



**Kailanya v Kaungu & 15 others (Environment & Land Petition
E008 of 2021) [2024] KEELC 4566 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND PETITION E008 OF 2021**

CK NZILI, J

JUNE 5, 2024

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS, UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA AND
IN THE MATTER OF ARTICLES 22, 23, AND 165 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF SECTION 26 (1) OF THE LAND CONSOLIDATION ACT

AND

IN THE MATTER OF SECTIONS 26, 27 AND 28 OF THE LAND ADJUDICATION ACT

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

PATRICK M. KAILANYA PETITIONER

AND

ANNISIETA KAUNGU 1ST RESPONDENT

WILSON KABERIA 2ND RESPONDENT

DOMIANO MWENDA 3RD RESPONDENT

GABRIEL CHOKERA 4TH RESPONDENT

FESTUS MATTHEW 5TH RESPONDENT

PAUL KIANJI THITWA 6TH RESPONDENT

ROSE KAGWIRIA 7TH RESPONDENT

SIMON WAWERU MBUGUA 8TH RESPONDENT

ISAACK MUCHENURA 9TH RESPONDENT



PATRICK KUBAI	10TH RESPONDENT
MOSES GICHURU	11TH RESPONDENT
PETER NTONJIRA	12TH RESPONDENT
WILLIAM MURIUNGI	13TH RESPONDENT
DISTRICT LAND ADJUDICATION OFFICER, TIGANIA WEST DISTRICT	14TH RESPONDENT
LAND REGISTRAR TIGANIA EAST/WEST	15TH RESPONDENT
ATTORNEY GENERAL	16TH RESPONDENT

RULING

1. The court is asked to reopen the petition for adduction of viva voce of the evidence of the cross-petitioners and to arrest the judgment slated for 26.6.2024. The reasons are contained on the face of the application and a supporting affidavit of Mr. Muia Mwanzia advocate and that one of the cross-petitioners. The applicants stated that they came late to court only to find that the proceedings had just been closed.
2. The hearing of the matter commenced on 18.3.2024. A further hearing date before the court was taken for 20.5.2024.
3. On 20.5.2024, Mrs. Muia advocate appeared for the cross-petitioners and some of the respondents in the main petition. She requested a time allocation. The court placed the matter for further hearing at 11.30 am. At 11.55 am, Mr. Karatu advocate appeared for the main petitioners while Mr. Mutunga held a brief for Mr. Mwanzia advocate for the cross petitioners.
4. Miss Mbaikyatta appeared for the 14th – 16th respondents. The request for an adjournment by both the main petitioners and the 14th – 16th respondents was declined, and a warrant of arrest was issued against the land adjudication officer, who, despite the service of the witness summons, failed to appear in court.
5. The petitioners' case was marked as closed. Mr. Mutunga, holding a brief for Mr. Mwanzia, was unable to call as witnesses any of the cross-petitioners since none were in court when the court assistant called out their names. Counsel told the court that in the circumstances, the cross-petitioners would rely on their replying affidavits and annexures thereto. He closed the cross petitioners' defence.
6. Miss Mbaikyatta, for the state, similarly opted to rely on the replying affidavit of Anthony D. Mureithi dated 23.11.2022 and the annexures or documents filed thereto.
7. On his part, Mr. Karatu advocate said the respondents to the cross-petition would rely on the response dated 8.12.2023. Miss Mbaikyatta opted to rely on the replying affidavit by her clients to the cross-petition. Parties were, therefore, directed to file written submissions by 20.6.2024 and come for judgment on 26.6.2024.
8. The cross-petitioners urge the court to find that they had good reasons not to attend the hearing on time and that they will be prejudiced if they are not heard through oral evidence. Arrest of judgment and the reopening of a case is a discretionary power to be exercised judiciously and only in deserving cases.



9. In *Mary Igoki Mutuaruchiu v Johnson Rwigi* (2019) eKLR, the court said that after a plaintiff case is closed, ordinarily, the defense would commence, and there was nothing wrong if the defendant is absent though served with a hearing notice for the court to order that the defense be closed. The court declined an application for review for there was no mistake or error apparent on the face of the record to revisit its orders, since the presence or existence of the application before the court on that day was in the knowledge of the applicant as early as January 2018.
10. In *Odongo Osodo v Rael Obara Ojuok & others* (2017) eKLR, the court held that the discretion to reopen a case has to be on the basis of sufficient cause.
11. In this petition the applicants were aware of the hearing date and the timelines given by the court to hear the matter. Counsel represented them, but they were absent in court when they were called out to testify. The witnesses walked into court alongside Mr. Mwanzia advocate at 12.45 pm, long after Mr. Mutunga advocate had already left following the directions given. There is no reason given why the applicants kept away from court since morning; even if their lawyer on record was held up in Isiolo Law Courts. A case belongs to a litigant and not the lawyers.
12. No evidence has been tendered to show that Mr. Mutunga advocate had no instructions to hold brief and or address the court as he did, given the absence of the witnesses. Court business is to be taken seriously. The applicants were given an opportunity to be heard but opted to squander it.
13. In *Kadzo Charo v Alex Nzai Dzombo* (2019) eKLR the appellant had complained of denial of an opportunity to present her case. Her advocate was absent on the hearing date. The court observed that there was nothing wrong with the trial court proceeding with the hearing since there was due notice of the hearing.
14. Article 159 of the *Constitution* mandates this court to expeditiously hear and determine cases. Even though I am not persuaded that there is sufficient cause to reopen or arrest the scheduled judgment, it is noted that Mr. Mwanzia Advocate was also delayed on the way to court due to a traffic accident. On that account alone, I shall give the applicants a benefit of doubt and allow them to ventilate their defence. See *Ramzan Abdul Dhanji Civil Application No. NRB 179 of 1998*, *Wambua Maithya v Pharmacy & Poison Board P.S.K & others* (2021) eKLR, *Samuel Kiti Lewa v HFCK Ltd & another* (2015) eKLR. The application is hereby allowed. Throw away costs to be met by the applicants.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 5TH DAY OF JUNE, 2024

HON. C K NZILI

JUDGE

In presence of:

C.A Kananu

Mr. Mwanzia for the cross-petitioners/applicants

Miss Maina for Mbaikyatta for the AG

