



Abdulrahman (Administrator to the Estate of Adalamin Abdala alias Abdala Amin Abdala alias Abdulrahman Bin Abdulla alias Abdaraham Abdara – Deceased) v Suan Holdings Limited & 5 others (Petition 8 of 2020) [2022] KEELC 13657 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION 8 OF 2020
CK NZILI, J
OCTOBER 19, 2022**

BETWEEN

YASIN ABDULRAHMAN (ADMINISTRATOR TO THE ESTATE OF ADALAMIN ABDALA ALIAS ABDALA AMIN ABDALA ALIAS ABDULRAHMAN BIN ABDULLA ALIAS ABDARAHAM ABDARA – DECEASED) PETITIONER

AND

**SUAN HOLDINGS LIMITED 1ST RESPONDENT
AUTOMAC KENYA LIMITED 2ND RESPONDENT
LAND REGISTRAR MERU COUNTY 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
THE DIRECTOR OF SURVEYS 5TH RESPONDENT
THE ATTORNEY GENERAL 6TH RESPONDENT**

RULING

1. The petitioner by an application dated May 25, 2022 has asked the court to vacate its orders issued on March 16, 2020 dismissing the petition for non-attendance, or non-compliance and reinstate it for hearing on merits.
2. The grounds of the application are set out on the face of the application, the two supporting affidavits sworn by Mr Ali and Purity Gakii Murangiri advocates.



3. Briefly, the reasons given for non-attendance on the hearing date are that out of long sickness on the part of Mr Ali and Miss Murangiri. The petitioner's counsels therefore regret the non- attendance which they term as non-deliberate but inadvertent and excusable under the circumstances.
4. Further the applicant stated that the court orders were extracted, service effected on the respondent but the OCS Meru had to first seek a clearance from his superiors Nairobi and when he received it both the land registrar and the county surveyor were unavailable on the proposed site visit date. The petitioners urge the court to find noncompliance with the court orders was beyond his control.
5. The applicant submitted the reasons given are line with the court's discretion under order 12 rule 7 of the Civil Procedure Rules for sufficient cause given the medical report which shows that Mr Ali advocate had a bed rest of almost two weeks and the sickness of Miss Murangiri advocate.
6. The applicant has implored the court to be guided by the case of Wachira Karani v Bildad Wachira (2016) eKLR on the proposition that sufficient cause means a party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or that a party was not acting diligently or remaining inactive.
7. The applicant further relied on Richard Ncharpi Leiyangu v IEBC & 2 others (2013) eKLR, Harrison Wanjohi Wambugu v Felista Wairimu Chege & another (2013) eKLR, Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another (2014) eKLR , CMC Holding Ltd v James Mumo Nziki (2004) KLR 173, Wenendeya v Gaboi (2002) 2 EA 1662, Shah v Mbogo (1967) EA 166, Mureithi Charles & another v Jacol Atina Nyagesuka (2022) eKLR, Philip Chemwolo & another v Augustine Kubede (1982-88) KAR 103, Murai v Wainaina (1982) eKLR and Gladys Njeri Kirugumi v Hangak Development Co Ltd and another (2016) eKLR & films Rover International Ltd v Canno fills sales Ltd (1986) 3 ALLE ER 1772.
8. The application was opposed by the 1st respondent through a replying affidavit sworn on June 16, 2022 on the basis that no reason has been availed for the non-attendance and the affidavit in support of the application was intended to aid the applicant in his fishing expedition who strangely does not even know where the alleged suit land is situate. The 1st respondent, submits the court was justified under orders 12 rule 3 & 17 rule 3 of the Civil Procedure Rules to dismiss the suit for non-attendance and noncompliance with court directives.
9. Reliance was placed on TSC v KNUIT & 2 others (2013) eKLR on the proposition that a court order is not a mere suggestion, an opinion or a point of view but is issued after much thought and with circumspection, whose non-compliance will open the door to chaos and anarchy.
10. As to compelling reasons or sufficient grounds, the 1st respondent urged the court to find a pendency of a case when a party seems disinterested in his case prejudices the opposite party and a court becomes a punching bag leading to loss of confidence in the judicial system due to delays. Therefore, dismissal of suits though draconian, is inevitable when an occasion calls for such an action as held in Bilha Nyongo Isaac v Kembu Farm & another (2018) eKLR, KPLC LA v Alliance Media (Ki) Ltd (2014) eKLR.
11. The 1st respondent averred that what the court is being asked to do is to complicate and lengthen the route to justice especially where an order for a land county surveyor to visit the locus quo was issued but not complied; with the petitioner failed to attend court for further directions without an explanation that two missteps in the case were a clear demonstration of a petitioner disinterested in his case.As regards prayers no. 4 the 1st respondent submits the prayer was not justifiable when similar directions had been issued and were never complied with.



