



Republic v Principal Magistrate, Malindi; Belec Veronique t/a Caribou Kijani Real Estate Investment Ltd (Interested Party); Tamu Rafiki Real Estate Limited (Ex parte Applicant) (Environment and Land Miscellaneous Application E001 of 2025) [2025] KEELC 5932 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5932 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2025**

EK MAKORI, J

JULY 31, 2025

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL MAGISTRATE, MALINDI RESPONDENT

AND

BELEC VERONIQUE T/A CARIBOU KIJANI REAL ESTATE INVESTMENT LTD INTERESTED PARTY

AND

TAMU RAFIKI REAL ESTATE LIMITED EX PARTE APPLICANT

RULING

1. The Ex-parte Applicant’s Notice of Motion application dated April 12, 2025, was filed pursuant to Article 25(c), 48, 50(1) of *the Constitution* of Kenya, 2010, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, as well as Section 3 of the *Environment and Land Court Act*. The orders sought are:
 - a. Spent.
 - b. The orders made on 25th March 2025 be set aside and the chamber summons application dated 19th February be reinstated for hearing and determination on prayer (b) for the grant of leave to apply for orders of certiorari.
 - c. Spent.



2. In support of the application, the Ex parte Applicant relied on an affidavit sworn by its counsel, Mr. Kinyua Kamundi, an advocate of the High Court and a partner at Kinyua Muyaa and Co. Advocates, who personally handled the matter.
3. He stated that on March 25, 2025, the matter was scheduled for mention. However, the Court, in the absence of the Ex-parte Applicant's advocates, proceeded to mark the Chamber Summons as spent and awarded costs to the Respondent and the Interested Party. The deponent explained that he was handling other matters on a single device, and his partner was away in Kwale, attending a hearing in open court. As a result, no representative of the Applicant was present.
4. He argued that the issue had not yet moved beyond the leave stage because no leave had been granted to start substantive judicial review proceedings. He noted that the Court certified the matter as urgent on February 24, 2025, and scheduled an inter partes hearing for February 27, 2025, to decide whether leave should be granted. He stated that the hearing did not take place.
5. The deponent emphasized that the main relief sought in the Chamber Summons dated February 19, 2025, was an order of certiorari to quash the orders issued by the Respondent on various dates—January 10th, 24th, 27th, 30th, and 31st, as well as February 10th, 2025—based on the claim that these orders were issued without giving the Ex-parte Applicant a hearing and by a magistrate who allegedly lacked the necessary jurisdiction, contrary to Articles 25(c) and 50(1) of *the Constitution*. He clarified that only the prayer for prohibition had become spent due to the Respondent's Ruling of March 17, 2025, in which she maintained that she had jurisdiction.
6. Counsel, however, vehemently challenged this finding, pointing to the Interested Party's Bill of Costs dated April 2, 2025, which valued the subject matter at Kshs. 15,525,000.00, significantly exceeding the Kshs. 10,000,000.00 pecuniary jurisdiction limit of the Magistrate. He argued that this valuation strongly supported the claim that the Respondent lacked jurisdiction from the beginning and that all orders issued under that jurisdiction were null and void.
7. Furthermore, Mr. Kinyua stated that he filed a Further Affidavit on March 20, 2025, in which he attached the Respondent's ruling and reaffirmed the need for certiorari on the grounds of procedural and jurisdictional impropriety. He expressed regret that the Court was not informed of this affidavit before the matter was marked as spent.
8. Meanwhile, the Interested Party filed a Bill of Costs amounting to Kshs. 548,366.80, which Mr. Kinyua deemed unjustified and prejudicial, especially since the application for leave had not been heard or decided. He urged the Court to reinstate the Chamber Summons to allow the Ex parte Applicant to raise its grievances and secure the protections outlined in Articles 48, 25(c), and 50(1) of *the Constitution*. He concluded by asserting that the Respondent and Interested Party had misled the Court into prematurely disposing of a matter that, in his view, remained active and unresolved.
9. In response to the application, the Respondent and Interested Party filed their grounds of opposition dated May 28, 2025, and a replying affidavit sworn on April 28, 2025, by Bellec Veronique, respectively. The Respondent's grounds of opposition were:
 1. This court is functus officio, having rendered a decision on 25th March, 2025, a date taken in the presence of all parties on 27th February 2025.
 2. The reasons given by the Plaintiff for non-attendance are not worthy of the benefit of the mercy of this honourable court because of the following;
 - i) Counsel should have planned his day's court attendance well since he only complains that he had one gadget and was to attend other matters, which he doesn't even



mention, and/or produce a causelist for the same or a copy of his diary. Doesn't counsel appreciate that other counsel can hold a brief of other counsel or even communicate to colleagues to set a file aside as he attends to other matters?

