



Kirimi v Marangu (Being sued as the administrator of the Estate of Aribu Bolwa – Deceased) & 5 others; Marangu (Applicant) (Environment & Land Case 30 of 2019) [2023] KEELC 20397 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 30 OF 2019
CK NZILI, J
SEPTEMBER 27, 2023**

BETWEEN

AMBROSE KIRIMI PLAINTIFF

AND

**EMILIO MARANGU (BEING SUED AS THE ADMINISTRATOR OF THE
ESTATE OF ARIBU BOLWA – DECEASED 1ST DEFENDANT
EMILIO MARANGU 2ND DEFENDANT
JANE KAREGA FABIA 3RD DEFENDANT
DAVID KIRIMI KABURU 4TH DEFENDANT
RAPHAEL KABURU 5TH DEFENDANT
THOMAS KARANI M'ARIBU 6TH DEFENDANT**

AND

LUCY NKATHA MARANGU APPLICANT

RULING

1. By an application dated 25.4.2023, the court is asked to:-
 - i. To allow the firm of Mutegi Mugambi and Co. Advocates to come on record for the applicant.
 - ii. Allow Lucy Nkatha Marangu to substitute the 1st and 2nd defendants
 - iii. Stay the judgment and decree herein.



- iv. Order the suit as abated.
2. The application is premised on the grounds on its face and the supporting affidavit sworn by Lucy Nkatha Marangu on 25.4.2023. Briefly, the applicant avers that she is the daughter of the 2nd defendant and that both the 1st & 2nd defendants were condemned unheard, given that the 1st defendant passed on in 2020, the estate of the deceased was not served with the suit papers, and that it was later that she established at the land registry about the impending execution of the decree.
 3. Further, the applicant avers that the estate now has a legal representative. Attached to the application are the death certificate, limited grant, confirmation of grant, a copy of the replying affidavit, and the chief's letter, all marked as LNM "1", "2", "3", "4" and "5" respectively. Lastly, the applicant aver that the plaintiff/respondent failed to inform the court of the passing on of Emilio Marangu and that his only entitlement out of the estate was only one acre of the land subject to clearance of the balance of the purchase price. The deponent avers that no prejudice would be occasioned if the application was allowed.
 4. The application is opposed by a replying affidavit of Ambrose Kirimi sworn on 22.5.2023, on the basis that the defendants were properly served with the original originating summons as per the affidavit of service dated 26.7.2019, after which they instructed the firm of Wamache and Associates on 28.8.2019, which lawyers were also representing the defendant's applicants in Meru Succession Cause No. 200 of 2015. He avers that the applicants knew of the suit but chose not to file a response after the entry of appearance by their advocates on record, who continued to appear on their behalf on various dates, including the hearing date on 5.10.2021.; that the application was filed 12 months after the decree was issued; that if Emilio Marangu passed on 19.10.2020 without knowing the existence of the suit, counsel was on record for him and therefore by the time of his passing one year had already passed.
 5. Additionally, the respondent avers that the applicant cannot represent the estate since the subject matter did not fall under the estate of Emilio Marangu, given that the registered owner before the judgment was Alibu Bolwa; that Lucy Nkatha Marangu, therefore, lacks locus standi unless she was a substitute of the deceased administrator of the estate of Aribu Bolwa.
 6. The respondent avers that the applicant is misleading the court for she does not understand the cause of the action, the application is a delaying tactic; the basis of stay is not explained, no triable issue has been shown, the applicant has been indolent, it is an afterthought; the issues raised though substantial ought to have been appealed against and lastly no substantial loss has been demonstrated.
 7. With leave of court, parties filed written submissions dated 26.5.2023 and 23.5.2023, respectively. On her part, the applicant has submitted that Order 10 Rule 1 of the *Civil Procedure Rules* allows this court to set aside an ex parte judgment as discussed in *Patel vs E.A Cargo Handling Services Ltd* (1974) E.A 75 *KCB Ltd vs Nyantage & another* (1990) KLR 443 and *Rayat Trading Co. Ltd vs Bank of Baroda & another* (2018) eKLR.
 8. Further, the applicant submitted that the respondent's replying affidavit admits that the aspect of one acre of land as his only entitlement has not been refuted as opposed to 1.9 acres. Additionally, the applicant submitted that the respondent had not challenged the issue of non-disclosure of the death of the party to the suit. Again, the applicant submitted that the respondent would unduly gain 0.9 acres out of the judgment without payment and expose the applicant to third parties who have already purchased part of the suit land and occupy it as per annexure LMM "5". Lastly, the applicant submitted that she had a good defense to the suit and was ready, as held in *Rayat Trading* (supra), to meet the terms or conditions the court may impose by allowing the application.



