



**Mberia v Miriti (Environmental and Land Originating Summons
E002 of 2020) [2023] KEELC 21945 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2020
CK NZILI, J
NOVEMBER 29, 2023**

BETWEEN

GERALD MWITI MBERIA PLAINTIFF

AND

ELINA KATHAMBI MIRITI DEFENDANT

RULING

1. On 31.5.2023, this court set aside the *ex parte* judgment entered herein on condition that Kshs.50,000/= throw away costs be paid to the plaintiff and a replying affidavit to be filed within 14 days. Inhibition orders were also issued against the new title. A mention date was taken for 27.7.2023, to confirm compliance.
2. By an application dated 9.8.2023, the court is asked to review the order issued on 27.7.2023 for dismissal of the suit for non-compliance with pretrial directions. The reason for non-compliance is said to be an inadvertent mistake since the case was initially heard and determined and a decree issued.
3. The application is supported by the affidavit of Mr. Karanja advocate, who averred that in the interest of justice and fair practice, the court should set aside the dismissal order to enable substantive justice to be rendered; otherwise, the applicant would suffer harm and be rendered desolate, if evicted from the land he has occupied for over 20 years.
4. The respondent opposes the application by a preliminary objection dated 22.9.2023 and grounds of opposition even date. On the grounds, the deponent to the affidavit has sworn contested facts that; the application is defective, frivolous, vexatious, an abuse of court process, a waste of the court's time, a fishing expedition, seeks outlandish prayers with ulterior motives, and it was a delaying tactic.
5. By written submissions dated 6.10.2023, the applicant urges the court to find it has powers under sections 1A, 1B, and 3A of the *Civil Procedure Act* to do justice between the parties by allowing him to hear the case on merits. Reliance was placed on *Wachira Karani vs Bildad Wachira* (2016) eKLR.



6. Further, the applicant submitted that the court's discretion was unfettered, as held in *Patel vs E.A Cargo Handling Services Ltd* (1974) E.A 75. Additionally, the applicant submitted that inadvertent mistakes and blunders regarding non-compliance with order 11 of the [Civil Procedure Rules](#), are bound to occur and should be excusable as held in [Chemwolo and another vs. Augustine Kubende](#) (1986) eKLR.
7. On the preliminary objection raised by the respondent, the applicant submitted it fell short of what the court said in *Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distribution Ltd* (1969) E. A 696 and in [Beach Villas Ltd vs. Mogeni & others](#) (2022) KEELC 2547 (KLR) 18th July 2022 (Ruling), since it was purely argumentative and that the affidavit did not offend rule 9 of the [Advocates Practice Rules](#). Reliance was placed on [Turea Ltd T/a Dr. Mattress vs Mohammed](#) (Civil Appl E030 of 2022) (2022) KECA 1271 (KLR) 18th November (2022) (Ruling) and in [Kwacha Communications Ltd and another vs Pindoria Holdings Ltd & another](#) (2022) eKLR.
8. By written submissions filed on 9.10.2023, the respondent submitted that no good reason was given why the affidavit in support was sworn by counsel for the applicant on contested facts.
9. Further, it was submitted that the explanation for noncompliance with court orders was insufficient, especially after counsel on record said he had lost contact with his client contrary to the earlier allegation of an inadvertent mistake. The respondent submitted that the grounds for review under order 45 of the [Civil Procedure Rules](#) have not been met since no error on the face of the record has been shown, new and vital evidence is not available, and lastly, no sufficient reason has been provided.
10. On the preliminary objection, the respondent submitted that an advocate cannot swear on contested facts on behalf of a client that requires producing evidence, especially on prejudice. Reliance was placed on *Shah vs Mbogo* (1967) E. A 116 and 123 B.
11. When this suit came for a case conference on 27.7.2023, the plaintiff's counsel on record told the court he had lost contact with his client, hence the noncompliance with Order 11 of the Civil Procedure Rules. Counsel sought for seven days to make an application to cease acting for his client. The court dismissed the suit for noncompliance with Order 11 of the Civil Procedure Rules.
12. By an application filed on 9.8.2023, the court is asked to reinstate the suit for an alleged inadvertence, since counsel genuinely believed that having already been heard, they had complied with Order 11 of the Civil Procedure Rules and, thus, no need for further compliance documents.
13. In the affidavit sworn by Peter Karanja, counsel in paragraphs 3, 7, and 11 he avers on oath that they had complied the matter was ready for hearing; the interest of justice and fair practice requires the setting aside for substantive justice to be rendered and that his client will suffer harm and be rendered desolate if evicted from the land he had occupied for over 20 years.
14. Unfortunately, counsel for the applicant on oath purports to discount or distort the events of 27.7.2023. He had told the court that he had lost touch with his client and contemplated applying to withdraw from the suit if granted seven days. The affidavit was sworn less than 14 days after 27.7.2023. At the very least, one would have expected counsel to state if he had now gotten in touch with his client and received instructions to comply with order 11 of the [Civil Procedure Rules](#) by filing a paginated bundle of documents and statements.
15. Counsel still insists in his affidavit on oath that he need not comply with order 11 of the [Civil Procedure Rules](#) and that the suit is ready for hearing, regardless of the court's directions to comply with the law. Order 11 of the [Civil Procedure Rules](#) provides that after the close of the pleadings, parties shall, within ten days, complete, file, and serve the pre-trial questionnaire as provided under Appendix B. Compliance with order 11 [Civil Procedure Rules](#) is by both parties and is mandatory. It is not an elective



