



**Mwilaria v Mangachiu & 3 others (Environment & Land Case
E001 of 2023) [2024] KEELC 4445 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4445 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E001 OF 2023**

CK NZILI, J

MAY 29, 2024

BETWEEN

DENNIS GITARI MWILARIA PLAINTIFF

AND

PAUL KIRIMI MANGACHIU 1ST DEFENDANT

TIMOTHY MUNGATHIA 2ND DEFENDANT

**THE DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
TIGANIA WEST 3RD DEFENDANT**

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The court is asked to set aside the orders made on 6.2.2024, reinstate the suit, and grant a temporary injunction stopping the 1st & 2nd defendants from transferring or trespassing on the parcels of land. The reasons are contained on the face of the application and in the supporting affidavit of Joan Wambui Advocate, sworn on 19.2.2024. It is averred that the deponent was taken ill and admitted to the hospital on the same day; hence, her office had to take care of her scheduled cases by canceling and rescheduling appointments or cases for the following week.
2. The applicant avers that on 2.2.2024, a letter was sent to CP Mbaabu Advocate and the Hon. AG via email which was four days before the hearing, and that the same email used in the previous correspondences. The applicant avers on the hearing date, counsel was engaged in holding brief, but the matter was prematurely dismissed out of outright malice by advocates for the 1st & 2nd defendants who refused to indulge his lawyers on record despite prior notice.



3. The applicant's counsel blames the court for not indulging her in producing the letter dated 2.2.2024, yet she was still hospitalized and for not considering other factors available in cases where parties sought to have a matter adjourned but instead moved to dismiss the suit.
4. The applicant's counsel deposes that her client should not be punished for something that was beyond anyone's control, such as an illness that was never planned and especially this having been the first hearing where the plaintiff had never caused the delay or demonstrated disinterest in his matter to warrant the dismissal.
5. Counsel for the applicant deposed that her client would be highly prejudiced by this action for he had come to court to seek justice and protection of his right and that there would be no prejudice to the respondent if the application is allowed.
6. Additionally, counsel for the applicant deposed that by dismissing the case for not sharing the letter with the Deputy Registrar, the court was misguided and failed to protect her client. The applicant attached the letter dated 2.2.2024 and the email forwarding the letter as annexures J.W. 1 & 4, respectively.
7. The application is opposed through a replying affidavit sworn by Carl Peters Mbaabu on 28.2.2024, for being full of falsehoods, frivolous, vexatious, scandalous, paragon of abuse of the court process, for lack of substantiation, imputation of malice to advocates, casting aspersions on the court, flabbergasting and queerly dismaying.
8. The 1st & 2nd respondents, through counsel, deposed that the suit was dismissed under Order 12 Rule 3 (1) of the Civil Procedure Rules because no evidence of sickness or the alleged letter was on record and for non-attendance by the plaintiff.
9. It is averred that the court was unsatisfied with the reasons given for seeking the adjournment, especially in view of order 17 Rules 1 (1 & 3) of the Civil Procedure Act, which obligates parties to assist the court in dispensing justice expeditiously.
10. The 1st & 2nd respondents' counsel averred that his cell phone number appears in all the pleadings and was not used to contact him by counsel or her law firm or his correct email used, which differs from the annexure marked J.W. 2.
11. The 1st & 2nd respondents deposed that there was a 13-day delay, and reliance was placed on John Mutuma M'Ikiao vs Isaya M'Kirera & another Meru ELC No. 6 of 2020. The 1st & 2nd respondents averred that they are not selling their land since that is where they live and that the plaintiff lives on his land.
12. With leave of court, parties relied on written submissions dated 28.2.2024 and 4.3.2024. The applicant isolated three issues for determination. On reinstatement of the suit, the plaintiff/applicant invoked Article 159 of the Constitution, Sections 1A & 1B & 3A of the Civil Procedure Act, for there was an excusable reason that the court should have considered before dismissing the suit due to an earlier communication to the opposite parties, it was a technicality to consider availing the letter to court, mistakes of counsel should not be visited upon client's doors of justice should not be closed on the applicant; there is need to dispense substantive justice; non-appearance was on factors beyond the applicant's control; it was a hasty decision by the court; other remedies were available than dismissing the suit and that the 1st & 2nd respondents misled the court that they did not receive the letter. Reliance was placed on Utalii Transport Co. Ltd & others vs NIC Bank Ltd & another (2014) eKLR.



