



**Cherret v Lapedo (Environment & Land Case 258 of 2017)
[2023] KEELC 16136 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 258 OF 2017
FM NJOROGE, J
MARCH 15, 2023**

BETWEEN

MICHAELA CHERRET PLAINTIFF

AND

CHRISTINE NARUMU LAPEDO DEFENDANT

RULING

The application.

1. The background to the present application is that the plaintiff filed the present suit and obtained judgment in her favour on May 18, 2021. Thereafter on September 23, 2021 the defendant lodged an application dated September 21, 2021 seeking *inter alia* orders setting aside the said judgment. That application was heard in the absence of the plaintiff and granted on November 18, 2021 thereby effectively setting aside the judgment. It is those orders of setting aside that have provoked the plaintiff's instant application dated December 1, 2022 and led to the present ruling.
2. The plaintiff's instant Notice of Motion application dated December 1, 2022 has been brought under section 1A, 1B, 3, 3A, 63 and 80 of the [Civil Procedure Act](#), sections 3, 13(7) of the [Environment and Land Act](#), order 12 rule 7 and order 45 of the [Civil Procedure \(Amendment\) Rules 2020](#) and it seeks the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the ruling and order of court (Honorable Justice Mr Mwangi Njoroge) delivered on November 18, 2021 and all consequential orders re-opening the suit be reviewed and set aside.



- e. That the plaintiff be granted leave to defend the defendant's Notice of Motion dated September 21, 2021 in terms of the plaintiff's Replying Affidavit annexed herewith and the said defendant's application be heard and determined on merits.
 - f. That costs of this application be paid by the defendant/respondent.
3. The application is supported by the affidavit of Michaela Cherret sworn on November 30, 2022. The grounds on the face of the application and the supporting affidavit are that the plaintiff was the registered owner of the suit property known as Nakuru/Municipality Block 17/291 until September 2021 when she sold it to a third party; that she purchased the suit property from her father who transferred it to her on July 18, 2005.
 4. The plaintiff states that she had filed this suit through the firm of CM Advocates LLP on June 22, 2017 but on February 18, 2019 she changed her advocates on record to Litoro & Omwebu Advocates; she further stated that despite service upon her the defendant only entered appearance but failed to attend the hearing and she regularly obtained a judgment on May 18, 2021. The plaintiff avers that a Notice of Change of Advocates dated January 22, 2019 was filed on February 18, 2019 and served on her previous advocates on record, CM Advocates, on April 24, 2019; that upon conclusion of this matter her advocates on record, Litoro & Omwebu Advocates, served the defendant's previous advocates with the judgment and decree of the court on June 21, 2021 and July 02, 2021 respectively. She states that long after the judgment was obtained in the matter in her favour, she became aware of further activity in this matter when the firm of CM Advocates which was previously on record for her in the present matter transmitted to her advocates on record with a mention notice on November 15, 2022 stating that the matter was scheduled for mention on November 17, 2022 and the said mention notice did not indicate the purpose of the mention and so her advocates attended court and upon inquiry they were informed that there was a ruling on record that had set aside the judgment and decree of the court.
 5. The plaintiff also stated that the firm of CM Advocates also wrote an email dated November 17, 2022 copied to the defendant's advocates on record informing them that they were no longer on record for the plaintiff.
 6. At that juncture the plaintiff's advocates on record, Ms Litoro & Omwebu Advocates wrote to the defendant's advocates requesting for the Notice of Change of Advocates and a copy of the defendant's application seeking to set aside the judgment and decree in this matter. The plaintiff states that the ruling and order of the court delivered and issued on November 18, 2021 together with a copy of the defendant's Notice of Motion application dated September 21, 2021 were forwarded to her advocates by the defendant's advocates on November 17, 2022 about one year later after the ruling was delivered.
 7. The plaintiff further avers that she discovered that the ruling and order of November 18, 2021 allowed the defendant's application dated September 21, 2021 as undefended.
 8. She however attributes her failure to respond to the said application as per the orders of the court issued on September 23, 2021 solely to the defendant's failure to serve her with the application and the said orders and that such default was not deliberate.
 9. She further states that the defendant therefore obtained the said orders by non-disclosure of material facts; that there is an apparent error or mistake on the face of the record; that the court failed to note her Notice of Change of Advocates filed in court on February 18, 2019 which clearly illustrated that the defendant had not effected service of her application dated September 21, 2021 and that it is fair and just that the present application be allowed as prayed.