- provision of the law that parties can opt out of at their whims. Non-compliance with order 11 of the Civil Procedure Rules has consequences.
16. In Fitzpatrick vs Batger and Co. Ltd (1972) ALL ER 659 Lord Denning, M.R. said public policy demands that the business of the courts shall be conducted with the expedition. In Oracle Productions Ltd vs Decapture Ltd and others (2014) eKLR, the court said the pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules has been substantially devoted to it, including sanctions for noncompliance.
 17. In Mbithuka Titus vs Jackline Mutindi (2020) eKLR, the court said failure to comply with directions under order 11 of the Civil Procedure Rules included the power to strike out the action. The court cited with approval Stephen Boro Gitiba vs Family Finance Building Society & others C. A Nai 263 of 2009 on the New Dawn as a warning to litigants and counsels that times have changed, and the court was in the driving seat of justice to avoid unacceptable delays. Further, the court cited with approval Union Insurance Co. of (K) Ltd vs Ramzan Abdul Dhanji Civil Application No. Nai 179 of 1998, that the right to be heard includes being given a chance to be heard, and that does not mean a party has to be heard in every litigation and so long as an opportunity of being heard is given and a party does not utilize it, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.
 18. In Yatin Vunbhai Kotak vs. Tucha Adventures & another (2000) eKLR, the court said the court should not be astute to find excuses for such failure, since obedience to peremptory orders of the court is the foundation of its authority. However, if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not to be treated as contumacious and ought not to disentitle him to rights which he would otherwise have enjoyed.
 19. The affidavit by Mr. Peter Karanja advocate leaves the court with no option. It is a clear demonstration that court orders and, in particular, order 11 of the Civil Procedure Rules are not applicable to him and that his client does not intend to comply with it, no matter the existing court order and the law.
 20. If parties were to take that path and, more so, advocates who are duty-bound by article 159 of the Constitution to assist courts in delivering justice, then the law of the jungle would replace the rule of law.
 21. The case law of Chemwolo & another vs Augustine and Patel vs E. A Cargo (supra) would only apply if a party is remorseful and is willing to make amends. Counsel for the applicant has taken a belligerent approach, and to him, it does not matter to swear facts that are not within his knowledge.
 22. The upshot is that I find the application as supported by an incompetent affidavit, lacking an explanation for noncompliance, and unmeritorious.
 23. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 29TH DAY OF NOVEMBER 2023

In presence of

C.A Kananu/Mukami

Miss Otieno for Karanja for applicant

Miss Githinji for Inoti for respondent



HON. CK NZILI
JUDGE

