIL BULEMI & 26 OTHERS & 26 OTHERS & 26 OTHERS .... DEFENDANT**

**RULING**

1. Before court is a Notice of Motion dated 8<sup>th</sup> April, 2025 filed by the defendants seeking the following orders;
  - a. Spent
  - b. That this court be pleased to set aside its proceedings and orders made on the 4/3/2025 and the case to start de novo.
  - c. Spent
  - d. That the defendants be granted leave and opportunity to defend the suit.
  - e. That any other relief this honourable court may deem just and expedient to grant.
  - f. That the costs of this application be provided for
2. The application is anchored on the supporting affidavit sworn by Phinias Evoge Muhindi, the 16<sup>th</sup> defendant. The applicants' case is that by October 2024, the applicants' advocates had not obtained the diary for 2025 but indicated the hearing date as 4. 3. 2024 and did not indicate the proper year, though that was not fatal. That when posting the date to the 2025 diary, the advocate mis diarized the matter as 4.3. 2024 instead of 4.3.2025. That they only realized on 4.4.2025 that the matter was wrongly diarized. That counsel for the applicants learnt from counsel for the plaintiffs that the matter proceeded on 4.3.2025. That the advocate's non-attendance was an excusable mistake. That they have a good defence



and should be heard on merit as they stand to suffer irreparable loss. That their application was made in good faith and without delay.

3. The application was opposed. Anne Kimemia the 1<sup>st</sup> plaintiff filed a replying affidavit dated 28<sup>th</sup> April 2025 opposing the application. She stated that the hearing date of 4. 3. 2025 was fixed in court in the presence of both counsel and that their excuse of misdiarization of the date is neither credible nor sufficient to justify setting aside the ex parte proceedings. That the matter has been pending since 2022 and the applicants are aware of the importance of the hearing date. That the misdiarization of the date amounts to negligence on the part of the defendants' counsel which should not be visited on the plaintiffs who have been diligent in prosecuting their matter. That the applicants have not shown that they have a valid defence and their application is a delay tactic. That setting aside the proceedings will greatly prejudice the plaintiffs. That the overriding objective of the *Civil Procedure Act* and Article 159 of *the Constitution* requires the court to deliver expeditious justice. That setting aside proceedings is a matter of discretion which should not be exercised to assist a party to obstruct or delay the course of justice.
4. The application was disposed by way of written submissions and on record are submissions filed by the applicants dated 5<sup>th</sup> May 2025 which the court has duly considered.

### **Analysis and determination**

5. The court has carefully considered the application, replying affidavit and submissions. The only issue that arises for the court's determination is whether the applicants deserve orders of setting aside ex parte orders.
6. Order 51 Rule 15 of the Civil Procedure Rules grants this court jurisdiction to set aside ex parte orders and provide as follows;

“The court may set aside an order made ex parte”
7. The discretion to set aside an ex parte order must be exercised judiciously and not whimsically. In the case of *Shah v Mbogo* [1968] EA the court held that the discretion to set aside an ex parte order should not be to assist a party to delay or obstruct the course of justice but where there is an inadvertent mistake, the same is meant to assist the party access justice.
8. In the instant case, the applicants allege that their advocate misdiarized the hearing date. The explanation that in October 2024, at the point of transferring dates to the 2025 diary, counsel diarized the matter for 4<sup>th</sup> March 2024, when that date had already passed and the new diary was a 2025 diary, in my view is illogical, makes no sense, is an implausible excuse and a mere clutch at straws. Be that as it may, this is squarely the fault of the defendants' advocate, which fault has consequences that shall be borne by the applicants. The defendants moved to court without delay to file the instant application. In the interests of justice, I will give the applicants a chance to be heard. As the plaintiffs and their advocate attended court on 4<sup>th</sup> March 2025, it is only fair that they are compensated by way of thrown away costs. In the premises the application dated 8<sup>th</sup> April 2025 is hereby allowed. The orders made on the 4<sup>th</sup> March 2025 are hereby set aside. The defendants are hereby granted leave and opportunity to defend the suit and this case shall start de novo. These orders are granted on condition that the defendants/ applicants shall pay the plaintiffs and their counsel thrown away costs of Kshs. 20, 000/= (Twenty thousand shillings only) in 30 days of this ruling.
9. It is so ordered.



**DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY/OPEN COURT THIS  
1<sup>ST</sup> DAY OF OCTOBER 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM.**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Athunga for the defendant/applicants

Ms Anne Kimemia the plaintiff in person

Court Assistant- Delphine

