



Kibene & 6 others v Kabiru & another (Environment & Land Case E002 of 2021) [2025] KEELC 1426 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E002 OF 2021**

**JM MUTUNGI, J
MARCH 20, 2025**

BETWEEN

**JOSEPH MWANGI KIBENE 1ST PLAINTIFF
GEOFFREY IRUNGU KIBENE 2ND PLAINTIFF
NANCY WANJIRU KIBENE 3RD PLAINTIFF
HELLEN MUTHONI NJUKI 4TH PLAINTIFF
CYRUS KARIUKI KIBENE 5TH PLAINTIFF
STEPHEN MBURU KIBENE 6TH PLAINTIFF
ANN KABURA KIBENE 7TH PLAINTIFF**

AND

**KIBENE KABIRU 1ST DEFENDANT
MARK MURIUKI MAINA 2ND DEFENDANT**

RULING

1. This Ruling relates to the Applicant’s Notice of Motion dated 8th July 2024, in which the Applicant seeks the following orders:
 1. That the Honourable Court be pleased to set aside the proceedings of 29th April 2024 and set down the matter for hearing denovo.
 2. That leave be granted to the 2nd Defendant/Applicant to file his defence out of time and the annexed defence be deemed as duly filed upon payment of the requisite Court filing fees.
 3. That costs of this application be provided for.



2. The Motion is based on the grounds outlined on the face of it and the Applicant's Supporting Affidavit. The Applicant asserts that he instructed Mr. Gitonga Muthee of Gitonga Muthee & Co. Advocates to represent him in this matter. He states that the case proceeded for hearing on 29th April 2024 in his absence and in the absence of his Advocate. The Applicant averred that he had been following up on the progress of the case with his Advocate, who assured him that it was up to the Plaintiffs to prosecute their case. The Applicant stated that he was shocked to learn that the case was on 29th April 2024, heard in his absence and in the absence of his Advocate. The Applicant stated that he never received any communication regarding the hearing and contends that he has a valid defence to the Plaintiffs claim and that he ought to be accorded the opportunity to ventilate his defence.

He urges that the mistake of Counsel should not be visited on him as an innocent litigant and contends that allowing the application would not occasion any prejudice to the Plaintiffs.

3. The 1st Plaintiff/Respondent filed a Replying Affidavit in opposition to the Applicant's application. The 1st Plaintiff asserted that the Applicant's claim of being unaware of the proceedings in the case was unfounded, as he had been represented by the Firm of Gitonga Muthee and Co. Advocates until they filed their application on 11th July 2024 to cease to act on his behalf. She stated the Firm was served with mention and hearing notices, and were therefore duly notified of all actions in the suit. The Respondents contend that the Applicant had not demonstrated that they made any efforts to follow up with Gitonga Muthee & Co. Advocates to ascertain the status of the case during the pendency of the suit. The Respondents argue the Applicant seeks to exploit the alleged negligence of his Advocate to persuade the Court to set aside the proceedings of the Court on 29th April 2024 yet it was his duty to ensure his Advocate conducted his case diligently. The Respondents argue it would be unjust for the Court to burden the Respondents with the consequences of the alleged negligence of the Applicant's Advocate and further aver they have incurred costs in prosecuting the suit and would suffer prejudice if the proceedings were set aside and the matter ordered to be heard *denovo*.

4. The application was canvassed by way of Written Submissions. The Applicants submissions are dated 9th October 2024 while those of the Respondents are dated 26th November 2024.

5. I have reviewed and considered the application, the Supporting Affidavit and the Replying Affidavit and I have also considered the submissions made on behalf of the parties. The singular issue for determination is whether the Applicant has sufficiently explained and/or offered a reasonable explanation for his non attendance on 29th April 2024 when the suit was heard to warrant the Court to exercise its discretion in his favour and set aside the proceedings of the day and to have the suit heard *denovo*.

6. The Applicant's explanation for non attendance on the date the suit was heard was that his Advocate then on record had not notified him of the hearing date. In order to contextualize the application and the response thereto it is necessary to have a review of the Court record in the lead up to the date the suit was fixed for hearing and heard *exparte*.

