



**Kiragu v Murage (Environment & Land Case 238 of 2015)
[2023] KEELC 18203 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 238 OF 2015**

**JO OLOLA, J
JUNE 16, 2023**

BETWEEN

GEORGE MAINA MURAGE APPLICANT

AND

DANIEL MAINA KIRAGU RESPONDENT

RULING

1. By the Notice of Motion dated September 19, 2022, George Maina Murage (the Defendant) prays for orders:
 3. That the Judgment entered against the Defendant/Applicant on May 23, 2018 and all consequential orders be set aside;
 4. That the Defendant/Applicant be granted leave to defend the suit and file any necessary pleading, documents and witness statements; and
 5. That the costs of this application be met by the Plaintiff/Respondent.
2. The application which is supported by an Affidavit sworn by the Defendant's Counsel on record Jacob Waweru Kiragu, is based on the following grounds:
 - (i) That the Defendant had earlier appointed the firm of Gori & Ombongi Advocates to defend him in this matter but the said Advocates ceased acting without notice being issued to the Defendant;
 - (ii) That the Defendant was under the mistaken belief that its former advocates were actively involved in defending the suit;



- (iii) That the Defendant's defence on record raises reasonable defence which entitles it to orders of setting aside the Judgment on record and leave to defend the suit;
 - (iv) That the Defendant has since become ill and has been under treatment since 2021 which explains why he was unable to participate in the proceedings;
 - (v) That the Defendant will suffer prejudice if the orders sought are not granted;
 - (vi) That this application has been brought without undue delay;
 - (vii) That the Plaintiff will not suffer any prejudice if the orders sought are granted; and
 - (viii) That the application is made in good faith.
3. Daniel Maina Kiragu (the Plaintiff) is opposed to the grant of the orders sought in the application. In a Replying Affidavit sworn by his Advocate on record Davidson Warutere Iregi, the Plaintiff asserts that the application as filed is mischievous, defective and without merit and he urges the Court to dismiss the same for being an abuse of the Court process.
 4. The Plaintiff avers that he instituted this suit on September 11, 2015 and that Messrs Gori, Ombongi & Company Advocates came on record for the Defendant. The said Law Firm later made an application to cease from acting for the Defendant which application was allowed.
 5. The Plaintiff denies that the Defendant was unaware of the proceedings and asserts that after the Advocates ceased acting for the Defendant, he had served notices upon the Defendant at his residence situate at Warazo Jet. The Defendant then appointed the Law Firm of Waweru Kiragu & Associates who entered appearance on May 31, 2019 but failed to set aside the Judgment.
 6. The Plaintiff further avers that the Defendant has since failed to transfer the portion of 1 ½ acres to the Plaintiff and has blatantly sub-divided the suit land and transferred two portions to third parties. The Plaintiff asserts that the application has been brought after an inordinate and unexplained delay of four (4) years and urges the Court not to entertain the same.
 7. I have carefully perused and considered the Defendant's application as well as the response thereto by the Plaintiff. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties.
 8. By the application before me, the Defendant urges the Court to set aside the Judgment delivered herein on May 23, 2018 and that he be granted leave to file any necessary pleadings, documents and witness statements as appropriate.
 9. In support of his application, the Defendant avers through his Advocate on record that before the said Judgment he had appointed Messrs Gori, Ombongi & Company Advocates to defend him in the matter but the said Advocates ceased acting without notice being issued to him. He asserts that he was under the mistaken belief that the former Advocates were actively involved in defending the suit.
 10. The Defendant further told the Court that he has been unwell since 2021 and hence his inability to participate in these proceedings. It is his case that his Statement of Defence on record raises a reasonable defence and that the same entitles him to orders of setting aside the Judgment on record.
 11. That the decision whether or not to set aside an ex-parte Judgment is discretionary is not in doubt. As has been said before, that discretion is intended to be so exercised to avoid an injustice and hardship



arising from accident, inadvertence or excusable mistake or error. It is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (See *Shah vs Mbogo & Another* (1967) EA 116).

12. The suit herein was instituted by the Plaintiff against the Defendant on September 11, 2015. The record reveals that the Defendant was served with Summons at his home at a place known as Warazo Jet in Karima Sub-location within Nyeri County on September 17, 2015. Subsequently, on November 10, 2015 Messrs Gori, Ombongi & Company Advocates filed a Notice of Appointment and Statement of Defence on behalf of the Defendant.
13. A year later and by an application dated November 21, 2016, the said Law Firm sought leave of the Court to withdraw from acting on account that the Defendant had failed to attend briefings in their office and to provide sufficient instructions. While the Defendant's current Advocates swears in the Supporting Affidavit that the application was subsequently allowed without proper notification being issued to the Defendant, it was unclear to this Court what was meant by the words "without proper notification" and how the new counsel arrived at the conclusion that there was no proper notification of the application.
14. What was clear was that the said application was considered by the Court and the same was allowed on March 28, 2017. The matter was subsequently scheduled for hearing on December 5, 2017. The record further reveals that a day before the date fixed for hearing, the Plaintiff filed an Affidavit of service sworn by one Julius Kariuki Mundia indicating that on November 22, 2017 he served the Defendant with a hearing notice at his residence situated at the said Warazo Jet in Kieni West Sub-County of Nyeri. Having been satisfied that the Defendant was served, the Court proceeded with the hearing. I have not heard the Defendant's present Counsel deny in the Affidavit he has filed on behalf of his client that the Defendant does not reside at the said Warazo Jet and/or that he was not present at home on the date he is said to have been served.
15. It was also apparent that while he was not present in Court on the date the Judgment was delivered on May 23, 2018, he soon thereafter came to learn of the same. By an application dated July 12, 2019 but filed in Court on July 31, 2019 by his current Advocates, the Defendant sought an order of stay of execution of the Judgment and sought further to have the same set aside to enable him defend himself.
16. In an Affidavit again sworn on his behalf by his Advocate on record Jacob Waweru Kiragu, Counsel swears that the Defendant had filed a bill of Costs against the Defendant dated October 9, 2018 and further that the Defendant had only "recently" perused the Court file after which he discovered that the previous lawyers had ceased to act for him.
17. For some unexplained reason, that application was abandoned in the Court file. By this present application filed some four (4) years after the Judgment was delivered, the Defendant contends that the same has been brought without undue delay and that if the same is not granted, he stands to suffer prejudice.
18. I was however not persuaded that the matter had been brought without undue delay. By his dilatory conduct herein, it was apparent to me that the Defendant was a person undeserving of the Court's discretion. His conduct since the institution of the suit depicts a person who was clearly out to obstruct and delay the course of justice.
19. It follows that I am not persuaded that there was any basis to set aside the Judgment delivered herein on May 23, 2018. The application dated September 19, 2022 therefore fails and is dismissed with costs to the Plaintiff.



**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 16TH DAY OF JUNE, 2023.**

In the presence of:

Mrs. Machira holding brief for Waweru for the Defendant/Applicant

No appearance for the Respondent

Court assistant - Kendi

J. O. Olola

JUDGE

