



Mukwanyaga v Kathendu & another (Environment & Land Case E011 of 2023) [2024] KEELC 1530 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E011 OF 2023
CK NZILI, J
MARCH 20, 2024**

BETWEEN

HILDA MUKWANYAGA PLAINTIFF

AND

FESTUS KATHENDU 1ST DEFENDANT

THE LAND REGISTRAR – MERU CENTRAL 2ND DEFENDANT

RULING

1. The court is asked to put on hold delivery of the judgment due on 24.4.2024 and to reinstate the application dated 1.2.2024 for hearing on merits. The reasons are contained on the face of the application and in the supporting affidavit by Kibagendi Assa Nyakundi, advocate, sworn on 19.2.2024. Briefly, the applicant avers her application was certified urgent and directed for inter-party hearing which she complied by filing written submissions. The applicant avers that she noticed the cause list at the Kenya Law portal on 16.2.2024 did not bear the case, as annexed as KAM "1," and sent an email through her lawyers to the court, which was not responded to.
2. The appellant avers that her lawyer was only able to communicate with the court registry at 9.30 am and also log in after getting the link long after the matter had been dealt with. The applicant avers her advocates on record eventually mentioned their predicament to the court at the end of the cause list on the same day after the lawyers managed to log in.
3. The application is opposed through a replying affidavit by Mwirigi Kaburu, advocate sworn on 22.2.2024 on the basis that the matter was indeed on the cause list for 19.2.2024 and was called four or five times with no answer as per the attached cause list marked MK "1." However, the advocate had not joined the online court session, and neither has he attached a screenshot of the gadget that was allegedly used to log in showing that he was in the lobby. The respondent avers all his pleadings have his lawyer's



- telephone number, and nothing would have been easier than the lawyer to call his lawyer or the court prior to 9 am to inquire about the status of her case.
4. The respondent avers the directions of 7.2.2024 were was particular that the application would be heard on 19.2.2024; otherwise, the applicant should not hide behind the excuse that the matter was not in the cause list. The respondent avers that virtual court proceedings rules dictate inter-alia that the parties and their advocates should join the virtual session at least 30 minutes before the court starts its session so that any hiccup, difficulties, or experience in admission can be sorted out. The respondent avers that the plaintiff's advocates willingly absented themselves from court on 19.2.2024 and that the dismissal of the application dated 1.2.2024 was proper, rendering this application without merit.
 5. Arrest of judgment is not a right of a party, for it impedes the right to a fair hearing and the administration of justice that justice shall not be inordinately delayed. Order 21 Rule 1 of the *Civil Procedure Rules* provides that after a case is heard, the court shall pronounce judgment in open court, either at once or within 60 days from the conclusion of the trial, provided if it is not delivered within the 60 days, the judge shall record the reason thereof copy of which shall be forwarded to the Hon. Chief Justice and shall immediately fix a date of judgment.
 6. This suit was heard and evidence concluded on 18.1.2024, in the presence of the plaintiff's erstwhile lawyers. A judgment date was given for 24.4.2024. Parties were directed to put in written submissions within 30 days by 18.2.2024. The 1st defendant filed his written submissions on 6.2.2024, while none have been filed by the law firm then on record for the plaintiff represented by a Mr. Mwaura advocate.
 7. Instead of complying with the directives, the plaintiff, on 7.2.2024, filed a notice of change of advocates and filed the application dated 1.2.2024, seeking the setting aside of the orders made on 19.1.2024 and for her to present her case. The applicant also sought a stay of the proceedings. The reasons given were that at the hearing, the applicant was sickly and could not, therefore, attend the prosecution of her suit. In her affidavit in support, she admitted that her former advocates had informed her of the dismissal of her suit. The reason for non-attendance was sickness, as per the attached medical report marked HMM "1" & HMM "2".
 8. In the medical report it is indicated that the plaintiff was attended to on 20.1.2023 and found stable enough to attend to regular duties. The report is dated 14.1.2024, yet it refers to an attendance of 20.1.2023. It does not show if the applicant was admitted to any hospital on 19.1.2024 or a day earlier. Annexure marked HMM "2" is not dated 19.1.2024. The 1st defendant strenuously opposed the application through a replying affidavit sworn by Festus Kathendu on 14.2.2024. Written submissions had also been filed against the application. None had been filed by the applicant, yet in this application it is averred there was compliance.
 9. Coming back to the instant application, the reasons for non-attendance by the applicant and her counsel are that the matter was missing from the cause list appearing at the Kenya Law portal and that an email sent on 16.2.2024 to court to court was not responded to.
 10. The respondent disputes the alleged version by the applicant and has attached a cause list on the Kenya Law portal containing the two cause lists attached by the parties, are different. One has five matters, while the other has eight matters. The applicant does not state when she printed her cause list. Even assuming without admitting that the matter was not cause listed, the applicant still knew that the court was sitting and had issued a hearing date for 19.2.2024. Prudence and diligence would have demanded that the applicant attend court virtually before the court session started.
 11. Between 8.00 am and 9.00 am, when the court started its sessions, the applicant would have established why her matter was missing from the cause list. Virtual court directives ordain that parties log in



through the shared link at least fifteen minutes before the court sessions start. The applicant does not say that she encountered any difficulties while accessing the link set out in the Kenya Law portal on the morning of the hearing. Why the applicant decided to log in late, and after the matter had been called out and not before has not been satisfactorily explained.

12. Additionally, the applicant avers that she was ready with her submissions, yet none had been filed before the hearing date, as directed by the court. The court downloaded its cause list on Thursday, 16.4.2024, from the same portal as the respondent, which it followed on 19.2.2024. The applicant's matter was the first in the cause list and was called out at 9.00 am. The applicant was not logged in or in the lobby from the call logs in our system. Counsel only logged in at 9.38 am. It is, therefore, not possible that the portal would only generate a different cause list for the applicant from that of the respondent and the court. From our system loggings, the applicant was not online by 9.00 am as alleged. She only appeared at 9.38 am, long after the court had gone through the cause list. The written submissions were not filed before the hearing date. Counsel did not attempt to avail himself in court on time whether or not the matter was listed. Without appearance and written submissions, the court had no option but to dismiss the application for non-attendance and non-prosecution.
13. The above notwithstanding the court is mandated to consider also the interests of justice. I therefore will give the applicant the benefit of the doubt since she says she had filed written submissions. The application shall be reinstated and determined on merits. Consequently, the judgment due for 24.4.2014 is deferred till after the ruling on 8.5.2024. Costs to 1st the respondent.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 20th DAY OF MARCH, 2024**

In presence of

C.A Kananu

Plaintiff

Mr. Nyakundi for the plaintiff

Mr. Mwirigi Kaburu for the respondent

HON. C K NZILI

JUDGE

