



Mosaisi & another v Akombe & another (Environment & Land Case E014 of 2022) [2022] KEELC 3585 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E014 OF 2022
FO NYAGAKA, J
JULY 20, 2022**

BETWEEN

PETER AKOMBE MOSAISI 1ST PLAINTIFF

ANNAH MOKEIRA ROBERT 2ND PLAINTIFF

AND

EUNICE NYANCHAMA AKOMBE 1ST DEFENDANT

JELIAH NYAKERAIRO AKOMBE 2ND DEFENDANT

RULING

1. This is a ruling on an application for adjournment of this matter from today's court session's proceedings. The suit had been fixed for hearing virtually since many of the parties and their witnesses reside outside the country, that is to say, in New Jersey in the United State of America. It is submitted that the time now, in Kenya being 12.10 pm, is about 5.10 am there and the witnesses of the defence together with the defendants and three members of the family have been logged into the court's team system from 8.30 am East African time in Kenya, which was about 1.30 am. In essence the defence submits that the parties logged into the system for about four hours while it is not explained how it is possible that the 1st defendant can fail to successfully log in for all that time.
2. It was further submitted that even though the 1st defendant may be aged, he resides (in his US residence) with some grand children who could assist him to log onto the system. Hence, he did not have an excuse. The date had been taken by consent.
3. I have considered the application for adjournment. Adjournment of hearings of suits is provided for under order 12 of the *Civil Procedure Rules*. Rule 2 of the order caters for situations where only the plaintiff attends. Rule 3 relates to where only the defendant attends the hearing.



4. This court considers the fact that today's hearing of this suit was supposed to be virtual. Thus, attendance in the session means being in the virtual court room. That is to say being online. In the circumstances, only the 2nd plaintiff and his witnesses are in attendance only, together with their advocate. He is the one who sought the adjournment on behalf of his client, the 1st plaintiff, on account of inability to log into the court session hence his absence.
5. Granted that the 1st defendant has attempted to log in but in vain, that is a situation akin to where a party sets off to attend to a physical hearing but for supervening events such as sudden illness, a road accident or other factor making it impossible for him to attend court, he fails to. The question that arises is should the party be punished for mistakes wholly outside his control? Should such mistakes amount to be good reason for adjournment? In my view, they do.
6. In the instant matter, the date was fixed on a priority basis given the facts, as the parties implored the court, that the existence and pendency of the suit has caused a great family strain, rift and stress. The background to that is that one of the plaintiffs and one of the defendants are husband and wife respectively.
7. The court was informed and noted that the 2nd plaintiff was ready to proceed with the hearing. She was with two witnesses. It was only that the 1st defendant was absent that the adjournment was sought. Also noted was that the defendants with their witnesses were logged into the system and willing to proceed. Both the plaintiffs' and the defendants' learned counsel were ready to proceed.
8. Basically, the hitch in the hearing of the suit was because the 1st plaintiff was totally unable to log into the system - talk of inability to access justice! The 1st plaintiff is the one whose evidence is basically the main stay of the suit. He may be said to have the "greater share" in the proceedings since he is the main witness on the part of the plaintiffs.
9. The 1st plaintiff's failure to attend online is attributed to technology challenges due to the failure of his iPhone gadget to log into the team system.
10. The applicant argued that this was the first time the adjournment was being sought. It is true it was. And so the court had to consider the application as being made in good faith.
11. Much as the family or the parties are suffering as they wait for the hearing and determination of the matter, the failure by the 1st plaintiff to log into the court session/system is a matter the court shall not fault him at this stage. Earlier, the court had advised the parties to confirm to the court at least four days before hearing about readiness for hearing. That was not done. Perhaps the issue of failure to log into the system could have been detected then. But since the court did not give a mention date for that exercise the issue can now be addressed in a subsequent order.
12. Needless to state that the use of technology at the hearings of matters in Kenya is a fairly new phenomenon which everyone is being encouraged to embrace. It still has its teething problems, and care should be taken in its application or use so that it does not end up causing injustice to parties to matters rather than enhancing the access to and improving justice. For these reasons this court shall adjourn this matter in the interest of justice to accommodate the 1st plaintiff.
13. As I do so, I am alive to the fact that I note, besides the above issues, that technology use to access justice has its challenges. This does not mean that the courts back tract in the steps so far taken in accessing justice through this great assistance devise or took. Rather the challenges ought to be relooked at and addressed very skillfully and with a conscious mind. This is especially given the fact that not all parties may enjoy similar internet connectivity or strength by way of stability and even bandwidth. Similarly, not many may be familiar with how the net works and even the use of technology. Again, there may



