



**Mutie v Maundu & another (Environment & Land Case
146 of 2016) [2023] KEELC 16594 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 146 OF 2016
A NYUKURI, J
MARCH 22, 2023**

BETWEEN

JENNIFFER SYOKAU MUTIE PLAINTIFF

AND

GRACE MWITHI MAUNDU 1ST DEFENDANT

GK & D COMPANY LIMITED 2ND DEFENDANT

RULING

INTRODUCTION

1. Before court is a Notice of Motion application dated August 11, 2020 filed by the Defendants seeking the following orders;
 - a. Spent.
 - b. That all exparte orders granted against the 1st and 2nd Respondents/Applicants herein on various dates be set aside; and the 1st and 2nd Defendants/Applicants be granted an opportunity to defend these proceedings instituted by the Plaintiff/Respondent.
 - c. That the planned visitation to the 1st Defendant/Applicant's land parcel on August 13, 2020 be stayed and or kept in abeyance pending the final determination of the present application.
 - d. Any other order(s) which the Honourable Court may deem fit and just to grant in the circumstances.
2. The application is premised on the grounds on its face as well as the supporting affidavit sworn on August 11, 2020 by Thomas N Maosa, counsel for the Defendants. The Applicant's case is that in the month of August 2020, the 1st Defendant received a WhatsApp/short message service from the Area Chief Kinanie Location that her parcel of land at Mavoko Sub-County was due to be visited by the



Land Surveyor, Machakos on August 13, 2020. That the 2nd Defendant has never been served with any court process and the visit will deal with the 1st Defendant's land adversely in her absence and that the 1st Defendant was then under self-isolation due to Covid -19 pandemic.

3. The application was opposed. Jenniffer Syokau Mutie, the Plaintiff herein filed a replying affidavit sworn on October 23, 2020. She stated that she filed this suit on February 21, 2013 and that summons were served on the Defendant on July 11, 2013. That on July 31, 2013, the firm of Andrew Makundi & Co Advocates entered appearance and filed defence on August 20, 2013.
4. She further deponed that the matter proceeded in court on various dates, which dates were duly served. That on March 14, 2017, despite service, the 1st Defendant chose not to attend court and the matter proceeded and upon hearing the same, it was fixed for judgment on November 24, 2014; and that therefore it is not correct for the counsel of the Applicants to assert non service.
5. He maintained that the Defendant is currently represented by the firm of Andrew Makundi Advocates and therefore the current advocates have no locus standi to appear in this matter. She held the view that the application raised contested matters and therefore the affidavit in support ought not to have been sworn by the advocate. She held the position that it was in the interests of justice that she be allowed to enjoy the fruits of her judgment.

Analysis and Determination

6. I have carefully considered the application and the replying affidavit. In my view, two issues arise for determination; namely –
 - a. Whether the firm of Maosa & Company Advocates had capacity to file the application dated August 11, 2020; and
 - b. Whether there is sufficient cause to grant the orders sought.
7. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides as follows;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

 - a. Upon an application with notice to all the parties; or
 - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
8. Essentially therefore, where judgment has been passed and a party who had been represented by an advocate intends to change their advocate after judgment, they can only do so with an order of the court where the new advocate moves the court seeking such leave, or a consent is executed and filed between the outgoing and incoming advocates. It therefore follows that pleadings filed by an incoming advocate who has not obtained an order to allow them file a notice of change would be deemed as incompetent and not properly filed.
9. The record shows that the firm of Andrew Makundi Advocates entered appearance on July 31, 2013 and filed defence on August 20, 2013 on behalf of both Defendants herein. Subsequently, the matter was heard and judgment entered on January 26, 2018. On August 13, 2020, the firm of Maosa & Company Advocates filed a Notice of Appointment in this matter without any reference to the firm of Andrew Makundi Advocates. In my considered view, as the firm of Andrew Makundi is still on record for the Defendants, the firm of Maosa & Company Advocates ought to have sought leave of



court to come on record for the Defendants in the place of the firm of Andrew Makundi. A Notice of Appointment could not be filed herein when there were already advocates on record. It therefore follows that the firm of Maosa & Company had no locus standi to file the Notice of Motion dated August 11, 2020 as they were strangers to these proceedings.

10. That being the case, the Notice of Motion dated August 11, 2020 is incompetent for having been filed by a stranger to the proceedings and the same is hereby struck out with costs to the Plaintiff/ Respondent.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A NYUKURI

JUDGE

In the Presence of;

Mr Kibaba holding brief for Mr Makori for Plaintiff

No appearance for Defendants

Ms Josephine – Court assistant

