



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chweya v Shah (Environment and Land Case E041 of 2023)  
[2025] KEELC 7904 (KLR) (13 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 7904 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE E041 OF 2023  
MAO ODENY, J  
NOVEMBER 13, 2025**

**BETWEEN**

**MERCY MAKENA CHWEYA ..... PLAINTIFF**

**AND**

**VIJAY LAXMI SHAH ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the Defendant/Applicant's Notice of Motion application dated 4<sup>th</sup> August, 2025 which seeks the following orders:
  - a. The proceedings of this Honourable Court of 28<sup>th</sup> July, 2025, where the Plaintiff's case was heard ex parte and the Defendant's case was closed without evidence, be set aside.
  - b. A fresh hearing date be fixed for both parties to be afforded an opportunity heard on merit. (sic)
  - c. The costs of this application be in the cause.
2. The application is supported by the annexed affidavit of Michael Mutea, the Applicant's counsel, who deponed that on 28<sup>th</sup> July, 2025, when the matter proceeded for hearing, he was admitted at AAR Healthcare, George William House Nairobi under the care of Dr. Ochieng Dan for management of chronic, non-healing foot ulcers, and this information was communicated via email to counsel for the Plaintiff. It was the Applicant's counsel's deposition that no prejudice will be occasioned to the Plaintiff that cannot be compensated by costs if the suit is re-opened and a fresh hearing date is fixed.
3. Kisilah Daniel Gor, the Plaintiff/Respondent's counsel filed a Replying Affidavit sworn on 22<sup>nd</sup> September, 2025, and deponed that the hearing date of 28<sup>th</sup> July, 2025, was taken in the presence of both counsel. He deponed that prior to receiving the Applicant's counsel email, he called him and urged him to make appropriate arrangements by sending another counsel to hold his brief.



4. The Respondent's counsel deponed that the Plaintiff had travelled from the United Kingdom (London) on the eve of the hearing for the specific purpose of testifying in the matter and to set aside her testimony will be oppressive. Counsel asked the court to dismiss the application with costs.

### **Applicant's Submissions**

5. Counsel for the Applicant filed submissions dated 26<sup>th</sup> September, 2025 and identified the following issues for determination:
  - a. Whether the Defendant/Applicant has established cause for setting aside of the ex parte proceedings of 28<sup>th</sup> July, 2025?
  - b. Whether the Defendant/Applicant is entitled to be heard on merit in accordance with the right to a fair hearing under Article 50 of *the Constitution* of Kenya, 2010?
  - c. Whether the Plaintiff will suffer any prejudice that cannot be compensated by costs if the orders sought are granted?
  - d. Whether it is in the interest of justice that the proceedings be set aside and the matter heard afresh?
6. On the first issue, counsel submitted that the Applicant has demonstrated that her counsel's absence was occasioned by circumstances beyond her control and has acted promptly in bringing this application. Counsel relied on Order 12 Rule 7 of the Civil Procedure Rules and the cases of *Shah vs Mbogo & Another* 1967 EA 116 and *Philip Keipto Chemwolo & Another vs Augustine Kubende* [1986] KECA 87 (KLR).
7. On the second issue, counsel relied on Article 50(1) of *the Constitution* of Kenya and submitted that the Applicant was denied the opportunity to present her case and adduce evidence due to circumstances beyond her control. Counsel relied on the cases of *David Oloo Onyango vs Attorney General* [1987] KECA 56 (KLR) and *James Kanyiiita Nderitu & another vs Marios Philotas Ghikas & another* [2016] KECA 470 (KLR).
8. On the third issue, counsel submitted that the Plaintiff will not suffer any prejudice that cannot be compensated by an award of costs if the proceedings are set aside and the matter is heard afresh. Counsel relied on the case of *Tree Shade Motors Limited vs D.T Dobie and Company (K) Limited & Another* [1998] KECA 40 (KLR).
9. On the fourth issue, counsel submitted that the applicant has demonstrated a genuine desire to be heard and has not acted in bad faith and relied on Sections 1A, 1B and 3A of the *Civil Procedure Act* and the case of *CMC Holdings Ltd vs James Mumo Nzioki* [2004] KECA 143 (KLR).

### **Respondent's Submissions**

10. Counsel for the Respondent filed submissions dated 2<sup>nd</sup> October 2025 and identified the following issues for determination:
  - a. Whether the Defendant/Applicant's application dated 4<sup>th</sup> August, 2025 is merited?
  - b. Whether it is in the interest of justice that the proceedings of 28<sup>th</sup> July 2025 be set aside and the matter be heard afresh?
11. On the first issue, counsel submitted that the Defendant/Applicant has not shown any intention of having this matter proceed to a conclusion. Counsel submitted that no mention is made why



the Defendant/Applicant did not attend Court to show her commitment to the proceedings and urged the court to take note of the Applicant's conduct during the proceedings. Counsel relied on the cases of Shah vs Mbogo & Another [1967] EA, Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 others [2015] eKLR, Philip Keipto Chemwolo & another vs Augustine Kubende (1986) KECA and Habo Agencies Limited vs Wilfred Odhiambo Musingo [2015] eKLR.

12. On the second issue, counsel submitted that setting aside the proceedings of 28<sup>th</sup> July, 2025 will be prejudicial to the Plaintiff/Respondent and submitted that the Defendant's counsel was negligent when he failed to discharge his professional duty. Counsel relied on the case of Ivita vs Kyumbu [1984] KLR 441, and urged the court to dismiss the application with costs.

### **Analysis And Determination**

13. The issue for determination is whether the court should set aside the proceedings of 28<sup>th</sup> July, 2025, and fix a fresh hearing for both parties. Counsel for the Applicant deponed that when this matter came up for hearing, he was admitted at AAR Healthcare, George William House Nairobi under the care of Dr. Ochieng Dan for management of chronic non-healing foot ulcers.
14. Counsel for the Respondent submitted that the Plaintiff had travelled from the United Kingdom (London) on the eve of the hearing of this suit and setting aside her testimony would be oppressive and prejudicial to her.
15. The hearing date was taken by consent of counsel for both parties and if counsel was unwell he should have asked an advocate to hold his brief to relay the information about his indisposition. The Defendant should also have appeared in court for the hearing of the suit. This did not happen. In the case of Johana Kipkemei Too v Hellen Tum [2014] eKLR, the court stated as follows:

“the Plaintiffs will be greatly prejudiced if I am to allow this application by the Defendant. The Plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the Plaintiffs, if I am to allow the Defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the Plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the Plaintiffs and will violate the provisions of Article 50(1) of the Constitution.”

16. 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”.

17. In the interest of justice, I therefore grant the Applicant leave to defend the case and set aside the proceedings of 28<sup>th</sup> July 2025. The Applicant to pay thrown away costs to the Plaintiff of Kshs.25,000/ as the Applicant did not attend court to defend the case. The Applicant to fix the case for hearing within 14 days failure to which the order lapses.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 13<sup>TH</sup> DAY OF NOVEMBER 2025.**

**M. A. ODENY**

**JUDGE**