The response

10. In response to the said application, the defendant on December 19, 2022 filed her replying affidavit sworn on December 14, 2022. She deposed as follows:
- i. That the application to set aside the said judgement was duly served upon the firm of CM Advocates who did not protest to the said service;
 - ii. That if indeed there was a notice of change of advocates from the firm of CM Advocates to Litoro & Omwebu Advocates, the same was never served upon herself or her previous advocates together with all the documents filed in court by the plaintiff;
 - iii. That the plaintiff has not produced the sale agreement to prove how the property was conveyed to her;
 - iv. That the plaintiff has also not produced a sale agreement between herself and the third party she has sold the suit property to;
 - v. That it is just and equitable that the court allows her an opportunity to ventilate her case and that she has a strong defence and counterclaim on record which raises triable issues and that it will be prejudicial and unfair if she is condemned unheard.

The applicant's supplementary affidavit

11. In response to the defendant's replying affidavit, the plaintiff on January 17, 2023 filed a supplementary affidavit sworn on January 5, 2023. She reiterated the contents of her supporting affidavit and deposed that:
- i. On February 21, 2018 the court granted her leave to serve the defendant with summons and all the documents via substituted service;
 - ii. That the defendant instructed the firm of Kale Maina & Bundotich Advocates who filed a Memorandum of Appearance dated July 3, 2019 upon whom all pleadings in the matter were served upon;
 - iii. That the said advocates participated in the proceedings;
 - iv. That it is evident from the record that the defendant had notice of the suit herein and that her inaction together with that of her advocates on record should not be suffered by the plaintiffs who at all material times prosecuted her case;
 - v. That as advised by her advocates on record she believes that it is not every mistake of an advocate can be excused as only acts and omissions that meet the threshold of a proper and reasonable explanation should benefit from the court and that in the present matter no reasonable explanation has been issued by the defendant; and
 - vi. That there is no evidence that the defendant took any action against her alleged advocates for failure to update her of the case as alleged; that she is aware that an order obtained by a party from court through misrepresentation and non-disclosure of material facts such as this case ought to be set aside.



The submissions of the plaintiff

12. The plaintiff filed her submissions dated January 13, 2023 on January 17, 2023 while the defendant filed her submissions dated February 02, 2023 on February 07, 2023.
13. The plaintiff in her submissions submitted on the following issues:
 - a. Whether the applicant has made out a good case to justify setting aside of the orders delivered on November 18, 2022;
 - b. Whether the entire application dated September 21, 2021 is incompetent due to misrepresentation, suppression and withholding of material facts;
 - c. Whether there is an apparent error on the face of the court record in the ruling/order delivered on November 18, 2022.
14. On the first issue the plaintiff submitted that she has established that she had duly filed her Notice of Change of Advocates which was served upon the defendant's advocates. She further submitted that the orders issued on November 18, 2021 were obtained by way of misrepresentation by the defendant as she was never served with the defendant's application dated September 21, 2021 and the orders of the court issued on September 23, 2021. The plaintiff then relied on the case of *Doa Doa Tented Camps and Lodges Limited v Jubilee Insurance Company of Kenya Limited* [2021] eKLR and *PMM v JNW* [2020] eKLR in support of her arguments.
15. On the second issue, the plaintiff submitted that the defendant obtained the orders issued on November 18, 2021 by concealing material facts by stating that she was not aware of the present proceedings and yet she had entered appearance in the matter but chose not to defend the suit; that it is trite law that a party who instructs an advocate to act for them in a matter is duly represented and any actions by the duly appointed advocate are binding on the party. The plaintiff relied on the cases of *Andrew Ouko v Kenya Commercial Bank & 3 Others* [2005] eKLR and *Saflo Limited v Lloyd Masika Limited* (citation not given) among other cases in support of her arguments.
16. On the third issue, the plaintiff relied on the case of *Zablon Mokuva v Solomon M Choti & 3 Others* [2016] eKLR and submitted that she has established that there was no service of the application dated September 21, 2021 which deprived her of the right to be heard and therefore the rulings and the orders emanating therefrom were irregular as there was an apparent mistake or error apparent on the face of the record. The plaintiff relied on other cases and sought that her application be allowed as prayed.

