



**Malack & 3 others v Board of Management Nyabongo Primary School & 2 others
(Environment & Land Petition 3 of 2021) [2023] KEELC 17538 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND PETITION 3 OF 2021**

M SILA, J

MAY 24, 2023

BETWEEN

**DAVID NGOGE MALACK 1ST PETITIONER
SAMSON ONDERI MAENDA 2ND PETITIONER
SAMWEL OGACHI NYATWANGA 3RD PETITIONER
THADEUS MOMANYI NYARONGE 4TH PETITIONER**

AND

**BOARD OF MANAGEMENT NYABONGO PRIMARY SCHOOL 1ST
RESPONDENT
HON. SAMWEL ONUKO, MEMBER COUNTY ASSEMBLY BOOCHI BORABU
WARD 2ND RESPONDENT
DIRECTOR NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY,
KISII COUNTY 3RD RESPONDENT**

RULING

1. The application before me is that dated 1 March 2023 filed by the petitioners. What the petitioners seek is an order to reinstate the petition, which petition was dismissed on 31 October 2022 for non-attendance. The application is supported by the affidavit of Kanyi Mwangi who deposes that he is the advocate in conduct of the petition. He has sworn that the petition came up for hearing on 31 October 2022, but he was indisposed, and he requested his colleague, Mr. Matwere, to hold his brief and inform court of his situation. He also asked his clients and witnesses not to turn up because of his illness. He deposes that counsel who was to hold his brief informed him that the court was on transfer and that the court would issue fresh dates for directions and notify parties through email. He states that he was later shocked when he was served with a bill of costs from the respondents, and that this prompted



- him to peruse the file, and he found out that the file was called out and nobody was present for the petitioners. Consequently the suit was dismissed. He avers that the disputed land is a public school whose field was excavated and is in a precarious state.
2. The application is opposed by the affidavit of Samuel Onuko who is the 2nd respondent. Inter alia, he deposes that the hearing date was fixed by consent five months earlier and the petitioners failed to appear. He deposes that the indisposition of Mr. Mwangi was not communicated to counsel and that there is no evidence in proof. He also points out that there is no affidavit from Mr. Matwere to support the assertions that he told Mr. Mwangi that the matter would not proceed and that fresh dates would be given and communicated via email.
 3. When the matter came up for inter partes hearing, counsel submitted that they would rely on the affidavits on record. I have considered the depositions in the affidavits together with the court record.
 4. I observe that this suit was commenced through a petition filed on 9 April 2021. The petitioners contended that on 19 February 2021, the 1st respondent (said to be a public school) in collusion with the 2nd respondent (who was Member of County Assembly) started harvesting murram from Nyabongo Primary School ostensibly to use it for repair of roads within the area. They got concerned and made a complaint to the School which went unaddressed. They then wrote a letter dated 24 February 2021 to the 1st respondent which they copied to the 2nd and 3rd respondent, the National Environment Management Authority (NEMA). They averred that NEMA issued a restoration order as deep holes had formed owing to the excavation. They contended that the extracted area is a risk to the children and neighbourhood. In the suit, they asked for a permanent injunction to stop the 1st and 2nd respondents from excavating murram and any other relief deemed fit.
 5. The petition was opposed by a replying affidavit of the 2nd respondent. I need not be too elaborate on the affidavit, save to state that the 2nd respondent contended that there was public participation before the excavation, and there was approval from NEMA for the exercise. It was also raised that one of the petitioners was his political competitor for Boochi Borabu ward and has filed suit for his selfish interests and politics. The 1st respondent also filed a replying affidavit to oppose the petition. I have not seen anything filed by the 3rd respondent.
 6. On 16 May 2022, Mr. Mwangi was present for the petitioners whereas Mr. Okemwa was present for the 1st and 2nd respondents. Mr. Mwangi asked for a hearing date and the case was fixed for hearing on 31 October 2022. On 31 October 2022, the file was first called out in the virtual platform, but only Mr. Nyambati, learned counsel for the 1st and 2nd respondents, was present. I placed the file aside and directed that it be called out again in open court. Later in open court, the appearance was the same; there was still no counsel present for the petitioners and the petitioners were also absent. I dismissed the case for non-attendance. This application was subsequently filed.
 7. I observe that this application was filed in March this year (2023) despite the matter having been dismissed in October last year (2022). There is a gap of about four months which is completely unexplained. The reason given for non-attendance is that Mr. Mwangi was indisposed. There is no proof attached that Mr. Mwangi was indisposed. It was said that Mr. Mwangi asked Mr. Matwere advocate to hold his brief, and Mr. Matwere informed him that the court was on transfer, and would issue fresh dates for directions, and notify parties through their email addresses. There is no deposition from Mr. Matwere that indeed he was asked to hold brief and this is what he informed counsel. The fact of the matter is that the judge (myself) could not have been on transfer for I had just reported to Kisii Court on 3 October 2022. There can be no substance in the claim that the court was on transfer, and in any event, I believe that the cause list of the day was duly published for all and sundry to know that I was going to sit on that day. I find the depositions of Mr. Mwangi completely unsupported.



8. In addition to the foregoing, I do not have any supporting affidavit from the petitioners. Do they really want to have their case reinstated? If that was the case, you would expect that the petitioners, or at least one of them, would file an affidavit to depose that they are keen to prosecute their case and that they did not attend court owing to advice of their counsel. They would explain why they were absent from court and beseech court to consider reinstating their case. There is no such affidavit from the petitioners and I wonder whether the petitioners really have any interest to prosecute the case.
9. I have every reason to dismiss this application for I find it completely unsupported by cogent evidence. However, out of this court's own discretion, and so that the petitioners, if they really still wish to pursue this case, are not shut out, I will reinstate the suit but subject to payment of thrown away costs of Kshs 15,000/= to be paid within the next 14 days. If the said costs are not paid, within the specified time, this suit will remain dismissed.
10. It is so ordered.

DATED AND DELIVERED AT KISII THIS 24 DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

