



**M'Iberi v Inspector General of Police & another (Environment & Land  
Case 178 of 2017) [2023] KEELC 425 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 425 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 178 OF 2017  
CK NZILI, J  
FEBRUARY 1, 2023**

**BETWEEN**

**HILDA MUKWANYAGA MATHIU M'IBERI ..... PLAINTIFF**

**AND**

**INSPECTOR GENERAL OF POLICE ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By an application dated October 21, 2022 the court is asked to set aside the orders made on October 18, 2022 and reinstate the suit for hearing. The grounds of the application as contained in the supporting affidavit by Hilda Mukwanyaga Mathiu M'Iberi are that she failed to attend the hearing due to sickness and an earlier notification from the defence that they were not going to proceed with the hearing. The applicant has attached copies of the defence letter and a medical report as annexures marked HMMM "1" and "2" respectively. Further, the applicant averred that she has always been ready to proceed with the hearing and hence it was only fair that the court hears the matter on merits.
2. The application is opposed through grounds of opposition dated November 17, 2022 on the basis that the application was an afterthought and an abuse of the court process; it was based on half-truths; there was no prior notice of non-availability of the plaintiff; it was a non-starter and a misconceived application.
3. Order 12 rule 1 & 2 of the *Civil Procedure Rules* grants the court the power to dismiss a suit for non-attendance whereas rule 7 thereof, provides that the court which had dismissed a suit for non-attendance may set aside the dismissal order upon such terms as may be just.
4. This suit was filed on June 9, 2017. By an application dated June 7, 2017, the applicant was on August 30, 2017 granted orders to continue utilizing the suitland subsequent to which an application dated October 2, 2017 was brought for contempt of court against the defendant's agent. The defendant's



- put in a defence dated January 14, 2019, claiming that the suit property was public land illegally and fraudulently allocated to the plaintiff.
5. Parties thereafter complied with order 11 of the [Civil Procedure rules](#) and filed paginated bundles on October 6, 2021 and February 16, 2022 respectively. At the time the plaintiff was represented by Wetangula Adan & Co Advocates. The court record indicates that a hearing date was by consent taken for February 17, 2022 when the matter proceeded partly but was adjourned midway during cross-examination since the plaintiff alleged she could not read the exhibits yet she had already read them during examination in chief and went to an extent of producing all the said documents as exhibits without any complaint. The court reluctantly stood her down and set a further hearing date for May 3, 2022.
  6. On May 27, 2022, the plaintiff took an *ex parte* hearing date for October 18, 2022, through the law firm of Otieno C Advocates, now on record for her. When the matter came up on October 18, 2022, the law firm of Otieno Co Advocates represented by Mrs Otieno advocate who had filed a notice of change of advocates the same morning, told the court that they were unable to proceed since their client was not present for she had allegedly fallen ill.
  7. Counsel requested for a last adjournment. Mr. Kieti counsel present for the defendants admitted to have had communicated to the plaintiff about their intention to seek for an adjournment after the plaintiff's case, given one of their defence witnesses was engaged in a Mombasa court. Counsel reluctantly conceded to the request for adjournment.
  8. The court at 10.30 am declined the adjournment given that after the time allocation, the plaintiff's counsel came up with a totally different version of an explanation and also failed to produce any medical reports to support the claim of sickness. The court granted the plaintiff up to 12 noon to avail herself to proceed with the hearing.
  9. At 12 noon, the plaintiff sent a receipt from Meru Diagnostic Clinic dated October 18, 2022 which did not indicate the date of the plaintiff's alleged treatment or admission. The court had no option but to dismiss the suit for non-prosecution and non-attendance by the plaintiff
  10. Given the foregoing record, the affidavit by the plaintiff herein is not only misleading but also out to distort the facts. Annexure marked HMMM "1" is clear that the defendants were only intimating to seek for adjournment after the close of the plaintiff's case. Therefore, it could not be true that the plaintiff failed to attend court due to the letter dated 10.2022.
  11. Annexure marked HMMM "2" is dated 19.10.2022 which was the following day after the hearing date. It does not indicate that the plaintiff was taken ill a day before the hearing or the morning of December 18, 2022.
  12. Be that as it may, the discretion of this court to set aside dismissal orders must be exercised judicially and not capriciously. The court has also to consider its constitutional obligation to dispense substantive justice under article 159 2 (b) of the [Constitution](#). In *Shah vs Mbogo* (1967) EA 116, the court held that the discretion was intended to avoid an injustice or hardship resulting from accidents, inadvertence or excusable mistake or error but it was not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
  13. In *Wachira Karani vs Bildad Wachira* (2016) eKLR, the court held that sufficient cause was a question of fact and a party had to demonstrate that he was prevented from attending court by a sufficient cause.



14. Looking at the reasons given by the applicant herein it is quite obvious that she had no good reasons for failing to attend court for her case. Similarly, the explanation given is also lacking merits. I will nevertheless give the applicant a last chance.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2023.**

**In presence of:**

C/A: Kananu

Mrs. Otieno for plaintiff

Applicant

Kieti for respondent

**HON. C.K. NZILI**

**ELC JUDGE**

