



**Imathiu v M'inoti (Suing in his Capacity as Administrator ad Litem of the Estate of Hellen Karambu M'inoti - Deceased); Mwendwa (Interested Party) (Environment & Land Case 101 of 2016) [2022] KEELC 13774 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13774 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 101 OF 2016  
CK NZILI, J  
OCTOBER 25, 2022**

**BETWEEN**

**PETER KIRIMA IMATHIU ..... APPLICANT**

**AND**

**PAUL MWENDA M'INOTI (SUING IN HIS CAPACITY AS ADMINISTRATOR  
AD LITEM OF THE ESTATE OF HELLEN KARAMBU M'INOTI -  
DECEASED) ..... RESPONDENT**

**AND**

**CATHERINE MWENDWA ..... INTERESTED PARTY**

**RULING**

1. The court by an application dated September 30, 2022 is asked to stay the proceedings the filing of final submissions, review, vary and set aside its orders issued on September 22, 2022, reopen the defence and hear the defendant on merits.
2. The reasons given are on the face of the application and the supporting affidavits sworn on September 27, 2022. That the applicant was unable to attend court during the defence hearing on September 22, 2022; that he would be condemned unheard and stands to be prejudiced; that it is in the interest of justice to grant the orders sought; that he is willing to be heard virtually before the court can close the defence case so as to produce both his oral and documentary evidence.
3. The application was served upon the respondent who has not filed any response.
4. The matter commenced with an originating summons dated July 18, 2016 and has had a checkered history.



5. On December 16, 2021, directions were taken for compliance with order 11 [Civil Procedure Rules](#) following which a hearing date for May 12, 2022 was taken by consent of the parties.
6. When the case came up for hearing counsel present for the defendant sought for an adjournment on the basis that the defendant was out of the country. The court ordered the plaintiff's suit to proceed. The plaintiff's closed their case.
7. The defence called one witness and an adjournment was granted for the defence to avail the defendant said to be in the United States of America. Counsel sought for enough time for their client to make the necessary travel arrangements. The court reluctantly gave a far-off date for September 22, 2022.
8. When the case came up for further defence hearing on September 22, 2022, again an adjournment was sought on the same reasons that the defendant was out of the country. Asked to clarify when the defendant could be available, counsel for the applicant said she had no communication with her client on when he intended to attend court should the adjournment be granted. The court rejected the request and ordered that the matter to proceed at noon, upon request by counsel.
9. At 1.10 pm, counsel for the defendant told the court she was unable to get in touch with her client hence requested for another date or in the alternative the defendant's witness statement be adopted as his evidence in chief.
10. The court rejected the request ordered the defence case be marked closed and for the parties to put in written submissions within 60 days.
11. The application is premised on articles 40,48,50and 159 of the [Constitution](#), sections 1a,1b,3a of the [Civil procedure Act](#), orders 12, and 51 of the Civil Procedure Rules and section 146 of the [Evidence Act](#)
12. Order 45 of Civil Procedure Rules as read together with section 80 of the [Civil Procedure Act](#) provides that a court may review, vary or set aside its orders on new and important issues which were not before court at the time the order was made and which out of due diligence, were not within the reach of the applicant. Secondly, is where there is an error apparent on the face of the record and thirdly, is on other sufficient reasons. The court must also consider, sections 1A, 1B and 3A of the [Civil Procedure Act](#) as read together with article 159 of the [Constitution](#) to establish if it is in the interest of justice to the grant orders sought.
13. In [Equity Bank vs West Link MBO Ltd Civil Application No 78/2011](#) Musinga J, held that courts of law exist to administer justice and in so doing they must balance between the competing rights and interests of different parties but within the confines of law to ensure the ends of justice are met.
14. In [Richard Ncharpi Leiyagu vs IEBC & 2 others \(2013\) eKLR](#) the court said the discretion to set aside an order is not aimed at assisting a party who deliberately seeks to obstruct or delay the cause of justice. Further, the court held that the right of a fair hearing is a well-protected right but the same should be done in such a way as to protect the integrity of the court from abuse that would amount to injustice and at the end of the day there should be proportionality.
15. In [Abduraham Abdi vs Safi Petroleum Products Ltd and 6 others \(2011\) eKLR](#), the court said it had to weigh the prejudice that was likely to be suffered by the innocent party and against the prejudice to be suffered by the offending party.
16. In this application the applicant has not pointed out any error apparent on the face of the record or brought any material which is new and was not within his reach at the time the order declining the adjournment was granted.