- ii) While counsel also adds that his fellow partner, Ms Muyaa was out of town attending an open court hearing before a judge in Kwale, no case number has been given, no causelist has been annexed, there is no name of the judge where she was attending the hearing and all this points to an afterthought of a reason which should be allowed by this court.
3. This honourable court dismissed all the orders sought in the judicial review application by dismissal of the application for leave to apply for judicial review orders.
4. The application is thus incompetent and ripe for dismissal with further costs to the respondent and the interested party.
10. The Interested Party challenged the Applicant's explanation for not attending court on March 25th, 2025, calling it implausible and unsubstantiated. She argued that the reasons given did not justify reinstating an application that she believed was frivolously prosecuted. According to her, the absence of evidence regarding the other matters supposedly handled by the Applicant's counsel on that day showed a lack of seriousness.
11. The Interested Party further stated that the application for leave to initiate judicial review is not an automatic right but an exercise of judicial discretion. She also noted that even when the matter was scheduled for an inter partes hearing, the Court refused to grant leave and instead directed the parties to the Respondent for a determination of jurisdiction. Her position was that the Applicant's challenge to the contested orders amounted to an attempt to litigate the merits rather than the legality of the decision-making process, and thus was outside the scope of judicial review.
12. Regarding jurisdiction, she stated that the Respondent had pecuniary jurisdiction because the plaint filed on January 7, 2025, sought a liquidated amount of Kshs. 7,053,726.51, which falls within the Magistrate's jurisdiction. She explained that the latter reference to a higher amount of Kshs. 15,525,000.00 was based on the Applicant's claims and was only considered as a precaution. However, she emphasized that in her Ruling dated March 17, 2025, the Respondent explicitly confirmed her jurisdiction and refused to set aside the contested orders. She added that if the Applicant was unhappy with that ruling, the proper course of action was to appeal, not seek judicial review.
13. The Interested Party also objected to the Applicant's Further Affidavit dated March 19, 2025, arguing that it had neither been served on her counsel nor the Respondent. In her view, it was the Applicant's duty to bring that affidavit to the Court's attention, and its failure to do so could not now be used to criticize the Court.
14. She maintained that the Ex-parte Applicant did not demonstrate any specific prejudice. Conversely, she explained that her former attorneys were neither served with nor notified of the orders issued on January 30 and 31, 2025, and only accessed them through the court's online tracking system. According to her, no party was unduly favored.
15. The Interested Party stated that the entire application was an abuse of the court process. She accused the Applicant of using judicial review to challenge orders that should have been addressed through review, setting aside, or appeal. She further argued that the Court had marked correctly the application as spent and that it was now functus officio. She urged the Court to dismiss the application and award her costs.



16. The application was canvassed by way of written submissions.

The Ex-parte Applicant's submissions

17. Counsel for the Ex parte Applicant filed two sets of submissions dated May 27, 2025, and May 30, 2025. He argued that the application dated April 12, 2025, should be allowed to reinstate prayer (b) of the Chamber Summons dated February 19, 2025, which requested leave to apply for a certiorari order. He contended that the Honourable Court erred in marking the application as spent, even though leave to start judicial review proceedings had not been granted. No decision had been made on the substantive certiorari prayer.
18. Counsel emphasized that only prayer (c), seeking an order of prohibition, had been overtaken by events. The prayer for certiorari, he submitted, remained alive and was necessitated by the Respondent's ruling delivered on March 17, 2025, in which the subordinate court declined to vacate the impugned orders and asserted jurisdiction over a matter whose value, as reflected in the Interested Party's own Bill of Costs, exceeded its pecuniary jurisdiction.
19. It was further submitted that the Ex parte Applicant's Further Affidavit, sworn on March 19, 2025, and filed on March 20, 2025, remained on record and demonstrated that the orders sought under prayer (b) were still merited. Counsel maintained that the Ex-parte Applicant's rights under Articles 25(c), 48, and 50(1) of *the Constitution* on fair hearing, access to justice, and a fair trial were violated by the orders of this court issued on March 25, 2025.
20. Counsel argued that the Court's failure to consider this context, especially in light of its directions issued on February 24, 2025, led to an incorrect conclusion that the chamber summons was spent. Counsel added that the court is not functus officio as it still has the authority to reopen the case in such circumstances. He urged that the matter be reinstated and allowed to proceed to a substantive hearing on its merits.

The Respondent's submissions.

21. The Respondent opposed the application on two main grounds. First, it was argued that the court is functus officio, having already dismissed the substantive Chamber Summons application on March 25, 2025. Citing the decision in *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] KEHC 7107 (KLR), the Respondent stated that the orders sought, which were of certiorari and prohibition, had been overtaken by events, especially by the ruling delivered by the lower court on March 17, 2025. The dismissal of the Chamber Summons, it was argued, effectively ended the court's jurisdiction on the matter.
22. Secondly, the Respondent contended that the Applicant had failed to meet the threshold for the reinstatement of a dismissed suit. While counsel for the Ex parte Applicant had offered reasons for non-attendance, no tangible evidence was tendered to support such claims, which remained bare assertions. The Respondent urged the court to dismiss the application with costs.

The Interested Party's submissions

23. In the submissions dated May 26, 2025, counsel for the Interested Party argued that the Motion lacked merit and did not raise any significant issues of fact or law that warranted judicial discretion. It was noted that the Ex-parte Applicant had not sworn the Supporting Affidavit personally but instead by counsel, which, in their view, highlighted the frivolity of the application. Counsel also contended that the reasons given for non-attendance were implausible and not supported by affidavits from relevant



persons, including counsel's partner. The explanation regarding a lack of proper digital devices was dismissed as unserious and disingenuous.