13. On temporary injunction, the applicant submitted that by an order dated 26.10.2023, status quo orders were issued until the matter was to be heard and determined, and since there is imminent danger of disposal or by the interference of the 1st & 2nd respondents, orders of injunction should be issued. Reliance was placed on *Kenleb Construction Ltd vs New Gatitu Service Station Ltd & another (1990) eKLR*.
14. The 1st & 2nd respondents submitted that the application for temporary injunction was res judicata in view of a previous ruling dated 18.10.2023 to a similar application dated 4.7.2023 and in any event, alienating of the land was not possible for it is registered in the name of the plaintiff. Further, 1st & 2nd respondents submitted that there was no substantiation of paragraph 7 of the supporting affidavit by any evidence under Sections 107 – 112 of the *Evidence Act*, through a discharge summary or treatment notes as proof of hospitalization. Therefore, the court has nothing on record to show counsel's hospitalization in any known hospital.
15. The 1st and 2nd respondents submitted that the absence of the applicant before the court has not been explained such that even if the counsel was ready, the case could not be heard due to the unexplained absence. Again the 1st & 2nd respondents submitted that the applicant violated Order 12 Rule 1 (1) (2) & 17 3 of the Civil Procedure Rules, as read together with sections 1A (3), *Civil Procedure Act*, the plaintiff had violated them.
16. As to the letter and email attached, the 1st & 2nd respondents submitted that the email had no date, contrary to practice, it was sent to the wrong name, so it did not reach them, it was missing in the court file or email of court counsel holding brief was unable to display it online and efforts were afforded to the counsel holding brief to avail it in vain and that he was also unable to proceed with the suit or explain why the applicant was not before the court.
17. The 1st & 2nd respondents submitted that the discretion to set aside should not be exercised to a dishonest, lackadaisical and recalcitrant plaintiff whose intention is to obstruct the cause of justice. Reliance was placed on *John Mutuma M'Ikiao vs Isaya M'Kirera & another (supra) and Patel vs E. A cargo Handling Services Ltd 1974 E.A 75 and Richard Ncharpi Leiyagu vs IEBC & others (2014) eKLR*.
18. Similarly, the 1st & 2nd respondents submitted that justice is akin to a double-edged sword cutting both ways, and the matter should rest as per the order dated 6.2.2024.
19. On 18.10.2023, this court granted an order for the maintenance of the status quo and directed that the land registrar visit the land and file a report before the court. The applicant was unable to procure the report and sought for more time when the matter came up on 7.11.2023. Parties were ordered to comply with Order 11 Civil Procedure Rules and attend court on 23.11.2023 to fix a hearing date.
20. Come 23.11.2023, counsel for the plaintiff applied for more time to comply with pretrial directions. A mention date was fixed for 7.12.2023. Counsel for the applicant told the court she would be calling one witness and had fully complied with Order 11 Civil Procedure Rules. A hearing date by consent of the parties was taken for 6.2.2024. The 3rd and 4th defendants were granted leave to comply with Order 11 Civil Procedure Rules by 15.1.2024.
21. When the matter came up on 6.2.2024, Mr. CP Mbaabu, advocate for the 1st & 2nd respondents, was present while Miss Micah advocate held brief for Miss Wambui for the applicant. The applicant was absent. Counsel for the plaintiff told the court that the plaintiff was not ready to proceed due to the hospitalization of the applicant's counsel, who had sent a letter dated 2.2.2024 to the rest of the parties' counsels on record.



