



**Mathio t/a Meru Junior Primary School v Kathendu & another (Environment & Land Case E011 of 2023) [2024] KEELC 4995 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4995 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E011 OF 2023**

**CK NZILI, J  
MAY 8, 2024**

**BETWEEN**

**HILDA MUKWANYAGA MATHIO T/A MERU JUNIOR PRIMARY  
SCHOOL ..... PLAINTIFF**

**AND**

**FESTUS KATHENDU ..... 1<sup>ST</sup> DEFENDANT  
THE LAND REGISTRAR, MERU CENTRAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The court is asked to set aside its orders made on 19.1.2024 and allow the applicant to present her case on merits. Further, the court is asked to stay the proceedings herein. The grounds are set on the face of the application and in the supporting affidavit of Hilda Mukwanyaga sworn on 29.1.2024. Briefly, the applicant says that she suffers from certain conditions that sometimes would put her down completely, and of late, she has been undergoing intense medical care, going by the medical reports marked HMM "1" and 2, respectively. Out of this ailment, the applicant says that she was unable to attend court on 19.1.2024. The applicant admits that her advocate, previously on record, had informed her that her suit was dismissed for non-attendance.
2. The application is opposed through a replying affidavit sworn on 14.2.2024. It is averred that the medical reports attached to the application were manufactured or prepared to suit this application. It is stated that when the matter was called out for hearing on 18.1.2024, the advocate present for the applicant informed the court that she had woken up sick and had gone for treatment without specifying the ailment or hospital she was taken to.
3. Further, it was averred that when the matter was called out again the said lawyers were unable to name the hospital where the plaintiff was being treated and were similarly unable to furnish any evidence of sickness. From the annexures, the 1<sup>st</sup> respondent avers it appears that the applicant was allegedly treated



- on 14.1.2024 and was observed for 12 hours only, meaning if the report is to be believed, she was never admitted to any hospital.
4. Assuming the applicant was sick, the 1<sup>st</sup> respondent avers nothing would have been impossible for her advocates to write to the court and the 1<sup>st</sup> defendant's advocates in advance and attach any treatment/medical reports and or avail the medical report summary, which is stamped and dated 14.1.2024 and was five days before the hearing date.
  5. Parties agreed to canvass this application by way of written submissions. The plaintiff relies on written submissions dated 15.2.2024 and states the medical reports attached are self-explanatory and sufficiently detailed that the primary prognosis is acute hypertension, which has now stabilized where the court's understanding and latitude is craved for.
  6. It is submitted that Order 12 Rule 7 Civil Procedure Rules permits this court to set aside its orders made dismissing the suit for non-attendance by the applicant. Reliance was placed on Mureithi Charles & another vs. Nyagesuka Civil Appeal No. E10 of 2020, where the court cited Shah vs Mbogo (1967) EA 116 and CMC Holdings Ltd vs Nzioki (2004) KLR 173.
  7. The 1<sup>st</sup> respondent relied on written submissions dated 14.2.2024. It is submitted that the suit was fixed for hearing by consent for 18.1.2024 following full compliance with Order 11 of the Civil Procedure Rules save for paginated bundle, issues for trial case summary, and questionnaire on the part of the applicant.
  8. The respondent submits that parties had been directed to avail all their witnesses, and he came with one of his witnesses all the way from Arthi House Nairobi, who testified for his counterclaim and closed the case. The 1<sup>st</sup> respondent submitted the incomplete application was filed 21 days after the order of dismissal, which is inordinately long, and no reason for the delay had been laid out.
  9. Similarly, the 1<sup>st</sup> respondent submitted that the applicant's advocates were heard at length on 18.1.2024, giving a myriad of excuses why the applicant was absent, following which a considered ruling was made which is yet to be appealed against.
  10. It is submitted that the applicant had lied about her whereabouts on 18.1.2024, by stating that she was in the hospital, yet her documents show that she was treated on 14.1.2024, observed for 12 hours, and was let to go home. Therefore, it is submitted that there is simply no evidence that the plaintiff was in the hospital on 18.1.2024, for this court to be called to exercise its discretion. Reliance was placed on Julius Kibowott Tuwei vs. Reuben Argout & others (2022) eKLR.
  11. The applicant came to court in person under a certificate of urgency by an application dated 24.5.2023, which was certified urgent and listed for hearing on 31.5.2023. By a ruling dated 19.7.2023, the court granted a conditional temporary injunction and inhibition orders to last for one year. The applicant was to deposit Kshs.1000,000/= (one million) as security, being the accrued monthly rent within 14 days from the date of the ruling. Parties were also directed to comply with Order 11 Civil Procedure Rules by the following mention on 3.8.2023.
  12. The record shows that the applicant did not attend the mention dates or comply with Order 11 before the Deputy Registrar on 3.8.2023 & 24.8.2023. The matter was then listed before this court on 22.11.2023, when Mr. Mwaura, advocate for the applicant, sought for more time to retrieve some documents from the land registrar for purposes of compliance. In the absence of non-compliance and inaction by the applicant despite the extension of time, the court gave a hearing date for 18.1.2024.
  13. When the matter came up for hearing on 18.1.2024, counsel for the applicant prayed for an adjournment on the reasons that the applicant had been taken ill and had proceeded to hospital.