24. Relying on *Elly Odhiambo Mumbo & another v. Caroline Khakame & Another* [2023] eKLR and *Esther Wamaitha Njihia and 2 Others v Safaricom Limited* [2014] eKLR, counsel emphasized that the court's discretion to set aside Ex parte orders must be based on sufficient cause, which was not demonstrated in this case. They believed the Applicant was adequately notified of the proceedings on March 25, 2025. Still, they chose to be absent, which they considered a deliberate attempt to delay the hearing of the pending suit in Malindi CMCC E001 of 2025.
25. The Interested Party also relied on *Okiya Omtatah Okoiti and Another v The Attorney General and 6 others* [2016] eKLR and *Zacharia Imbochi v Leopard Beach Resort and Spa* [2023] eKLR to emphasize that judicial discretion must not be exercised in favour of a party who has been negligent or has acted in bad faith. According to them, the Applicant's conduct was marked by inaction, lack of bona fides, and a clear intent to delay the cause of justice.
26. In conclusion, counsel urged the court to conclude that no sufficient cause had been established to justify setting aside the orders of March 25, 2025. He argued that the application was incompetent, fatally defective, and represented an abuse of the court process; therefore, he requested its dismissal with costs.

Analysis And Determination

27. The origin of this matter is a suit filed in the Malindi Chief Magistrate's Court under Civil Case No. E001 of 2025. That suit was brought by the Interested Party against the Ex-parte Applicant, following an allegedly flawed sale and purchase agreement of a villa located in Watamu. Along with the complaint, an application for an interlocutory injunction was submitted on January 7, 2025. This application was presented before the Respondent, specifically Hon. Makau (Principal Magistrate), and several orders were issued, as in any normal proceedings. Dissatisfied with the proceedings before that court, the Ex-parte Applicant moved to this court under judicial review, challenging the Principal Magistrate's jurisdiction over pecuniary matters and alleging biased and unfair conduct regarding the case before her. As required, the Ex-parte Applicant filed a chamber summons on February 19, 2025, seeking, among other things, leave to file a Notice of Motion application for orders of certiorari to quash all proceedings, directions, and orders issued by Hon. Makau (PM) on various dates between January 10, 2025, and February 10, 2025.
28. Notably, on March 25, 2025, when the chamber summons application was mentioned before this court, Mr. Kinyua, counsel for the Ex-parte Applicant, was absent. However, that date was set in court when the matter was first mentioned on February 27, 2025. On March 25, 2025, the court was informed of a ruling delivered on March 17, 2025, by the Honorable Makau regarding her jurisdiction to determine the primary dispute. The learned magistrate recused herself and referred the parties to the Chief Magistrate. As a result, this court marked the prayers in the chamber summons as spent.
29. The main issue for determination, therefore, is whether the Ex parte Applicant has laid sufficient grounds to warrant the setting aside of the ex parte orders issued on 25th March 2025.
30. The law on setting aside of ex parte orders is found under Order 12, Rule 7 of the Civil Procedure Rules, which provides thus:

“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.”



31. This provision is further clarified by Order 51, Rule 15 of the same Rules, which states that the Court may set aside an ex parte order. When setting aside ex parte orders, the Court must be convinced of one of two things: either that the respondent was not properly served or that the respondent failed to appear in Court at the hearing for a valid reason.
32. Essentially, setting aside an ex parte order is a matter of the discretion of the court. In *Esther Wamaitha Njihia & two others [supra]*, the court held inter alia that:

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd.*) The discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali*.) It also goes without saying that the reason for failure to attend should be considered.”
33. It then follows that the decision whether or not to set aside an ex parte order is discretionary. That discretion must be exercised carefully to prevent injustice caused by accident, inadvertence, or an excusable mistake. However, it does not intend to help litigants whose behavior amounts to obstruction or delay of justice.
34. In the present case, it is undisputed that Mr. Kinyua was present when the date of mention, March 25, 2025, was set. His explanation for absence, citing commitments in other courts and limited devices, is not supported by any affidavit, diary entries, or an advance request for adjournment. No sufficient grounds have been established to justify exercising discretion in the Applicant’s favor.
35. In any event, the intended judicial review proceedings sought to challenge the jurisdiction of the Principal Magistrate, Hon. Makau, who has since rendered a ruling recusing herself for want of jurisdiction. In light of that development, granting leave to commence judicial review proceedings would serve no practical purpose and would amount to an academic exercise. It bears emphasis that the grant of leave is discretionary and must be premised on the existence of a live and justiciable controversy. There is nothing live pending for the grant of leave to commence judicial review proceedings before this court.
36. As a result, I find that the application dated April 12, 2025, lacks merit and is hereby dismissed with costs to the Respondent and Interested Party.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Muyaa, for the Applicant

Mr. Ojwang, for the Respondent

Mr. Olaha, for the Interested Party



Happy: Court Assistant

