



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwakaë v Ong'era & 14 others (Environment & Land Case  
92 of 2021) [2023] KEELC 17913 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT & LAND CASE 92 OF 2021**

**JM KAMAU, J**

**JUNE 13, 2023**

**BETWEEN**

**SHADRACK NYABERI MWAKAE ..... PLAINTIFF**

**AND**

**DAVID M. OMOGANDA ONG'ERA ..... 1<sup>ST</sup> DEFENDANT**

**BENEDICTO CHARANA ONGARO ..... 2<sup>ND</sup> DEFENDANT**

**BERESI OURO ..... 3<sup>RD</sup> DEFENDANT**

**OMANWA ATERA ..... 4<sup>TH</sup> DEFENDANT**

**SIRO NYAMBORI ..... 5<sup>TH</sup> DEFENDANT**

**OGECHI ISOE ..... 6<sup>TH</sup> DEFENDANT**

**OURO MOITAI ..... 7<sup>TH</sup> DEFENDANT**

**NAUMI GESARE OKINYI ..... 8<sup>TH</sup> DEFENDANT**

**HENRY NYAKUNDI MOSE ..... 9<sup>TH</sup> DEFENDANT**

**GRACE GILBERT ..... 10<sup>TH</sup> DEFENDANT**

**BENEDICTO GICHANA OOKO ..... 11<sup>TH</sup> DEFENDANT**

**KENYATTA OOKO ..... 12<sup>TH</sup> DEFENDANT**

**MAISIBA OOKO ..... 13<sup>TH</sup> DEFENDANT**

**ROSANA OOKO ..... 14<sup>TH</sup> DEFENDANT**

**SIRO OMBORI ..... 15<sup>TH</sup> DEFENDANT**



## RULING

1 In an Application dated March 1, 2023 the Defendant/Applicant prays for orders that this court do set aside its orders of February 20, 2023 dismissing the Motion dated November 21, 2022 and reinstate the same for Hearing and determination. The grounds upon which the Application is brought are that the same was not heard due to power outage and which therefore occasioned counsel for the Defendants/Applicants not to attend court. In the Supporting Affidavit of One Japhet Osoro Kaosa, Counsel for the Defendants, the Defendant says that there was power outage and lack of connectivity which made the court dismiss the Defendants' application dated November 21, 2022. This, he says was not anybody's mistake. He says in paragraph 8 of the said Affidavit:

That failure to attend court was not the Counsel for the Defendants'/Applicants' mistake rather the same was occasioned by failure of power and network system on the side of the court."

2 The application is opposed *vide* a Replying Affidavit of Stephen Kimaiyo, Advocate for the Plaintiff/Respondent who cannot understand why Counsel for the Applicant and/or his clients did not attend court whether there was power failure or not.

3 The Application for extension of time dated November 21, 2022 that was dismissed on February 20, 2023 results from an order of stay of execution that was made on August 25, 2022 giving the Defendants 30 Days within which to deposit in court original Title Deeds in respect of Title Nos WEST MUGIRANGO/BOSAMARO / 1468, 1469, 2248, 2249, 2250 and 2251. This was not done. Time expired on 25/09/2022. The Defendant then waited for another 2 months to seek for the extension of time. The same came up for Hearing on February 22, 2023. On the Hearing date the matter was called out at 9.00am. and placed aside to await counsel. At 11.35am, more than 2 ½ hours later only Mr Kimaiyo for the Respondent was in court. It takes only less than an hour to travel from Kisii, where Mr Osoro says he was, to Nyamira where the court is located. I do not see any good reason for the Advocate not to have been in court by 11.35am. In any case the matter was to be heard in open court at 9.00am. and I don't therefore understand how power failure comes in. Again it took the Defendants up to March 2, 2023 to file the Application for reinstatement of the dismissed Application. It is also on record that on a number of occasions in this matter, the same Advocate has failed to turn up in court at times accusing the court of misleading him on dates.

4 In his letter dated February 22, 2023, he still places the blame on the court claiming that

.....we asked to be heard virtually and it took too long to inform us that there was a power outage and there were challenges in the teams link. My first request for virtual hearing was at 8.44a.m.....and the last request at 10.45a.m. and at 11.03a.m. we received communication from Machira Joyce that the Honorable Judge was to proceed physically....." I further requested that since there were challenges in the online, we could be comfortable if the matter could be taken out and new dates taken....."

5 It is quite unfortunate that Counsel chooses to call court staff dictating to them to tell the court to take the matter out of the Hearing list and give it another date. This is irresponsible advocacy. There was enough time from the time the file was placed aside at 9.00a.m. to 11.35a.m. when the same was called out again and Counsel only has himself to blame and not the court. If what Counsel says is true that there was power outage he should have made arrangements to come physically to court. Whereas we agree with him that online court sessions are acceptable, where this is not practical then Counsel should attend court physically.



6 Having said so, this is an Application where the court has discretion to decide either way. Although the Applicants are undeserving of the prayers sought the court will allow the Application but caution Counsel to take court more seriously. The throw away costs of the Application in the sum of Kshs 7,500/= shall be awarded to the Plaintiff/Respondent payable within the next 7 days from the date hereof.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 13<sup>TH</sup> DAY OF JUNE 2023.**

**MUGO KAMAU**

**JUDGE**

In the Presence of: -

Court Assistant Sibota

Plaintiff: Mr. Kimaiyo

Defendants: N/A

