



**Bi v Ndegwa (Environment and Land Case E142 of 2024)
[2026] KEELC 2135 (KLR) (20 April 2026) (Ruling)**

Neutral citation: [2026] KEELC 2135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E142 OF 2024**

JG KEMEI, J

APRIL 20, 2026

BETWEEN

AMINA BI PLAINTIFF

AND

FRANCIS MAINA NDEGWA DEFENDANT

RULING

1. The subject application for determination is the Notice of Motion dated 23/9/2025, filed by the Plaintiff. The application is said to be brought under Articles 48 and 50(1) of *the Constitution*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, as well as Order 51 Rule 1 of the Civil Procedure Rules 2010. The Plaintiff moved this Court for Orders that;
 - a. This Honourable Court be pleased to set aside or vacate its Orders of 18/8/2025 where the Plaintiff's application was dismissed for want of prosecution.
 - b. This Honourable Court be pleased to reinstate the application dated 8/7/2025 and allows the same to proceed on merit.
 - c. The Plaintiff/Applicant be allowed to proceed with the application dated 8/7/2025 on merit.
 - d. This Honourable Court be pleased to allow the Plaintiff/Applicant's application dated 8/7/2025 as it is unopposed.
2. The application is premised on the grounds set out on the face of it and reiterated in the Supporting Affidavit of Swaleh K. Yusuf, Counsel for the Plaintiff/Applicant, sworn on the same day. Counsel avers that he was instructed to represent the Plaintiff/Applicant in a Notice of Motion dated 8/7/2025. He states that the application was scheduled for hearing on 18/9/2025, but on that date the matter was not listed on the cause list.



3. He deposes that he logged into the virtual Court session on time, was admitted, but was not afforded an opportunity to address the Court because the Court was already issuing directions. He further deposes that the Court directed him to move the Court formally. As a result, the Plaintiff's application dated 8/7/2025 was dismissed without being heard on its merits. Counsel asserts that the Plaintiff/Applicant has suffered prejudice due to the dismissal, which is attributed to a breakdown in communication between counsel and the Court.
4. Counsel argues that the Advocate's mistake should not be visited on an innocent litigant and that justice is best served when matters are heard on merit rather than on technicalities. He maintains that the Plaintiff remains eager to prosecute the suit; that the Defendant will suffer no prejudice if the orders sought are granted; and that it is in the interests of justice that the orders sought be granted.

The Replying Affidavit

5. The application is opposed by the reply affidavit of Francis Maina Ndegwa, deposed on 23/10/2025, in which he deposed, inter alia, that the Plaintiff, having instituted this suit, cannot feign ignorance or claim to be unaware of the hearing dates or developments relating to her own case. She is expected to be fully apprised of the proceedings and progress of a suit which she voluntarily commenced.
6. The Defendant/Respondent avers that the Plaintiff's attempt to revisit or reopen a matter in which her case was closed is an unjustifiable misuse of judicial time and resources and creates an undue burden on the Defendant, both in terms of cost and process. He asserts that the allegation that the suit was not cause-listed is false, as the matter was duly listed. He contends that the instant suit raises substantially the same issues, involves the same subject matter, and concerns the same parties as the ongoing proceedings in MCELC No. E056 of 2024.
7. He avers that the instant suit offends the doctrine of sub judice and amounts to a duplication of proceedings, which this Court ought not to countenance. He argues that the application is an abuse of the Court process intended to delay and frustrate the fair and expeditious disposal of the matter. He urges the Court to dismiss the application for want of merit.

The Applicant's Further Affidavit

8. The Plaintiff/Applicant filed a Further Affidavit, sworn by herself, on 24/10/2025. The Plaintiff avers that the Defendant's assertions are misleading and intended to distract the Court from the real issues in dispute, as set out in the pleadings. Regarding the assertion of reopening a closed matter, the Applicant alleges that the current issues arise from new acts of trespass and interference following earlier proceedings, thereby creating a fresh cause of action.
9. Regarding the claim that the suit is sub judice, the applicant argues that the assertion is not true, since the parties, subject matter and reliefs sought in the instant suit differ from those in MCELC No. E056 of 2024. That, in any case, the Defendant/Respondent has not proved the existence of any parallel or pending matter before a competent Court that involves the same issues directly and substantially.
10. She asserts that the application has been filed in good faith to protect her proprietary rights over the suit property. She invites the Court to exercise its discretion judicially, to allow the suit to be determined on the merits, and not to allow technicalities to enable illegality.

The Written Submissions

11. On 23/1/2026, in the presence of Counsel for both parties, the Court directed that the application be canvassed by written submissions. The Defendant/Respondent complied and filed his written



submissions dated 28/1/2026. However, the Plaintiff/Applicant did not file submissions in support of her application.

12. The Court has had occasion to read the submissions by Defendant/Respondent and has considered them in its determination. In any event, the submissions filed now form part of the Court record.

Analysis and Determination

13. I have considered the application, the responses made, and the submissions filed thereto. I have also looked at the Court record. The issues that commend themselves to me for determination, are:
 - a. Whether the orders sought in the instant application should be granted as prayed.
 - b. Who should bear the cost of the application?

Whether the orders sought in the instant application should be granted as prayed.

14. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide 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.”