Submissions of the defendant

17. The defendant on the other hand identified the following issues for determination:
 - a. Whether the applicant's prayer for setting aside the ruling is justifiable;
 - b. Whether the defendant's defence and counterclaim raises triable issues;
 - c. Whether the plaintiff will suffer any prejudice by having the matter proceed to trial.
18. On the first issue, the defendant submitted that summons in the suit were properly served via substituted service in a daily newspaper dated March 6, 2018 and thereafter she appointed the firm of Kale, Maina & Bundotich Advocates to represent her. The defendant further submitted that the said advocates failed to file a Statement of Defence and appear during the delivery of the judgment. She then reiterated the contents of her replying affidavit, relied on the cases of *Belinda Murai & 6 others*



vs Amos Wainaina [1978] KLR, *Philip Chemwolo & Another vs Augustine Kubende* [1982-88] KLR 103 and submitted that she is keen on prosecuting her case to have it heard on merit.

19. On the second issue, the defendant submitted that the judgement delivered on May 18, 2021 was obtained by way of misrepresentation when the plaintiff misdirected the court to believe that the defendant was a mere caregiver to her grandfather yet she was his wife. She also submitted that the plaintiff further misdirected the court by stating that she was given an option to purchase the property and yet the suit property was the defendant's matrimonial home which her late husband (the plaintiff's grandfather) had purchased from his son Dr Peter Blunt. She relied on the cases of *Kyangaro v Kenya Commercial Bank Ltd & another* [2004] 1KLR 126, *Kenleb Cons Limited versus New Gattitu Service Station Limited & another* (citation not given), *Leah Nyambura Mburu vs Barclays Bank of Kenya Ltd* [2012] eKLR and submitted that it is in the interest of justice that she be granted unconditional leave to defend the matter and therefore the orders of November 18, 2021 were just and substantially unimpeachable.
20. On the third issue, the defendant relied on the case of *Abdi (also known as Abdirahman Mubamed Abdi) v Safi Petroleum Products Ltd & 6 Others & 6 Others*, Civil Application no Nai 173 of 2010 and submitted that the plaintiff will not suffer any prejudice if the judgement is set aside as it was the court's determination that the same was irregularly obtained. The defendant relied on other cases and sought the application be dismissed.

Supplementary submissions of the plaintiff

21. Upon service of the defendant's submissions, the plaintiff filed supplementary submissions dated February 24, 2023 and filed on February 28, 2023 and identified the following issues for determination:
 - a. Whether the applicant has made out a good case to justify setting aside of the orders delivered on November 18, 2022;
 - b. Whether the defendant's defence and counterclaim raises triable issues;
 - c. Whether the plaintiff will suffer prejudice by having the matter proceed to trial;
 - d. Whether the instant application is fatally defective.
22. On the first issue, the plaintiff submitted that the *Code of Standards of Professional Practice and Ethical Conduct* at paragraph 132 requires all advocates to demonstrate professional courtesy. Therefore, once an advocate has been instructed to act for a party, all communication between an advocate to the party who has instructed counsel ceases and the instructed advocate is served with all the relevant notices. The plaintiff further submits that it was not their responsibility to serve the defendant in person with the Notice of Change of Advocates for the sole reason that she was always represented by an advocate.
23. It is the plaintiff's further submission that the allegation that the defendant only became aware that there was a change of advocates on November 23, 2022 should not be blamed on the plaintiff as the defendant had the option of perusing the court file before issuing notices to the wrong firm of advocates; that service was never effected on her and so the court should set aside the orders of November 18, 2021 as provided for under order 12 rule 7 of the Civil Procedure Rules.
24. On the second issue, the plaintiff submitted that the issue of whether or not the defence raises triable issues should not arise for consideration at this point. She reiterated that the defendant's claim is that the suit property belonged to her late husband Harry Blunt, and that she therefore claims matrimonial interest, but the said Harry Blunt was never registered as the owner of the suit property and so no matrimonial interest can accrue without such registration. The plaintiff relied on the case of *Prime*



Bank Ltd vs Paul Otieno Nyamodi [2014] eKLR and submitted that the defendant has not given a reason why her statement of defence was not filed within the allowed time.

25. On the third issue, the plaintiff submitted that she would be prejudiced if the matter proceeds to trial as she had spent a considerable amount of time and resources to prosecute the case and that as a registered proprietor of the suit property, she has already sold it to a third party through a conveyance. She relied on the cases of *Abdullahi Mohamud v Mohammud Kabiye* [2015] eKLR and *Monicah Nyawira Wabome v Veronica Wambui* [2016] in support of her arguments and sought that the orders of November 18, 2021 be set aside.

Analysis and determination

26. After considering the application, replying affidavit, supplementary affidavit and the submissions, the only issue for determination is whether the court should review its orders issued November 18, 2021.

27. Section 80 of the *Civil Procedure Act* provides as follows:

“Any person who considers himself aggrieved—

- a.) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b.) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

28. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:

“(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

29. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR held as follows:

“Section 80 gives the power of review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other



sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

30. The plaintiff is seeking that the court do review its orders issued on November 18, 2021 which set aside its earlier judgment on the grounds that she was not served with the application dated September 21, 2021 which was allowed by the court in its ruling delivered on November 18, 2021.
31. The plaintiff alleges that instead of the defendant serving the firm of Litoro & Omwebu, her advocates on record, the defendant’s served the firm of CM Advocates LLP who were her former advocates on record.
32. The defendant on the other hand admits that her application dated September 21, 2021 was served upon the firm of CM Advocates who did not object to the said service. The defendant further argues that if at all there was a Notice of Change of Advocates filed by the plaintiff, then it was not served upon her former advocates on record.
33. A perusal of the court record indicates that the defendant had filed the application dated September 21, 2021 on September 23, 2021. The said application first came before court on 23/09/2021 when the court gave its directions. An affidavit of service was filed on November 12, 2021 sworn by Basil Malela who indicated that he had served the said application and the resultant orders on the firm of CM Advocates LLP.
34. A further perusal of the court record indicates that there is a Notice of Change of Advocates dated January 22, 2019 and filed on February 18, 2019 by the firm of Litoro Omwebu Advocates on behalf of the plaintiff herein.
35. When the defendant’s former advocates filed their Notice of Appointment of Advocates, the same was served upon and received by the firm of Litoro & Omwebu Advocates.
36. It is my view therefore that the plaintiff has sufficiently demonstrated that she was not served with the application dated September 21, 2021 that set aside the court’s judgement delivered on May 18, 2021 as the same was served upon her former advocates on record and not her present advocates.
37. A court can review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the order was issued or on account of a mistake or error apparent on the face of the record or for any other sufficient reason.
38. The Court of Appeal in the case of *Shanzu Investments Ltd v Commissioner of Lands* [1993] eKLR cited with approval the case of *Wangechi Kimita & Another vs Mutabi Wakabiru* CA no 80 of 1985 (unreported) where the court held as follows on what constitutes a sufficient reason for granting of review orders:

“...any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 for the Civil Procedure Act. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.”

39. In the circumstances of the present case, it is this court’s view therefore that the plaintiff has established sufficient grounds to warrant a review of this court’s ruling delivered on November 18, 2021.



Consequently, the plaintiff's application dated December 1, 2022 has merit and it is hereby allowed in terms of prayers (4) and (5). Costs of the application shall be in the cause.

40. Since the response to the said application dated September 21, 2021 has been filed and served as an exhibit to the instant application, I hereby order that it is now deemed properly filed and served, and that the defendant herein shall, if she deems it necessary, file a supplementary affidavit and serve within 14 days from today. The application dated September 21, 2021 shall be mentioned on April 19, 2023 for further directions.
41. Also, since the plaintiff has disclosed that she has transferred the suit land to the third party, she shall within 7 days of this order make an application to join the third party as an interested party and serve the intended third party to this suit and the said application shall, without prejudice to the mention scheduled for confirmation of the defendant's compliance with the order issued in the immediately preceding paragraph herein above, be mentioned on March 27, 2023 for directions as to hearing.
42. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 15TH DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