7. The Plaintiffs filed the suit against the Defendants vide a Plaint dated 25th January 2021 filed in Court on 28th January 2021 simultaneously with an interlocutory application praying for an inhibition and injunction in relation to the suit properties. The Firm of Gitonga Muthee & Company Advocates filed a Notice of Appointment of Advocate dated 15th February 2021 for both Defendants. The record indicates a Ruling on the application was delivered on 3rd June 2022 (though copy of the Ruling is not on the Court file). On the same date directions for compliance with Order 11 Civil Procedure Rules were given in the presence of both Counsel. By 22nd September 2022 when the parties were to have complied, the Defendants had not and the matter was to be mentioned further on 19th October 2022



for further directions. On 19th October 2022, 16th February 2023 and 19th April 2023 when the matter came up for mention for pretrial directions the Defendants Advocate did not attend. However, on 5th July 2023 when the matter was fixed for hearing Mr. Muthee Advocate for the Defendants was present in Court and he informed the Court he had ceased to have instructions from his clients and that he intended to file an application to cease to act for the Defendants. On the date, as both Counsel were agreeable to the matter being referred to mediation since the parties were close family members, the Court referred the dispute to Court annexed mediation but apparently the parties never reached any settlement.

8. The Defendants Advocate did not attend on 13th October, 2023 and on 15th February 2024 when the matter was mentioned and neither the Advocate or the Defendants attended on 29th April 2024 when the matter was fixed for hearing. The Defendant's Advocate had been served with a hearing notice and an Affidavit of service filed which prompted the Court to proceed with the hearing *ex parte*. Notably however the Firm of Gitonga Muthee & Company Advocates filed an application dated 7th June 2024 to cease to act for the Defendants which the Court allowed on 11th July 2024.
9. I have set out the Record of the Court in some considerable length, as I consider it has a bearing in the determination of the application under consideration. In the application the 2nd Defendant/Applicant explained that his Advocate on Record had not kept him informed of the progress of the case. From the Record of the Court, it is evident the Firm of Gitonga Muthee & Company Advocates hardly attended Court when the matter was cause-listed and notably on 5th July 2023 informed the Court that they had ceased to have instructions from the Defendants and they would be filing an application to cease to act for them.
10. They did not file this application until 7th June 2024. Had they processed the application to cease to act, the Plaintiffs would have served the Defendants directly with a hearing Notice of the Case on 29th April 2024. It is not evident that indeed the Firm of Gitonga Muthee & Company Advocates notified the Defendants that the suit had been fixed for hearing on 29th April 2024. The Defendants obviously could not attend Court on 29th April 2024 unless they had notice that the suit had been fixed for hearing. There is no doubt that the Firm of Gitonga Muthee & Company Advocates were served with a hearing Notice that the case was to be heard on 29th April 2024 but having regard to their conduct and considering they failed to attend Court on the majority of instances, I entertain a reasonable doubt that the Defendants were notified of the hearing date and I make a finding that they were not.
11. It is noteworthy that although the Plaintiffs case was heard by the Court in the absence of the Defendants, no Judgment has been issued. The Plaintiffs following the *ex parte* hearing were directed to file written submissions and the suit to be mentioned on 10th June 2024 for purposes of taking a date for Judgment. Before that date, the 2nd Defendant filed the instant application praying that the proceedings of 29th April, 2024 be set aside and that he be granted leave to file his defence. The Applicant has argued that the Plaintiffs will suffer no prejudice if the proceedings are set aside and that the ends of Justice will be served as the Applicant will not be condemned without being heard.
12. The Plaintiffs have argued that the Defendants Advocates on Record were their agents and service upon them was proper service and have contended the Applicant should not be allowed to use the negligence/mistake of Counsel as a ground to set aside the proceedings. The Plaintiffs have placed reliance on several authorities namely Neeta Gohil –vs- Fidelity Commercial Bank Ltd (2019) eKLR and Habo Agencies Ltd –vs- Wilfred Odhiambo Musingo (2015) eKLR to support their submission.



13. In the instant application I am satisfied there was a misunderstanding and miscommunication between the Defendants and their previous Advocates and in my view this is such a case, where a party ought not to be punished for the mistakes and/or omissions of his Counsel. Other than a delay in the finalization of the matter, I do not consider that the Plaintiffs will suffer any prejudice as they will be able to present their case and the Court will be in a position to hear both sides of the disputants and finally make a determination adjudicating all the parties respective rights. It does however appear the 2nd Defendant/Applicant may not have been diligent as he should have been in the pursuit of his case which allowed his previous Advocate to be lax in his handling of the matter. The 2nd Defendant from the draft defence and Counterclaim annexed does appear to have a defence that raises triable issues and not frivolous.
14. In the premises I exercise my discretion in favour of allowing the Applicant's Notice of Motion application dated 8th July 2024. I set aside the proceedings of 29th April 2024 and direct that the hearing shall start de novo. I grant the 2nd Defendant leave to file and serve his defence and Counterclaim within 15 days from the date of this Ruling. I award the Plaintiffs thrown away costs of Kshs 10,000/- for the application which should be paid within 30 days from the date of this Ruling.
15. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE

