



**Kibor & 3 others v Chemweno, The Chairman Board of Management,
Kamosong Primary School (Environment and Land Appeal
31 of 2022) [2023] KEELC 22441 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 31 OF 2022
L WAITHAKA, J
DECEMBER 19, 2023**

BETWEEN

**PRICILA KIBOR 1ST PLAINTIFF
EUNICE MAINA 2ND PLAINTIFF
SAMUEL K. KONDOGUT 3RD PLAINTIFF
BENSON KIPLAGAT 4TH PLAINTIFF**

AND

**VINCENT CHEMWENO, THE CHAIRMAN BOARD OF MANAGEMENT,
KAMOSONG PRIMARY SCHOOL DEFENDANT**

RULING

Introduction

1. On 21st September 2023, when this matter came up for further hearing of the defence case, counsel holding brief for Mr. Chemwok for the plaintiffs sought adjournment of hearing on the grounds that Mr. Chemwok who was handling the suit on behalf of the plaintiffs, was in kajiado handling another matter.
2. This court declined to allow the application on the ground that the date had been taken in open court by consent of advocates handling the matter.
3. By notice of motion application dated 16th October 2023, the plaintiffs urge this court to re-open the case to allow their advocate to cross examine the defendant's last two witnesses.
4. The application is premised on the grounds that at the time the witnesses testified, the plaintiffs' counsel was held before Kericho High Court handling another matter (matter not disclosed); that



their counsel had instructed another counsel to hold his brief and pray for adjournment; that the court denied the application for adjournment and that the counsel holding their advocate's brief was not privy to the case hence unable to cross examine the witnesses.

5. It is the applicants' case that granting the order sought would ensure that the right to fair hearing enshrined in Article 50(1) of *the Constitution* is respected.
6. The application is supported by the affidavit of Samuel Kiprop Kondogut (3rd plaintiff), sworn on 16th October 2023.
7. Through the said affidavit, the applicants contend that they were denied their right to a fair hearing on account of a mistake of their counsel which mistake they term excusable.
8. In reply and opposition to the application, on 10th November 2023, Josephine Cherotich swore an affidavit (replying) contending that the application is incurably defective, incompetent, untenable, scandalous, frivolous, vexatious, instituted in bad faith and lacking in merits. In that regard, it is pointed that during hearing, the advocate for the applicant was given opportunity to cross examine the witnesses but opted not to cross examine them; that the plaintiffs have not shown sufficient ground(s) to warrant granting of the order sought and that reopening the case would be prejudicial to the defendant as the school has been in a state of unrest since 2016 owing to the land issue. It is further contended that granting the order sought would offend the rules of procedure which are designed to formulate the issues the court has to determine and to give fair notice thereof to the parties.
9. It is noteworthy that the person who has sworn the affidavit is not a party to the suit. The party to the suit is the Chairman to the school's BOM and not the head teacher. In the circumstances, the head teacher lacks locus standi to swear an affidavit in response of the application as she is not a party to the suit.

Analysis and Determination

10. As pointed out herein above, on 21st September 2023, when the matter came up for further hearing of the defence case, counsel holding brief on behalf of Mr. Chemwok for the plaintiffs', sought for adjournment on the ground that Mr. Chemwok was held elsewhere. For reasons already flagged out in this ruling, herein above, this court declined to allow the application for adjournment.
11. Through the instant application, the applicants are urging this court to revisit its decision and consider re-opening the suit to allow for cross examination of the defendant's last two witnesses.
12. It is the considered view of this court that the application by the plaintiffs'/applicants' is a veiled attempt to appeal the decision of the court denying their application for adjournment.
13. This court having pronounced itself on the merits of the application for adjournment, there are only two avenues of getting the order set aside or varied, these are through an application for review under Order 45 Rule 1 of the *Civil Procedure Rules* or through an Appeal.
14. The instant application being none of those avenues, I find and hold that the application is bad in law.
15. I hasten to point out that even on the merits of the application, the application would still have failed as there is no evidence that the plaintiff's counsel was indeed held elsewhere as claimed.
16. The reason given by counsel who held brief for Mr. Chemwok is not the same as that given in the application, though both relate to Mr. Chemwok being held in court elsewhere.



17. When M/S Chepkoech appeared before court and sought an adjournment, she informed the court that Mr. Chemwok was handling another matter in Kajiado. In the instant application, the explanation given is that Mr. Chemwok was held up in the High Court in Kericho.
18. Given the contradictory accounts offered concerning the whereabouts of Mr. Chemwok and why he did not attend court to discharge his duty owed not to his clients alone but also to the court, one may be forgiven for concluding that the alleged mistake of counsel was not a genuine mistake but negligent failure on the part of counsel to discharge the duty owed to his client and the court.
19. It is the view of this court that the conduct of the plaintiffs' counsel in the circumstances of this case, does not warrant exercise of the court's discretion in the plaintiff's favour.
20. The upshot of the foregoing is that the application dated 16th October 2023 is bad in law and lacking in merit. Consequently, I dismiss it with no orders on costs as the affidavit sworn in support of it was sworn by a person who is not a party to the suit.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 19TH DAY OF DECEMBER, 2023

L. N. WAITHAKA

JUDGE

Ruling delivered virtually in the presence of:-

Ms. Odeyo for the Defendants

N/A for the Plaintiffs

Court Asst.: Christine

