



Ombongi v Simiyu & another (Environment and Land Case Civil Suit 88 of 2017) [2023] KEELC 18824 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 88 OF 2017**

**LN MBUGUA, J
JULY 13, 2023**

BETWEEN

JOEL MATOROKI OMBONGI PLAINTIFF

AND

CHAMI SIMIYU 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

RULING

1. There are 2 pending applications for determination herein. The first one is dated 9.5.2023 filed by the 1st Defendant, while the second one is dated 26.5.2023 filed by the 2nd defendant. Both applications are seeking orders to set aside the judgment delivered on 27.4.2023, and all consequential orders arising therefrom.

The Application dated 9.5.2023

2. This application is based on grounds on its face and on the 1st Defendant's annexed supporting affidavit sworn on 9.5.2022. He avers that in the judgment delivered on 27.4.2023, the Honourable Court found that that this suit was undefended though he had counsel on record, Mr. John Nyoike Mwaura of Nyoike & Co. Advocates.
3. He further avers the said Advocate misled him and was negligent. He points out that it has dawned on him that the said advocate did not file any defence, witness statement and list of documents herein, and when the matter came up for hearing, the said advocate asked him not to attend as he would handle the same. That when he asked him when he was going to testify, the Advocate told him that pursuant to the judgment, he is faced with eviction.



4. He contends that he acquired the suit property from the 2nd Defendant in 2014 and that he took possession and established his matrimonial home, thus he has a meritorious defence and he should be given an opportunity to be heard. He annexed a copy of his draft defence.
5. The application is opposed by the Plaintiff vide his replying affidavit sworn on 29.5.2023. He avers that he filed this suit upon discovery that the 1st Defendant had trespassed onto his property known as Plot No. G13 (C244). He contends that the 1st Defendant squandered his opportunity to participate in this suit where he was represented upto the tail end, but he never filed any statement of defence, witness statements and list of documents.
6. The Plaintiff also avers that on 16.1.2023, this Court ruled that the suit was an undefended claim since no defence was filed and the 1st Defendant has not filed an appeal to challenge the said ruling.
7. The Plaintiff also avers that the application does not meet the threshold for grant of orders to re-open the case and neither does it satisfy the requirement for a review under Order 45 of the Civil Procedure Rules.

Application dated 26.5.2023

8. The 2nd defendant is equally seeking an order for review and or to set aside this court's judgement delivered on 27.4.2023. The application is based on grounds on its face and on the supporting affidavit of the 2nd Defendant's registered surveyor one Jack Kamau Wachira sworn on 26.5.2023. He contends that this matter proceeded without their participation, yet they are the sole allocating authority and custodian of all documents relating to the suit property.
9. He avers that the suit was never brought to their attention as they were never served with summons, pleadings and hearing notices. Thus there was misrepresentation of crucial facts during the trial leading to the arrival of an erroneous judgement.
10. He avers that they have no records of the transfer of shares by one Mr. Mwaura Muguima to the Plaintiff, thus the documents produced by the Plaintiff are forged.
11. He also avers that the 2nd Defendant has issued beacons and cleared the 2nd Defendant for issuance of title and has also confirmed to the Ministry of Lands & Physical planning that the 1st Defendant is the owner of the suit land.
12. The application is opposed by the Plaintiff vide his replying affidavit sworn on 9.6.2023. He avers that initially, the 2nd Defendant was not party to this suit, thus they did not participate until 2018 when the Plaintiff was amended and the same was served upon the 2nd Defendant together with summons on 16.1.2019, whereupon the 2nd Defendant affixed its stamp.
13. He points out that there are various affidavits of service evidencing service upon the 2nd Defendant, hence it was always aware of the existence of this suit but elected not to participate.

Analysis.

14. I have considered all the arguments raised herein including the rival submissions. The issue falling for determination is whether there are sufficient grounds to warrant the setting aside of this court's judgment dated 27.4.2023.
15. This suit was commenced on 6.2.2017 and it was amended on 28.4.2018, whereupon the 2nd Defendant was joined as a party. There are summons taken out against the 1st Defendant, dated 22.3.2016. The 1st defendant was represented throughout the trial. And as rightly noted by the plaintiff,



the court rendered itself vide a ruling dated 26.1.2023, that the 1st defendant had squandered his chance to be heard.

16. In the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, cited in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, it was held that;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”

17. The 1st defendant has not given a plausible explanation as to why he never took a keen interest in the matter for the last 7 or so years, even if he had an advocate.

18. I therefore find that his application dated 9.5.2023 is not merited.

19. As regards, the issue raised by the 2nd defendant that they were not aware of the suit, I have taken into account that they were brought on board vide the court’s ruling of 9.3.2018.

20. Since the 2nd Defendant never entered appearance, the Plaintiff ought to have filed an affidavit of service of summons upon the 2nd Defendant. There are no summons to enter appearance in the court file taken after the plaint was amended. There is also no affidavit of service of such summons upon the 2nd Defendant on record. The provisions of Order 10 Rule (2) of the *Civil Procedure Rules* stipulate that: -

“Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.”

21. In *Lee Mwatbi Kimani v National Social Security Fund & another* [2014] eKLR it was held that:-

“...Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the defendant, the defendant has no valid invitation to defend the suit”

22. On the day the trial commenced on 3.10.2022, this court did inquire from the counsel for the plaintiff as to how the 2nd defendant was served. The reply thereof was as follows;

“There is no appearance for the 2nd defendant. We took out summons dated 22.3.2016 and served the 2nd defendant”.

23. The above statement is misleading since the 2nd defendant were not in the picture by year 2016!.

24. I also find that the document mentioned at paragraph 8 of the plaintiff’s replying affidavit dated 9.6.2023 in which one D. Mwaura appended his signature is, but the content of the extracted orders in the ruling of 9.3.2018. It is noted that by that date, the 2nd defendant had not come on board this suit.

25. In the end, I find that there was no service of summons and pleadings upon the 2nd defendant, thus the judgment entered is a nullity and is destined to be set aside.

26. In view of the fact that the application of the 2nd defendant is successful, then the 1st defendant will be granted an opportunity to defend this suit.



Final orders

1. The application dated 26.5.2023 is hereby allowed. The plaintiff is condemned to pay the costs of the said application to the 2nd defendant.
2. The Judgment delivered by this court on 27.4.2023 is hereby set aside.
3. The plaintiff is directed to serve the pleadings and effect service of summons upon the 2nd defendant.
4. The 1st defendant is directed to file his pleadings within 14 days from the date of delivery of this ruling, otherwise the suit will proceed as an undefended claim against him.
5. The application dated 9.5.2023 is hereby marked as Spent, but the 1st defendant is condemned to pay costs of the said application to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

M/s Lukoye for Plaintiff

Kirimi for 1st Defendant/Applicant

Court Assistant: Eddel