- No hospital report was availed. Mr. Mwirigi Kaburu, for the 1<sup>st</sup> defendant, opposed the application for lack of evidence of sickness or hospitalization or history thereof. Further counsel submitted that communication from the applicant came a little late, was an ambush and notification was a few minutes before the file was called out.
14. Learned counsel submitted that there was a clear indication that the plaintiff was not willing to prosecute the suit despite enjoying interim orders since July 2023. Counsel said that on 22.11.2023, the plaintiff's counsel was ordered to serve the 2<sup>nd</sup> respondent with the hearing notice but failed to do so.
  15. Miss Maina learned state counsel for the 2<sup>nd</sup> respondent conceded that Mr. Mwaura advocate only informed them of their predicament that morning, and was not opposed to the application. In a rejoinder, Mr. Mwaura learned counsel for the applicant submitted that no one wished to be sick and it could happen to anyone anytime. Counsel submitted that under Order 17 Rule 1 [Civil Procedure Rules](#), the court can grant an adjournment if there are good reasons, among them sickness.
  16. Further, counsel submitted that the 1<sup>st</sup> respondent had not shown what prejudice they would suffer if the adjournment was granted. Counsel submitted that the court has unfettered discretion on the overriding objective. It was also submitted that there was sufficient notice to the respondents before the suit was called out for hearing.
  17. The court rejected the application and ordered the matter to proceed at 10.00 am. At 10.00 am, counsel for the applicant told the court he was not ready to proceed, for his client was still unwell and unable to attend court. Counsel offered to pay adjournment expenses for the day. Mr. Kaburu, advocate for the 1<sup>st</sup> respondent, told the court he was ready to proceed with two witnesses, one from Nairobi, and a ruling had been read, and therefore, if the plaintiff was not ready, she should either close the case or withdraw it. Counsel for the 2<sup>nd</sup> respondent left it to court to determine.
  18. In an extempore ruling, the court held that in the absence of a medical report, there was no basis to review the earlier orders declining an adjournment. Counsel for the applicant sought and was granted leave to appeal against the ruling. Further, counsel for the plaintiff sought for stay of the proceedings pending appeal, which Mr. Mwirigi advocate opposed as an attempt to secure an adjournment through the backdoor. He sought the dismissal of the plaintiff's suit for want of prosecution or to be closed without calling any evidence. Counsel submitted that it was noteworthy that since morning, if the applicant was unwell, a document would have been availed via email, meaning that the applicant was adamant in ensuring that the suit was not heard. Miss Maina, for the 2<sup>nd</sup> respondent, left it to the court.
  19. The court made a finding that a stay of proceedings was a serious matter, as held by Gikonyo J in [Kenya Wildlife Services vs James Mutembei](#) (2019) eKLR requiring basis for it impedes access to justice and expeditious disposal of suits, which are rights equally leaning to the 1<sup>st</sup> respondent. In the absence of any material as to why the plaintiff was not present, the court dismissed her suit for non-attendance and non-prosecution with costs and discharged the interim orders issued on 19.7.2023. The court ordered the counterclaim to proceed to a hearing in which the applicant's counsel participated on behalf of the plaintiff. The 2<sup>nd</sup> respondent, who was not a party to the counterclaim, was discharged from attending to it.
  20. As if this was not enough, Mr. Mwaura sought a stay of the 2<sup>nd</sup> ruling for 45 days. Mr. Mwirigi Kaburu advocate opposed the application since a negative order cannot be stayed. The court declined to stay the dismissal order, paving the way for hearing of the evidence of PW 1 & PW 2, whom the respondent counsel extensively cross-examined.
  21. Regarding defense to the counterclaim, Mr. Mwaura advocate, for the defendant to the counterclaim, told the court that he was not calling any evidence to the counterclaim and proceeded to close the