12. The issue for my determination is whether there are sufficient grounds or reasons to vacate, set aside or vary the orders of dismissal and instead reinstate the petition for hearing on merits.
13. The petitioner filed the instant petition alleging breach of his constitutional right to land arising out of the actions of the respondents. Directions were made for the service of the petition whereof the 1st respondent filed a response on August 11, 2022.
14. Following several interlocutory applications, the court on March 16, 2022 ordered the parties to exchange pleadings. By consent parties agreed that the land registrar and the county land surveyor together with their representatives to meet at the suit premises, establish the status of the land and file a report within 30 days. The OCPD or OCS Meru central police station was to provide security during the exercise.
15. The petitioner averred that he extracted the order, served the same on the respective officers including the Land Registrar on April 11, 2022 and the OCS Meru who were to consult and give a convenient date of the site visit. The petitioner avers that the OCS Meru sought and received clearance from his superiors but both the land surveyor and land registrar were not available on the set date.
16. The law governing constitutional petitions is articles 22, 23, 16, 2 (b) of the Constitution, section 13 of the ELC Act and the Constitution of Kenya [Fundamental rights and Freedoms] Practice and Procedure Rules 2013.
17. Rule 25 of the rules grants the court powers to set aside, vary or discharge orders made under the rules. Rule (3) (3) provides the rules shall be interpreted in accordance with article 259 (1) and be applied for furtherance of the rights and freedoms, values and principles of the Constitution, to facilitate just, expeditious, proportionate and affordable determination of all cases while rule 3 (5) states that they should be interpreted in the furtherance of the overriding objectives so as to achieve just determination of the proceedings, efficient use of the available resources and the timely disposal of proceedings, at cost affordable manner of the parties.
18. Rule 3 (6) provides that a party and his advocate is under a duty to assist the court to further the overriding objectives of the Rules and in that regard to participate in the process of the court and to comply with the directives and orders of the court.
19. The above being the law, the applicant has opted to make the application under orders 12 and 17 of the Civil Procedure Rules and any other enabling provisions of the law. He urges the court to find the explanations given as falling under sufficient cause, that the application was brought timeously and if allowed there will be no prejudice to the respondents otherwise he will suffer irreparable if the petition is not heard on merits.
20. The letter and spirit to which the petition is based on has higher considerations above orders 12 & 17 of the Civil Procedure Rules given the very nature of and the manner of disposal of constitutional petitions which is guaranteed and decreed by the Constitution to an extent that a constitutional court is expressly directed under article 22 (3) (b) of the Constitution to keep formalities to bear minimum.
21. It is for this reason that a party is required under the Rules to plead with precision that right which he or she claims to have been infringed, threatened or breached, for clarity both to the court and the opposite party.
22. It is also for the same reasons that rule 15 gives the respondents timelines within which to proceed to the petition, and if need be for the issuance of conservatory orders in pursuit of the expeditious disposal of such matters.



23. The Court of Appeal while addressing its mind on similar election petition rules which are of the same wording as Rule 3 above in *Richard Leiyagu* (supra) cited with approval *Ferdinand Waititu v IEBC* Court of Appeal No 137 of 2013 in a situation where an election petition had been dismissed for failure to attend. The court reiterated the need for all parties in an election petition to comply with the strict timelines as held in *Raila Odinga v IEBC* Election Petition No 4 of 2013. Further the court reiterating the holding in *Shah v Mbogo* (1968) EA 93 supra held that the discretion was intended to avoid injustice, or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately sought to obstruct or delay the course of justice.
24. In that case the court asked itself whether the failure to attend court constituted an excusable mistake, an error of judgment regarding the counsel's failure to diarize the date properly or was meant to deliberately delay the cause of justice. The court cited with approval *Belinda Murai & others v Amos Wainaina* (1978) eKLR 2782 where Modan J held that a mistake was a mistake whether done by a senior or junior counsel and the doors of justice should not be closed out of that.
25. The court further cited with approval Philip Chemwolo & another (supra) on the proposition that blunders will continue to be committed from time to time and that a party should not suffer out of such mistakes hence the reason the court was there to decide the rights of parties but not to impose discipline. Eventually the court held the inconvenience and prejudice caused to the respondents could be compensated by way of costs since the right to a hearing was a well-protected right being the cornerstone of the rule of law in our Constitution.
26. Since there were no set rules on the setting aside an order a dismissed election petition, the court invoked its inherent jurisdiction to ensure that the ends of justice were met, which is a general power given to the court to control its own procedure so as to prevent injustice and also maintain its character as court of justice. Further the court said by the same analogy the court has such powers to set aside its own orders in order to do justice.
27. Applying the foregoing principles and binding decisions it should be noted that the Mutunga Rules are silent on the dismissal of a constitutional petition for both non-prosecution and non-attendance.
28. The court however under the rules has inherent powers to expeditiously dispose the petition and to enforce its directives, orders and decisions.
29. In this petition the court issued directives which were not complied with and during the hearing date there was no attendance on the part of the petitioner. The court was left with no option but to dispose the petition one way or the other.
30. The applicant has come offered the reasons for both non-attendance and non-compliance. The 1st respondent has not cast doubts on the medical reports and the reasons why counsel reached out to step in for Mr. Ali also fell sick. The application has also been made without unreasonable delay.
31. To my mind the applicant's counsel do not fit in the category of the ones out to inordinately delay, derail or obstruct the cause of justice.
32. Going by the past record, there is no evidence of the petitioner trying to steal a match and or using all manner means to delay the expeditious disposal of this matter.
33. Sickness is sickness and does not give notice when and how it is bound to come. It can affect anyone, anytime anywhere.
34. The 1st respondent has not stated the manner it is likely to be prejudiced if the petition was to be reinstated for hearing. The subject matter has not been said to have changed its status.



35. The court therefore finds merit to the prayer for the petition to be reinstated.
 36. As to the issue of the scene visit, it is not the business of this court to be used to aid parties to collect evidence and to wait for the gathering of facts and evidence so as to prosecute its case.
 37. The initial order was by consent of the parties which went away with the dismissal order.
 38. Unless there is a fresh consent duly signed by the parties, the court find no merit in that request.
 39. In the premises I allow the notice of motion. The petition is reinstated for hearing on priority basis. Costs to the 1st respondent in any event.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19TH DAY OF OCTOBER, 2022.

In presence of:

C/A: Kananu

Miss Rajab applicant

Kieti for 3rd, 4th, 5th and 6th respondents

HON. C.K. NZILI

ELC JUDGE

