



**Alfani v Karani (Environment & Land Case 373 of 2017)
[2023] KEELC 18109 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 373 OF 2017**

**SM KIBUNJA, J
JUNE 21, 2023**

BETWEEN

ALFAN MZEE ALFANI ALFANI APPLICANT

AND

LEVI KARANI RESPONDENT

RULING

[NOTICE OF MOTION DATED 21ST NOVEMBER 2022]

1. Levi Karani, the respondent, filed the notice of motion dated the 21st November 2022 through Ms. Asige Keverenget & Anyanzwa Advocates seeking for inter alia the setting aside and vacating the ex parte judgement and decree thereof entered in favour of the applicant; unconditional leave to enter appearance, file reply to the originating summons and issue conservatory orders of injunction restraining the applicant and or his agents from alienating, disposing, selling, wasting, destroying or pledging Title No. CR. 7172/294 Subdivision No. 699/111/MN, the suit property. The application is based on the nine (9) grounds on its face and supported by the affidavit of Levi Karani, the respondent, sworn on the 21st November 2022. It is the respondent's case that he is the lawful registered proprietor in use and possession of suit property that measures 0.7800 hectares since 23rd March 1989, having acquired it from Momo Bint Abubakar Bin Rashid for valuable consideration. That he did not enter appearance or file a reply in this matter as he never received service of the originating summons. That he has been living in Kitale since 2014 and did not see the advertisement in the Standard Newspaper of 15th February 2018 or receive the service by registered post through P.O. Box 1516 Kisumu as it was not in use by him. That his certificate of title to the suit property got misplaced and the loss was published in Kenya Gazette Notice of 30th May 2014. That the suit property was fenced and he and his family used to visit it frequently. That nobody was residing on the said land and the only structure there was a shade in one corner of the property. That the originating summons was fraudulently instituted and conducted with the object of deceiving the court and abusing its process to deprive him of his property



- contrary to the protection provided by the Constitution and law. That it was strange the applicant had provided a copy of the certificate of title of the suit land that the respondent had previously reported missing and the loss gazetted.
2. The application is opposed through the replying affidavit of Alfan Mzee Alfani Alfani, the applicant, sworn on the 16th January 2023 filed through Ms. Birir & CO. Advocates, in which he inter alia deposed that service of the originating summons was done through advertisement on the 2nd December 2017; that he is the one who has been in possession of the suit property and the respondent does not even know where it is situated; that the respondent application of the provisional certificate in 2014 has no relevance in this matter as the originating summons was filed in 2017; that the signature on the supporting affidavit is not of Levi Karani but was lifted from a previous document marked “LK-1”; that he is the legal owner of the suit property pursuant to the court orders and the application should be dismissed with costs.
 3. The learned counsel for the respondent and applicant filed their submissions dated the 28th February 2023 and 19th March 2023 respectively which the court has considered.
 4. The following are the issues for the determinations by the court;
 - a. Whether the defendant has met the threshold for setting aside of the judgement and to be granted leave to defend the suit.
 - b. Whether injunction order should issue at this stage.
 - c. Who pays the costs.
 5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, the record and come to the following conclusions;
 - a. That the plaintiff has challenged the defendant’s application on the basis inter alia that the signature on the supporting affidavit was lifted from a previous document instead of being signed by the defendant. That apart from the plaintiff disclosing his intention to cross-examine the Respondent at paragraph 11 of the replying affidavit, no further steps were taken to have the deponent called to court for cross examinations on the said affidavit. In the absence of a forensic expert’s report on the signatures on the two documents, the court is not in a position to confirm the plaintiff’s contention.
 - b. That as the Respondent has come forward and indicated his preparedness to defend this suit, and the dispute herein being over land, the court is of the view that justice would be better served if the defendant was granted an opportunity to be heard as guaranteed under Article 50 of the Constitution 2010, in defence of his proprietary rights over the suit land.
 - c. That so as to safeguard the legal status of the suit property, it is only fair and just that the parties maintain the status quo pending the hearing and determination of this suit.
 - d. That though under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya costs follow the event unless otherwise directed by the court, the circumstances in this matter commends that the costs of the application be in the cause to avoid a situation where the Applicant is condemned to pay the costs and later he emerges victorious.
 6. That in view of the above, the court finds and orders as follows;



- a. That the judgement delivered on the 17th October 2018 and the decree issued therefrom in favor of the Applicant are hereby set aside and the Respondent granted leave to defend the originating summons.
- b. That the Respondent to file and serve his reply to the originating summons in fifteen (15) days, and the Applicant granted corresponding leave to respond to any new issues therein after service.
- c. That both parties do maintain the obtaining status quo in respect of the legal status of the suit property pending the hearing and determination of this suit.
- d. The costs of the application be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 21st DAY OF JUNE 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF : Absent

DEFENDANT : Absent

COUNSEL : Absent

WILSON – COURT ASSISTANT.

S. M. KIBUNJA, J.

ELC MOMBASA.

