



**Ilays Trading & Transporters Company Limited v Our Lady of Mercy Secondary School
& 4 others; Nairobi Deputy Commissioner Kamukunji & 3 others (Interested Parties)
(Environment & Land Petition 40 of 2019) [2024] KEELC 1612 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 40 OF 2019
EK WABWOTO, J
MARCH 20, 2024**

BETWEEN

ILAYS TRADING & TRANSPORTERS COMPANY LIMITED PETITIONER

AND

**OUR LADY OF MERCY SECONDARY SCHOOL 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
NATIONAL LAND COMMISSION 3RD RESPONDENT
OUR LADY OF MERCY SCHOOL 4TH RESPONDENT
NAIROBI CITY COUNTY 5TH RESPONDENT**

AND

**THE NAIROBI DEPUTY COMMISSIONER KAMUKUNJI INTERESTED
PARTY
THE OCPD KAMUKUNJI INTERESTED PARTY
THE OCS SHAURI MOYO POLICE STATION INTERESTED PARTY
THE NAIROBI REGIONAL COMMISSIONER INTERESTED PARTY**

RULING

1. Before me for determination is an application dated 13th February 2024 accompanied by Supporting Affidavit sworn by David Kalii Advocate in which the Petitioner sought the following orders:
 - i. ...Spent.



- ii. The Court be pleased to review, discharge, vacates and or set aside its order issued on 13th February 2024 dismissing the Petitioner’s suit for non-attendance and consequently re-instate the suit and fix it for hearing afresh.
 - iii. Costs be in the cause.
2. The Application was hinged on Order 12, Rule 7, Order 45 of the [Civil Procedure Rules](#) and Section 3 and 3A of the [Civil Procedure Act](#). The application was premised on the following grounds the Petitioner raised the following grounds:
 - a. Mr David Kalii was given instructions by the Petitioner’s advaoctes on record to hold brief for Mr Mwendwa Munene for the Petitioner in the hearing.
 - b. At around 8.50am, Mr Kalii by sheer human error logged into the virtual link of Justice Angote instead of Justice Wabwoto.
 - c. Only when Justice Angote began his session at around 9.10 am did Mr Kalii realise he was logged into the wrong Court and rushed to log into Justice Wabwoto’s court.
 - d. By the time, Mr. Kalii was finally admitted to the Court, the matter had been called out and dismissed for non-attendance.
 - e. Mr. Kalii explained the predicament to Justice Wabwoto and prayed that the matter be called out again but his Lordship stated that his hands were tied since the advocates for the other side were not be present, which necessitated the instant application.
3. In opposition to the application, the 4th Respondent filed a replying affidavit dated 20th February 2024 in which it was submitted that the Petitioner had been guilty of laxity in the matter. It was further averred that no evidence had been adduced to confirm that Counsel Kalii had been instructed to hold brief. It was argued that the Petitioner had a history of filing vexatious and incompetent applications which it failed to prosecute and the 4th Respondent sought for dismissal of the application with costs.
4. The 5th Respondent equally opposed the application vide grounds of opposition dated 19th February 2024. It was submitted that the Counsel who alleges to have logged into the Court proceedings was a stranger, who was not on record for the Petitioner. Furthermore, it was argued that the application did not stipulate what provisions of Order 45 it invoked to which the application was incompetent and vexatious.
5. Having considered the application and submissions made by the parties, it is evident that the sole issue for determination is whether this court should reinstate the petition.
6. In so far as The Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2013(Mutungu Rules) is silent on re-instatement of a petition, Order 12 Rule 7 of the Civil Procedure Rules does provide for setting aside, recalling and or reinstating a suit or application dismissed for non-prosecution or non-attendance.
7. Articles 48 and 50 of the [Constitution](#) guarantees every Kenyan a right to access to justice and fair hearing. Article 159 requires that justice shall be administered without undue regard to technicalities whereas Sections 3, 4 and 13 of the [Environment and Land Court Act](#) as read together with Section 1A, 1B and 3A of the [Civil Procedure Act](#) expects the court to strive towards rendering substantive justice. In view of the above, the Court must reiterate and duly take judicial notice of the long-practised normative practise of “holding brief”. Bearing in mind that all advocates are officers of the Court, it is



not upon this Court to cast aspersion on the agreements between Advocates that would occasion one Advocate to hold brief for the other.

8. In *Gladys Njeri Kirugumi v Langata Development Co. Ltd & Another* [2016] eKLR and *Films Rover International Ltd. v Cannon Film Sales Ltd.*, [1986] 3 All E.R. 772 the Court in determining a similar issue, considered the least risk of injustice. In this instance, I have considered that the application was brought in a timely manner therefore, the route of lesser risk of injustice is to allow the application otherwise the applicant would be more prejudiced if denied a chance to prosecute the petition that is due for hearing.
7. In the foregoing, the Court finds that the Petitioner's Notice of Motion application dated 13th February 2024 is merited and proceeds to allow the same in the following terms:
 - a. The orders given by this Court on 13th February 2024 in effect dismissing the Petition for non-attendance are hereby set aside.
 - b. The Petition is hereby reinstated for hearing on its merits.
 - c. Each party to bear its own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MARCH 2024.

E. K. WABWOTO

JUDGE