22. Mr. Mbaabu, advocate for the 1st & 2nd respondents, told the court he had come ready for hearing with witnesses and had not received any such letter from the applicant's counsel on record, nor had he received any communication on the alleged hospitalization or sickness.
23. Counsel told the court that Miss Micah advocate should be honest and was nevertheless not opposing the application due to sickness alleged if the applicant could be given the benefit of the doubt. The court, in the absence of the letter sent to the respondents or copied to court and, for the non-appearance of the applicant for the hearing dismissed the suit for non-attendance and non-prosecution with costs.
24. The applicant urges the court to find that the counsel was unwell at the time her position was shared with the rest of the counsels on record; the dismissal was uncalled for; sickness was beyond the control of the plaintiff, who should not suffer out of mistakes of counsel on record; substantive justice should have prevailed, the court was misguided, and the conduct of the applicant shows that he did not deserve such a draconian action from a court of justice and equity.
25. In his written submissions, the applicant relied on the oxygen rule set under Sections 1A, 1B, 3A of the *Civil Procedure Act* and Articles 159 of *the Constitution* and Utalii Transport Co. Ltd & others vs. N.I.C Bank Ltd (supra).
26. The applicant seeks discretionary orders of this court to set aside a dismissal order of his suit for non-attendance of himself and his advocate on record and non-prosecuting on the day it was slated for hearing. A party seeking to set aside an order of dismissal has the onus to show that there was a good reason for non-attendance. In this case, the applicant has not seen it fit to swear an affidavit to explain where he was on that material day. A case belongs to the applicant and not his advocates on record. Similarly, the applicant's counsel has not seen it wise to explain where her client was on the hearing date. Counsel on record has also sworn matters on the likely prejudice, status and threat to the suit land faces if no interim orders are granted.
27. Under Order 18 of the Civil Procedure Rules, a counsel may not swear on matters that are disputed or not within his or her knowledge, especially where sources of the information has not been disclosed. See.
28. Courts are duty-bound to enforce the no adjournment policy of the judiciary as it deals with the backlog of cases. In this suit, the applicant's counsel does not seem to the gravity of the non-appearance of the applicant to prosecute his case or, at the very least, explain his non-attendance in court on the material day.
29. To this day the court has not been told even in a single word why the applicant was absent on the material day. On that score alone, I find the applicant underserving of any discretion for lack of sufficient reason for non-attendance and non-prosecution.
30. Turning to the explanation for non-attendance by the applicant's counsel, Ms. Micah advocate only mentioned attendance to the hospital and not admission on the hearing date. There was no indication of when counsel was taken ill.
31. Counsel holding brief was given the option to display on screen a copy of the letter now being produced as evidence of sickness or prior notification to the opposite parties who were disputing the two. Counsel, even after the file was placed aside was unable to produce such information which ideally would have been readily available.
32. In her affidavit sworn on 19.2.2024, Joan Wambui advocate talks of an undisclosed illness in the application. She did not find it necessary to in confidence or otherwise attach details, even if recanted,



