



**Choge & 2 others v Kirwa & another (Environment & Land Case 93 of 2014) [2023] KEELC 19095 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19095 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 93 OF 2014**

**EO OBAGA, J  
JULY 27, 2023**

**BETWEEN**

**ABRAHAM KIPROP CHOGE ..... 1<sup>ST</sup> PLAINTIFF  
NELSON KIPYEGO CHOGE ..... 2<sup>ND</sup> PLAINTIFF  
ELPHAS KIPCHIRCHIR CHOGE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**THOMAS KIRWA ..... 1<sup>ST</sup> DEFENDANT  
ABRAHAM ROTICH ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 8/3/2023 in which the Defendants/Respondents seek the following reliefs: -
  1. Spent
  2. That this Honourable court be pleased to stay execution of the judgement and/or decree and further proceedings in the suit herein pending the hearing and determination of this application inter-parties.
  3. That this honourable court be pleased to set aside its judgment and/or proceedings and all consequential orders of 30<sup>th</sup> June, 2022 against the Defendant/Applicant and order that he matter be heard de-novo.
  4. That the plaintiffs/Respondents be recalled for cross-examination and further that the Defendants/Applicants to adduce evidence.
  5. Costs of the application be in the cause.



## **Background**

2. The suit herein was filed on 25/3/2014. The Defendants filed their defence on 16/1/2015. Neither the Plaintiffs nor defendants bothered to prosecute their respective claims. On 23/3/2022, the Defendants filed an application for injunction but the court noted that the Defendants had been cultivating on part of the suit property since 2005. The court ordered that the status quo be maintained and directed that the suit be heard on 6/4/2022.
3. It happened that all judges of the Environments & Land court were to be in Mombasa on 6/4/2022. The parties were notified in time that all matters which had been fixed on 6/4/2022 had been rescheduled to 21/4/2022. The plaintiffs' advocate also served the firm of Morgan Omusundi Law Firm Advocates.
4. When the matter came up for hearing on 21/4/2022 neither the Defendants nor their advocate were in court. The case proceeded ex-parte and judgement was delivered on 30/6/2022.

## **Applicants' contention**

5. The Applicants contend that the hearing notice was received by an unqualified person who did not diarise the date and that non attendance in court on 21/4/2022 was not deliberate. They contend that they have a good defence to the Plaintiffs/Respondents' claim and that they should be given an opportunity to be heard.

## **Respondents' contention**

6. The Respondents' contend that the Applicants' application is an abuse of the process of court and that the Applicants' defence is a sham and that it will not serve any useful purpose to set aside the regular judgement.

## **Analysis and determination**

7. The parties were directed to file written submissions. The Applicants filed their submissions on 18/5/2023. The directions on filing of submissions were given a 7-day extension on 22/5/2023, no submissions were filed at expiry of the extended period.
8. I have considered the Applicants' application as well as the opposition thereto by the Respondents. I have also considered the submissions by the Applicants. The only issue for determination is whether the ex-parte judgement should be set aside.
9. I am aware that the court has a wide discretion to set aside a regular judgement. That discretion has to be exercised judiciously. To begin with, the Applicants allege that hearing notice was received by an unqualified person who did not diarize the date. the issue of unqualified person was not clarified. There was no attempt to annex a copy of the office diary to show that the case was not diarized.
10. In the case of *Kimani v MC Connel* [1966] EA 547, paragraph 555F, the court stated as follows: -

“Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgement, which would not or might not have been present had the judgement not been ex-parte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (*Jesse Kimani v McConnell* [1966] EA 547, 555F).”



11. The judgement herein was delivered on 30/6/2022. The bill of costs was filed on 22/11/2022. The bill was taxed on 5/4/2023 in the presence of the Applicant's counsel. Ruling on taxation was delivered on 19/5/2023. The application seeking to set aside the ex-parte judgement was filed 8 months after judgment.
12. The discretion of the court is not intended to assist a litigant who is clearly out to delay the course of justice. I have looked at the defence which is a sham. It does not raise any triable issues. The counter claim is also a sham. The Applicants' in their defence and counter-claim allege that the Chief Land Registrar cancelled the title to the suit property. During the hearing, a search was produced which shows that the title was intact and had no encumbrances.
13. The Applicants have their own land. They only come into the suit property each year to plant maize. They do not have any structures on the suit property. It will serve no purpose to set aside the ex-parte judgement in the circumstances.

### **Disposition**

14. From the above analysis, I find that the Applicants' application is devoid of merit. The same is dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 27TH DAY OF JULY, 2023.**

**E. OBAGA**

**JUDGE**

**In the virtual absence of parties who were aware of the date of delivery of Judgement.**

**Court Assistant -Albert**

**E. OBAGA**

**JUDGE**

**27TH JULY, 2023**

