



REPUBLIC OF KENYA



**KENYA LAW**  
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**M'tuamwari v County Government of Meru (Petition  
13 of 2017) [2022] KEELC 3562 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3562 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**PETITION 13 OF 2017**

**CK NZILI, J**

**MAY 11, 2022**

**IN THE MATTER OF CHAPTER FOUR – THE BILL OF RIGHTS**

**IN THE MATTER OF ARTICLE 19, 20, 21, 22, AND 23 OF THE**

**CONSTITUTION OF KENYA**

**IN THE MATTER OF ENFORCEMENT OF BILLS OF RIGHTS**

**AND**

**IN THE MATTER OF ALELGED CONTRAVENTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS UNDER ARTICLE 40 AND 47 OF THE**

**CONSTITUTION OF KENYA 2010**

**BETWEEN**

**BENJAMIN M'ABURUKI M'TUAMWARI ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF MERU ..... RESPONDENT**

**RULING**

1. By an application dated January 25, 2022 the court is asked to set aside and or reinstate the petition herein for hearing and secondly to extend time for the petitioner to file written submissions.
2. The application is supported by an affidavit of Muia Mwanzia advocate sworn on November 10, 2021. The reasons given are that on November 10, 2021 the court ordered for the filing of written submissions and service of the order dated March 12, 2021 to the relevant entity. That due to inadvertence mistake the advocate forgot to attend court on 24.1.2022 though he was in court for ELC No. 14 of 2011 since he had forgotten to diarize the matter. Further it was averred that the written



submissions had been filed. The applicant urged the court to find the oversight was not intentional but an honest mistake.

### **History of the matter**

3. The petition herein was filed on August 18, 2017 in which the petitioner alleged that his plot no. 123 and a portion of his no. 112 in Mikinduri market in which he was running a hotel business were been compulsorily acquired by the respondent for the purpose of a market expansion programme. That he surrendered the plots but had not been compensated for the same whose value was Kshs 5 (five) million vide a letter of offer dated June 4, 2014.
4. The petitioner averred that his rights under Articles 28, 40 and 47 of the Constitution had been infringed by the respondents hence sought for damages of breach and prompt compensation at the current market price.
5. By a reply sworn by Elizabeth Mburu on December 9, 2017 the respondent averred that the grounds verification report had established that Plot No. 123 belonged to another person after there was an interchange, and that plot no. 112 belonged jointly to the petitioner and another person and that the alleged letter was a mere invitation to treat as a condition precedent to the procedural process of land acquisition which required the involvement of the National Land Commission in line with the law.
6. It was averred that the respondent in exercise of the ownership rights to the allocated parcels proceeded to construct and develop the market with the petitioners' consent for the benefit of the members of public.
7. By consent of the parties the court on March 12, 2019 ordered that the county coordinator National Land Commission Meru to visit the two plots and ascertain the current market status and file a report within 45 days. By a letter dated June 28, 2019 the County Coordinator sought for certified copies of ownership documents for the subject plots so as to undertake court process.
8. By a letter dated July 2, 2019 the Deputy Registrar confirmed that the summons had been issued for the attendance by the County Coordinator, National Land Commission on October 7, 2019 to explain why the report had not been prepared. The said officer requested for the contacts of the parties to give him ownership documents for verification. The record indicates that a mention date was taken by the petitioner for October 7, 2019, and the report was duly filed on October 16, 2019.
9. The case was eventually mentioned on January 23, 2020 but the court was told that the report had not been field another mention date for April 23, 2020 was given. On October 22, 2020, the court ordered the petitioner to supply the report by January 28, 2021. None of the parties attended court. Later on March 4, 2021 the petitioner appeared online and a pre-trial direction date was taken for May 10, 2021 when no party appeared following which a hearing date for 5.10.2021 was given. On October 5, 2021 the petitioner appeared but there was no appearance by the respondent.
10. The petitioner asked for leave to replace the petitioner said to be elderly with a guardian before the matter could proceed any further. The court gave the petitioner 21 days to make the appropriate application with a mention for November 10, 2021 for further directions. On November 10, 2021 the petitioner's advocate appeared and told the court the purpose of the mention was to confirm the availability of the surveyor's report as per the orders issued in 2019. The court ordered for the County Surveyor to be served and that written, submissions to be filed within 21 days for the disposal of the petition by way of written submissions. A mention for January 21, 2022 to confirm compliance was given with clear directives for its service upon the respondent.



11. There was neither appearance by the parties nor affidavit of service upon both the county coordinator/surveyor of the National Land Commission. Similarly there were no written submissions by any of the parties. The court therefore dismissed the petition for non-compliance.
12. In this application the court is asked under Order 12 Rule 7 *Civil Procedure Rules* to set aside the dismissal order and reinstate the petition for hearing and find written submissions duly filed are now on record. The reason given of non-attendance is that there was mis-diarising by the counsel for the petitioners which was an unintentional mistake of counsel.
13. In *Richard Ncharpi Leiyagu vs IEBC & 2 others* (2013) eKLR the court said it had discretion to set aside an order so as to avoid injustice or hardship resulting from an accident mistake or error but not to assist a person who was deliberately seeking to obstruct or delay the course of justice.
14. The court in citing with approval *Belinda Murai & others vs Arnold Wainaina* (198) LLR 2782 held the doors of justice should not be closed because a mistake had been made by a lawyer of experience who ought to have known better.
15. The court cited with approval *Philip Chemwolo & another* (1982 – 88) KAR 103 where the court held unless there was fraud or intention to overreach there was no error or default that could not be put right by payment of costs. Further it held that the court existed for the purposes of deciding the rights of the parties and not to impose discipline on them.
16. The court held the right to a hearing was a constitutional right and a cornerstone of the rule of law in which courts had the inherent jurisdiction to protect the integrity of the court process from abuse that would amount to injustice.
17. Applying the above principles the court record is clear that the petitioner has been reluctant to follow up and or comply with court orders in his favour and which would have fast tracked the disposal of the petition.
18. The petitioner was given 21 days to substitute the petitioner alleged to be elderly since counsel insisted he wished the matter to be determined through *viva voce* evidence. The surveyors report was clear the plot numbers was arbitrary and could not be ascertained. That the plots were neither surveyed nor registered. Unfortunately it is apparent the petitioner is unaware of that that report was filed before court in 2019. Even if the petitioner had filed written submissions, without complying with earlier court directions, the submissions would not have replaced the evidence the petitioner was statutorily required to give before the court for the determination of the petition. The issue herein was beyond the mis-diarising of the matter.
19. The supporting affidavit to this application is silent on other previous court directives issued by this court for the ends of justice to be met.
20. Submissions however powerful may not translate into pleadings and evidence. See *James Nyoro Kibutiri vs Eliud Njau Kibutiri* (1983) 1KAR 60, *CMC Aviation Ltd vs Crusair Ltd* No. (1978) KLR 103). The same are also based on a non-registered and non-surveyed plots. In this matter the court has discretion to set aside the dismissal order but not where it would amount to assisting a party who has been consistent in delaying the matter and who has deliberately been obstructing the course of justice.
21. Even when this matter came up on February 14, 2022 the applicant was not present to prosecute the application and or confirm service upon the respondent regarding the application.
22. Given the foregoing the court in reinstating the petition would be acting in vain since there has been indolence, inaction and deliberate delay on the part of the petitioner.



23. I therefore find no merits in the application. The same is dismissed with costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 11<sup>TH</sup> DAY OF MAY, 2022**

In presence of:

Miss Muia for petitioner

Ikioo for Nkuubi for respondent

**HON. C.K. NZILI**

**ELC JUDGE**