- defense. It is essential to observe that the applicant had filed no defense to the counterclaim. The court granted parties 30 days to put in written submissions for judgment on 24.4.2024. The 1<sup>st</sup> defendant filed written submissions dated 6.2.2024 on 6.6.2024 while the applicant did not file any.
22. As a starting point in this analysis, let me point out that there were no orders made by this court on 19.1.2024 as requested in this application and repeated in paragraph 3 of the supporting affidavit. Secondly, the court has laid out several orders and rulings made on 18.1.2024 at the request of the plaintiff's counsel, then on record. Prayer No. (b) of the application is not specific on which orders to review or set aside. This is not an application for review, variation, or setting aside of the proceedings. It is an application made under Order 12 Rule 7 of the [Civil Procedure Rules](#). The applicant's counsel, then on record, had sought similar prayers under the same order based on the same set of circumstances or grounds of sickness.
  23. The only difference herein is that the court has been supplied with medical reports dated 14.1.2024. The main issue, assuming that the applicant wants the court to review and or set aside its many orders of 18.1.2024, is whether there is new and essential evidence which, had it been availed before the court by counsel then on record, the court would have reached a different holding.
  24. The new material produced as medical treatment is dated 14.1.2024. This was four days before the hearing date. It means, therefore the plaintiff was in possession of the documents on the morning of 18.1.2024. Counsel for the plaintiff then, from the court record between 9.00 am and 12.30 pm did not have with him the said documents. The applicant has not mentioned why she did not avail them to her lawyers then for onward transmission to the opposite party and the court.
  25. The applicant did not move the court at the earliest opportunity possible until 21 days later through a law firm yet to seek leave of this court under Order 9 Rule 9 [Civil Procedure Rules](#) to come on record. It is not enough to file a consent without moving the court for its endorsement under Order 9 Rule 9 [Civil Procedure Rules](#).
  26. The events of 18.1.2024 are what is essential for the applicant to address, to show that there was sufficient cause or reasons not to attend court. The 1<sup>st</sup> respondent has attacked the medical reports as manufactured or tailor-made to suit the circumstances.
  27. There must be a nexus between medical reports made on 14.1.2024 and 18.1.2024. It is either that the plaintiff was sick, admitted, or incapacitated such that she could not avail herself to court or, at the very least, communicate out of sickness with her lawyers then on record. The onus was on the applicant to explain herself and not to leave out glaring doubts that she was either careless, indifferent, unperturbed, and or very least concerned with her case, whose date had been given on 22.11.2023. Counsel for the applicant on 18.1.2024 was emphatic that he had no medical reports with him. The applicant is silent on why she did not consider passing them over to the said lawyer.
  28. A balance must be struck out with regard to scales of justice between the expeditious disposal of suits vis a vis locking out a litigant from trial. See [Japhet Pais Kilonga & another vs Mombasa Auto Care Ltd](#) (2015) eKLR. The record shows that the applicant failed to file a defense to the counterclaim or comply with Order 11 of the [Civil Procedure Rules](#) despite a court order to that effect on several occasions. In [CMC Holdings Ltd vs James Mumo Nzioki](#) (*supra*), the court said that the reasons why the applicant failed to turn up on the hearing date and a reasonable defense were some of the considerations.
  29. The applicant did not list any other witness in her filed list of witnesses. She, however, made a list of documents dated 21.5.2023. Other than stating that she had not complied with Order 11 of the [Civil Procedure Rules](#) on account of certain documents to be availed by the land registrar, the documents



were not specified at all. The past conduct prior to 18.1.2024 shows that the applicant ignored earlier court directives that were aimed at expediting the matter, yet she was enjoying interim orders.

30. Counsel then on record for the applicant when asked why he issued a notice to adjourn to the defendants that morning, he termed the notice a few minutes before the cause was called as sufficient since sickness does not give a notice when it is coming. It now turns out the applicant was only in hospital on 14.1.2024 and not 18.1.2024. This is the context the court has to bear in mind on whether the orders sought can be granted.
31. The discretion to set aside an order is intended to avoid injustice and hardship resulting from accident, inadvertence, or excusable mistake or error. However, it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. See *Shah vs Mbogo & another* (1967) EA 116.
32. In *Mbituka Titus vs. Jackline Mutindi* (2020) eKLR, the court held that in granting an adjournment, there must be sufficient reasons, causes, or grounds. The only reason for non-attendance on 18.1.2024 by the applicant on the hearing date is on account of sickness. The medical documents availed do not show that the applicant before, on, or soon after 18.1.2024 was critically ill, admitted in hospital, or incapable of attending court.
33. In *Japheth Pais Kilonga & others vs Mombasa Autocare Ltd* (*supra*), the court held that the drawback in the administration of justice is the delay in the determination of cases, resulting in the overwhelming case backlog. Public policy demands under Article 159 of the *Constitution* that the business of the court should be conducted expeditiously. It is no longer business as usual as the judiciary implements the non-adjournment policy.
34. Judicial discretion is exercised judicially upon proper material after considering a party's overall conduct in the case. A party cannot hold a court at ransom by refusing to attend court, comply with court directives, and turn around to complain violation or denial of the right to a fair hearing or to be heard. The rights of the respondents are equally to be protected and upheld. A court cannot merely act on the terms of one party at the prejudice of the other. See *Onjula Enterprises Ltd vs Sumaria* (1986) KLR 651, *Haile Selassie Avenue Development Co. Ltd vs Josephat Muriithi & 10 others* (2004) eKLR.
35. The upshot is that I find the application lacking merits. The same is dismissed with costs. Judgment on 19.6.2024.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 8<sup>TH</sup> DAY OF MAY, 2024**

**HON. C K NZILI**

**JUDGE**

In presence of

C.A Kananu

Mwirigi Kaburu for 1<sup>st</sup> Defendant/Respondent

Nyakundi for Plaintiff/Applicant