15. This provision is amplified by Order 51, rule 15, which provides that the Court may set aside an order made ex parte. In setting aside ex parte orders, the Court must be satisfied of one of two things, namely, either that the Applicant was not properly served or that the Applicant failed to appear in Court at the hearing for sufficient cause. Essentially, setting aside an ex parte order is a matter of the Court's discretion.

16. What the Court is to consider while exercising discretion was emphasized in the case of Esther Wamaitha Njihia & 2 Others -vs- Safaricom Ltd [2014] eKLR where the Court citing relevant cases on the issue held inter alia: -

“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see Patel vs 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 vs. 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.... It also goes without saying that the reason for failure to attend should be considered.”

17. In the case of Lucy Bosire –vs- Kehancha Div. Land Dispute Tribunal and 2 others [2013] KEHC 681 (KLR), the Court held as follows: -

“The principles guiding the setting aside ex parte orders are trite that the Court has wide powers to set aside such ex parte orders save that where the discretion is exercised the Court



will do so on terms that are just. In *CMC Holdings Limited vs. Nzioki* [2004] 1 KLR 173 it was held as follows: -

“That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate.”

18. It then follows that the decision whether or not to set aside an ex parte order is discretionary. The discretion is intended to be exercised to avoid injustice and 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. See *Shah vs Mbogo & Another* (1967) EA 116.
19. Time and again, the Courts have held that mistakes by advocates ought not to be visited on their clients. In the celebrated case of *Philip Chemwolo & Another v. Augustine Kubede* [1982-1988] KAR 103 at 104, Apaloo J.A stated:

“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. I think 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 the purpose of imposing discipline.”
20. Under Article 50 (1) of *the Constitution*, every party has a right to be heard, and the fundamental duty of the Court is to ensure that parties seeking justice can access justice by being accorded that opportunity to be heard.
21. For justice to be done to a party, the Court needs to ensure that an excusable mistake does not consign the affected party’s case to oblivion, irrespective of its merits. The Court is obliged to consider all the surrounding circumstances before taking the drastic step of shutting the doors of justice upon a litigant, thereby driving the litigant out of the seat of justice empty-handed.
22. To contextualise the application, the chronology of events is sufficient. This suit was scheduled for formal proof hearing on 13/3/2025. On that date, the Plaintiff was indisposed, and the matter was rescheduled for hearing on 30/6/2025. On 30/6/2025, Counsel for the Defendant informed the Court that they had filed a Preliminary Objection dated 22/5/2025. However, when the Preliminary Objection came up for hearing after the Court’s call-over, the parties were absent. Consequently, the Preliminary Objection and the suit were dismissed for non-attendance.
23. Subsequently, the Plaintiff filed a Notice of Motion application dated 8/7/2025, under a certificate of urgency. Directions in respect of the application were issued on 9/7/2025. The Court directed that the application be heard on 18/9/2025.



24. On 18/9/2025, there was no appearance by the Plaintiff, and Counsel for the Defendant informed the Court that the matter was coming up for hearing of the Plaintiff's application dated 30/6/2025. In the absence of the Plaintiff or her Counsel, the application was dismissed for want of prosecution. It is that dismissal that forms the basis of the instant application.
25. Counsel for the Plaintiff/Applicant attributes his non-attendance to a breakdown in communication between himself and the Court. He states that he logged in to the Teams Platform late. He further states that he was not given an opportunity to address the Court, as the Court was already issuing dismissal orders and directing him to formally move the Court.
26. In my view, counsel for the Plaintiff/Applicant has proffered an excusable reason for the Court to exercise its discretion. The first prayer of the application, which seeks to set aside or vacate its orders of 18/9/2025, is therefore allowed.
27. The Plaintiff also seeks to reinstate the application dated 8/7/2025, and that the same, being unopposed, be allowed as prayed. The application of 8/7/2025 sought the following orders: first, to review the orders issued on the same day, and secondly, to allow the Objector's application dated 19/6/2025.
28. The record shows that the application dated 8/7/2025 is not connected to the instant suit. First, the heading of the application indicates that it is a miscellaneous application No. E1152 of 2025 before the Chief Magistrates' Court at Nairobi. Secondly, the parties therein are entirely different from the parties herein. This suit was instituted by the Applicant against the Respondent vide the Complaint dated 9/4/2024. Evidently, the application dated 8/7/2025 is misplaced and ought to have been filed in the Lower Court. There is therefore no basis for reinstating the application dated 8/7/2025. The said prayer is declined.
29. Final orders for disposal;
The upshot of the foregoing is that the instant application is partially merited in the following terms;
- a. The application dated 23/9/25 is allowed in terms of prayer no a). only. Prayers Nos. b c and d are dismissed.
 - b. The orders issued on 18/9/2025 dismissing the Plaintiff's application dated 30/6/2025 are hereby set aside and/or vacated.
 - c. The Plaintiff's Notice of Motion dated 30/6/2025 is hereby reinstated and shall be heard and determined on merit.
 - d. Costs of the application are granted to the Respondent.
30. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF APRIL 2026 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Ms. Akinyi HB for Mr. Yussuf for the Plaintiff
2. Kimanzi HB for Abdulrazak for the Defendant



3. CA – Ms. Yvette