17. The applicant's lawyers at the time knew their client was out of the country as at May 12, 2022. The date for September 22, 2022 was taken with that information in mind and known to both the court, the applicant and the respondent.
18. Indeed, the court gave sufficient time as requested by counsel avail himself. In this application, the deponent now says he can only visit the country once and since he did so in June/July, it was impossible to attend on September 22, 2022. The travel to Kenya and in the court was obviously something within the applicant's knowledge but he chose which case had priority to him. At the very least one would have expected the applicant and his advocates on record to have requested and made prior arrangements to take his evidence at the time he was in Meru, or his evidence taken virtually. The applicant did nothing until it was too late
19. Looking at the supporting affidavits, it is quite apparent that the applicant chose to withhold his presence in the country to court and the respondent.
20. Time difference is not a new phenomenon. It is as old as history. The applicant knew the time difference and has not said why he failed to log in during the hearing date. Counsel for the applicant was given more than enough time to reach out to her client to log in but in vain.
21. Additionally, the defence called one witness and chose not to produce the replying affidavit by the applicant together with the list of documents through that DW1. Furthermore, the said documents are public documents which could have been produced by any other witness apart from the defendant since he was not the author of the said documents. The applicant did not pray for DW1 to be recalled to produce the said exhibits.
22. The applicant is therefore the author of his own misfortune. The court gave him more than sufficient time to attend court and offer his defence, either physically or virtually.
23. The court did not make it mandatory for the applicant to physically attend the hearing. Counsel for the applicant in the letter dated September 9, 2022 did not suggest or explore the virtual process for the applicant to tender his defence, until the court suggested so. Unfortunately, the applicant could not be traced for over two hours yet he knew his case was due for hearing that day. He simply assumed there will be an automatic adjournment. Counsel could not help further in suggesting other available dates to accommodate her client. It was therefore left to the court to determine the way forward.
24. The sword of justice cuts both ways and parties as well as their counsels are supposed to help the court to attain its overriding objective for expeditious disposal of cases under section 1A,1B,3A of the [Civil Procedure Act](#).
25. This suit by any stretch of imagination is an old matter which has been pending since 2016.
26. The orders were made on September 22, 2022 while the instant application was filed on September 3, 2022. In [Mbogo Gatuiku vs AG HCC 1983 of 1980](#), the court said even a delay of a day or two calls for an explanation.
27. To my mind, the applicant foresaw it was impossible to attend court again in July 2022, but chose to wait to notify the court and the other party on September 9, 2022 just two weeks before the hearing. He gave no other option other than to adjourn the matter. He did not suggest the date he would be available thereafter. In so doing, he did not consider the prejudice to the opposite party as to delay of the matter and pendency thereof if at all the issue of land is emotive.
28. The respondent is equally entitled to have the suit heard and determined, one way or the other in an expeditious manner.



29. As to stay of proceedings, the court has to weigh in and balance the pressure on courts caused by caseloads, the interest of parties, policies of the judiciary and expectation of Kenyans toward the reduction of case backlog. See *Mawji vs Laiji & others (1992) eKLR*.
30. In *Oboyo Osodo vs Rael Obara Ojuok & 4 others (2017) eKLR* the court said not even the overriding objective of the court could aid a party who had run counter to the tenets of article 159 of the *Constitution*. It declined to re-open the case for lack of justifiable and reasonable basis. See *Malindi HCCC No 56 of 1999, Kiti Lewa vs Housing Finance of Kenya & another (2015) eKLR* and *Pinnacle Projects Ltd vs Presbyterian Church of East Africa, Ngong' Parish & another (2019) eKLR*.
31. In my considered view, it would not be in the interest of justice to endlessly adjourn this case at the whims and convenience of the defendant under the circumstances obtaining.
32. In this application, the applicant has failed to lay a basis and satisfy the threshold by providing a rational basis for the court to stay the proceedings and or re- open his defence.
33. In the premises I find the application lacking merits. The same is disallowed. Parties to file written submissions as earlier ordered for mention on the scheduled date.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25<sup>TH</sup> DAY OF OCTOBER, 2022**

**In presence of:**

C/A: Kananu

Miss Gedion for applicant

HON CK NZILI

ELC JUDGE