- of the hospital, date of admission, discharge, and or urgency of the sickness with the court to, at the very least, discharge the onus that, indeed she was sick or unable to attend court.
33. Instead of dwelling on that, the counsel went on to blame the court and the other parties for not indulging her or action against *the Constitution*, the rules of procedure, and natural justice. Whereas sickness can befall anyone and can come calling anytime, it behooves parties and their lawyers to disclose such information and, when called upon to produce evidence to substantiate the same.
 34. The applicant has withheld vital information about why he did not attend court. Even assuming his counsel was sick and had sought indulgence, was it not necessary to copy the letter to the court and the other parties with sufficient notice? Was asking for the paper trail and the evidence a lot or beyond the jurisdiction of this court? Can a party casually seek an adjournment and when asking for the court's discretion, still approach the issue casually and blame everyone else except himself and expect that the discretion of the court can still be exercised in his favor? What about the prejudice to be occasioned on the opposite side? Was the client also sick on that day?
 35. The case belongs to a party and not the advocate on record. The party has failed to explain the non-attendance. If the court were to turn its eye to the other side and allow a party to decide when to and when not to come to court and endlessly derail the case, especially while enjoying interim orders, a preliminary objection that the case was purely on a boundary dispute had been raised and the plaintiff granted orders for a land surveyor or registrar report he failed to serve it or avail the report.
 36. The discretion of the court to set aside is to be exercised judiciously and on sound principles. The facts must be laid bare before the court to establish whether, indeed, the non-attendance was genuine in good faith, with reasons, and not with the intention of obstructing or derailing the cause of justice. The court has, in this ruling, set out the brief history of the matter and how many other times the applicant was indulged by the other side and the court for non-compliance with court directives.
 37. In *Patel vs E.A Cargo Handling Service Ltd (supra)*, the court observed that the primary concern of courts is to do justice to the parties, and its discretion is unfettered. In *Peter Mumo Masave vs Mutua Kioko & another (2019) eKLR* the court set aside its order since there was medical evidence of attendance by a doctor. In this suit, a good cause based on medical evidence is lacking. The letter written by the applicant's advocate law firm is not a medical document. Evidence of why the applicant was absent is also missing.
 38. The applicant mentions that mistakes of counsel should not be visited upon him or drive him from the seat of justice. Neither the applicant nor his counsel on record has admitted any mistake even when it is clear that the letter was not sent on time or at all and or followed with an online extract that it landed on the known emails of both the 1st, 2nd, 3rd and 4th respondents advocates and the court the date and time it is alleged to have been sent or forwarded.
 39. In *Belinda Murai & others vs Amos Wainaina (1978) eKLR*, the court said a door of justice should not be closed because a mistake has been made, and a court should do whatever is necessary to rectify it if the interest of justice so dictates.
 40. Submissions, however powerful by Miss Wambui advocate as held in *Daniel Toroitich Moi vs Mwangi Stephen & another (2014) eKLR*, cannot replace facts, evidence or pleadings. Sufficient cause, as stated in *Wachira Karani vs Bildad Wachira (2016) eKLR*, refers to adequate, enough, or necessary to answer the purpose intended in the facts and circumstances existing in a case and duly examined from the view of a reasonable standard of a curious man. In this application, the standard should be that the applicant and his counsel on record have not acted negligently or there was want of bonafide on their part in view of the facts and the circumstances.



41. Has the applicant discharged that burden so that the court can judiciously exercise discretion, even in the spirit of substantive justice? Did the applicant honestly and sincerely fail to attend court since his advocate had been taken ill? Is the applicant to blame for the non-attendance, or are his lawyers on record or both of them? The answer is no since the applicant and his lawyers on record have failed to demonstrate sufficient cause.
42. Regarding a prayer for a temporary injunction, one would have expected the applicant to shed light on the current status of the suit land for the court to gauge if there was a prima facie case, establish there will be irreparable loss and damage, and that the balance of convenience tilts in favor of granting a temporary injunction as held in *Kenleb Construction Ltd vs New Gatitu Service* (supra).
43. A land registrar's report has not been availed despite the court having issued orders to that effect on 18.10.2023. The applicant is aware of a preliminary objection on the jurisdiction that the dispute herein is a boundary dispute. Without such an expert report, the applicant is not entitled to equitable orders of the injunction. Orders of court are not given in vain. The applicant has been reluctant to obey such directives, which would have fast-tracked his case. The sword of justice cuts both ways. The interests of the respondents are equally to be protected under sections 1A, 1B, and 3A of the *Civil Procedure Act* and Articles 50 & 159 of *the Constitution*. A party who has been given a chance to prosecute his case and declines to do so or offer an explanation should not be heard to seek more indulgence without explaining why he failed to accede to the chance.
44. The upshot is that I find no merits in the application. The same is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 29TH DAY OF MAY, 2024

In presence of

C.A Kananu

Mawira for C.P Mbaabu for respondent

Wanjiku for applicant

HON. C K NZILI

JUDGE

