



**Ashiono v Lihutsu & 3 others (Environment & Land Case  
8 of 2020) [2024] KEELC 7043 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7043 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 8 OF 2020  
DO OHUNGO, J  
OCTOBER 24, 2024**

**BETWEEN**

**JOHN LIHUTSU ASHIONO ..... PLAINTIFF**

**AND**

**BERNETTA MUSANGA LIHUTSU ..... 1<sup>ST</sup> DEFENDANT**

**RITA MACHESO LUYINGWA ..... 2<sup>ND</sup> DEFENDANT**

**DYPHINA DIBISI LIHUTSU ..... 3<sup>RD</sup> DEFENDANT**

**WILSON PETER KHAKALI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. When this matter came up for hearing on 19<sup>th</sup> October 2022, the Plaintiff was granted a last adjournment after which the matter was scheduled for hearing on 18<sup>th</sup> January 2023. The Plaintiff was also ordered to pay court adjournment fees. Come 18<sup>th</sup> January 2023, the Plaintiff's advocate sought another adjournment on the ground that the Plaintiff was not in court. The court adjournment fees which were ordered on 19<sup>th</sup> October 2022 had also not been paid.
2. The Defendants opposed the application for adjournment. For reasons stated in a ruling which I delivered on 18<sup>th</sup> January 2023, I dismissed the application and scheduled the hearing for 12:00pm. When the appointed time for the hearing arrived, the Plaintiff was still not in court. Upon an application by counsel for the Defendants, I dismissed the Plaintiff's suit with costs to the Defendants.
3. The Defendants thereafter filed a party and party bill of costs dated 25<sup>th</sup> January 2023 which was heard inter parte through written submissions and a ruling delivered on 13<sup>th</sup> September 2023. The bill was taxed at Kshs 174,475. In the meantime, on 5<sup>th</sup> July 2023, the Plaintiff filed Notice of Motion dated 4<sup>th</sup> July 2023, which is the subject of this ruling.



4. The following orders are sought in the application:
  1. That this application be certified as urgent and be dispensed with in the first instance.
  2. That this honourable court be pleased to review, set aside or vary orders made on 18/01/2023 dismissing the applicant's suit for nonattendance and all consequential or subsequent orders arising thereof.
  3. That the costs of this application be in the cause.
5. The application is based on the grounds listed on the face thereof and is supported by an affidavit sworn by the Plaintiff. He deposed that failure to attend court on 18<sup>th</sup> January 2023 was excusable since he was sick. He also stated that failure to attend court on previous occasions was not deliberate.
6. The Defendants opposed the application through a replying affidavit sworn by the Third and Fourth Defendants. They deposed that the Plaintiff was aware of the hearing of 18<sup>th</sup> January 2023 but deliberately chose not to attend court.
7. The application was canvassed through written submissions, which both sides duly filed. I have considered the application, the affidavits and the submissions.
8. The record shows that the suit was dismissed following a contested application for adjournment. The court heard both the Plaintiff and the Defendants prior to delivering a considered ruling on the question of whether an adjournment was merited. I found that the Plaintiff did not merit an adjournment. I thereafter dismissed the Plaintiff's case, after according both sides another opportunity to be heard.
9. The gist of the Plaintiff's current application is that he was sick on 18<sup>th</sup> January 2023 and that his failure to attend court on that date was excusable. The argument of sickness was advanced on 18<sup>th</sup> January 2023 and was duly considered. The court still concluded that an adjournment was not merited and that the case was for dismissal. There is no basis upon which the court should revisit the same arguments and determine the issue afresh. If the Plaintiff is of the opinion that the court was wrong in denying him an adjournment, he ought to have appealed against the ruling of 18<sup>th</sup> January 2023.
10. I find no merit in Notice of Motion dated July 4, 2023. I dismiss the application with costs to the Defendants.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

Mr Mondia for the Plaintiff

Mr Akwala for the Defendants

Court Assistant: M Nguyayi