- be power outages. Additionally, the use of the technology, particularly during the actual hearing or trial poses numerous challenges. For instance, the integrity of witnesses and evidence taking especially where the network is poor or weak and causes a party to turn off the video will lead to undesirable problems such as witness coaching or impersonation or even the sanctity of the room being used by the witness as their access point to the court. Even when video is turned on, the possibility of other people interfering with the witness' independence becomes an issue since the court is not "present" (in the sense of the physical presence and the authority that impacts is absent).
14. Moreover, the noting of the demeanor of witnesses becomes an issue since the ability by a court to observe the full bodily movements, actions and reactions is fairly limited. Of greater importance as another limitation is the presentation and production and proof of documentary evidence. Where both the judge and/or parties are less endowed with the ability to navigate the system and even then where the documents are bulky or tiny or so large that scanning them to fit into the electronic format properly poses a great challenge.
 15. Lastly, where there is more than one witness the management of the witnesses such that only those who have testified attend the virtual hearing and those who have not testified stay outside the virtual courtroom so that they do not listen to the witnesses testifying and then give the similar but heard evidence thereby breaching the fundamental rule of independence becomes a big issue.
 16. In the instant case, the plaintiff's advocate made a passionate appeal to the court that the 1st plaintiff though resident in the United States, a developed nation, does not necessarily have standard internet as was submitted by the defence; he stated that that was hearsay. He also submitted that the 1st plaintiff is 78 years of age and has challenges with how to connect his gadget to the link provided by the court to use to join the proceedings. Such averments and pleas, cannot be wished away easily with an injustice likely occurring. On the other hand, the tendency of people to use such excuses as inability to connect to the system, internet challenges and many others cannot also be ruled out. In the circumstances there has to be a balance struck between strict use of the technology for hearing of cases and the application of the connectional method - the physical attendance of witnesses.
 17. Given the totality of the observations above, I am inclined to reluctantly adjourn this matter for the reason that the 1st plaintiff is unable to attend court for the reason given. Unfortunately, contrary to the wishes of the defendant that this matter be heard during this term, there are no hearings dates available before the August vacation begins on August 1, 2022. The court's diary is full. Even today's hearing date had been squeezed from a set of hearings one of which has had to be taken out this morning to accommodate this matter, which now, sadly, has also failed to proceed. It is practically impossible to once again squeeze the hearing of this suit within this term. The totality of this ruling is that the suit is adjourned from today's hearing. It shall be heard on 28/9/2022 at 2.30 pm, virtually. Before then, the parties will have to do a test run of all their electronic gadgets so as to confirm that they will be able to log into the court session and attend it. This shall be on 22/9/2022 at 8.30 am when the plaintiffs and defendants shall be expected to log into the teams account courtroom for the above purposes, and also for agreeing on how the documentation evidence shall be tendered to the court during the time of presentation, admission and proof.
 18. For the purposes of good order and re-appraisal of and addressing some of the concerns that I have raised in this ruling, this court recommends that the rules committee looks at them together with many others that I may not have alluded to and makes rules which will take into account the proper functioning and use of technology in enhancing access to justice, especially in the aspect of using the tool in the taking of evidence.
 19. Orders accordingly.



RULING DATED, SIGNED AND DELIVERED ONLINE AT KITALE THIS 20TH DAY OF JULY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

In the presence of:

J. Samba for the Plaintiffs

I. Okero for the Defendants