9. On the other hand, the respondent submitted that there had been an inordinate delay in moving the court, and coupled with lack of legal capacity to represent the estate of Aribu Bolwa, this court should not exercise its discretion in favor of the applicant.
10. Regarding the applicable law, the respondent relied on Order 10 Rule 11 of the Civil Procedure Rules, *Patel vs. E.A Cargo* (supra), *KCB vs Nyatange* (supra) *Rayat Trading Co. (supra)*, *Thorn PLC vs Macdonald* (1999) CPLR 660 and urged the court to find that there was an inordinate delay which has not been explained, there was no defense with merit in existence and that there will be prejudice to him if the orders sought were to issue.
11. Lastly, the respondent, relying on *Rayat Trading* (supra), urged the court to find that justice delayed was justice denied and that justice weighed on a scale would only be in balance if his rights were also to be considered otherwise, the applicants had demonstrated indolence, lack of goodwill, came with unclean hands, lack capacity, there was proper service of summons, no substantial loss is shown and the rules of fair hearing as well as the tenets of equity did not favor allowing the application.
12. This suit was commenced through an originating summons dated 14.6.2019, in which the respondent sought to be declared as entitled to LR No. Igoji/Gikui/1087 under adverse possession to the extent of 1.90 acres, said to have been under his use since August 2006.
13. In the supporting affidavit sworn on 14.6.2019, the respondent narrated that the suit property was then registered under Aribu Bolwa (deceased), with the defendants as children and beneficiaries of the estate. He attached a certificate of an official search dated 21.3.2019 and a sale agreement dated 1.6.2006, with the husband to the 3rd defendant.
14. Further, the plaintiff attached an acknowledgment receipt signed by the 4th defendant and 5th defendant as regards a portion measuring 0.30 acres on top of the earlier one and another acknowledgment receipt by 4th, 5th and 6th defendants as annexures marked AK 4 & 5 for 1.0, 0.60 acres making a total of 1.90 acres.
15. Following the service of the originating summons, the defendants appointed the firm of Wamache and Associates, who filed the notice of appointment before this court on 21.8.2019. The record indicates that the said law firm was duly served with the mention notices and affidavits of service filed on 20.11.2019, 6.2.2020, and 10.5.2021, which the applicant has not refuted and or asked to cross-examine the deponent to the said affidavits of service.
16. Going by the court record for 5.10.2021, Mr. Karanja duly represented the defendant's advocate, holding brief for Mr. Wamache, advocate.
17. The court rejected the explanation for an adjournment, and the order was not appealed against. The reasons why the applicants were not in court have not been given to this date. The applicant does not indicate if she represents the estate of the 1st defendant and the 3rd – 6th defendants herein, who essentially were parties to the sale agreement as shown above. The 3rd – 4th defendants were sued as beneficiaries to the deceased's estate in their particular portions, going by the certificate of confirmation of grant dated 23.10.2019.
18. The applicant herein has not produced any grant issued to her to replace the estate administrator of the late Aribu Bolwa, the registered owner of the suit parcel of land.
19. There is no indication before this court if Emilio Marangu was ever the registered owner of the suit land. No official search has been filed to indicate that, yet paragraph 5 of the supporting affidavit to this motion the applicants alludes to it.



20. The applicant blames the respondent for not telling the court about the demise of the legal administrator. She does not blame the advocates on record for the defendants who was their recognized agent in law.
21. The applicant does not also explain why she never filed a replying affidavit since service upon them of the originating summons on 12.6.2019 by Mwerandu Murithi at Gisisi sub-location Gianchuku village. The applicant does not say why her replying affidavit, or that of the other defendants was not availed before the court on time, yet a lawyer was on record for them. Additionally, the proposed defendant admits the plaintiff's claim to the extent of 1 acre of land.
22. Given the court's finding above that the rest of 0.90 acres of land was acknowledged by the 3rd – 6th defendants, who are not seeking to set aside the judgment herein, the applicant cannot seek to speak on their behalf without authority.
23. Whereas the court has the discretion to set aside a regular judgment, there must be reasonable ground to do so. In the case of *Dari Ltd & 5 others vs East African Development Bank* (Civil Appeal 70 of 2020) (2023) KECA 454 (KLR) 20th April (2023) Judgment, the court observed that the role of a court in application to set aside applications was not robotic and a court must apply its mind to the specific ground relied upon.
24. In this application, the 3rd – 6th defendants have not complained about the regularity of the judgment and decree and its impact on them.
25. The 3rd – 4th defendants have not explained or denied that they were party to the respondent's agreement on the 0.90 acres of land under his occupation, which this court decreed to him on account of adverse possession. The applicant strangely asks this court to set aside the judgment and decree delivered on 26.1.2022 & 31.3.2022 and proceed to find the suit to have abated.
26. The gist of the suit was on adverse possession under Order 37 of the Civil Procedure Rules and Sections 7, 14, 17, 18, and 38 of the *Limitation of Actions Act*.
27. The law is that the prescription right subsists against the successor to the title to land. The injustice, hardship, or mistake as held in *Shah vs Mbogo* (1967) E.A 166, is unclear from the application because of other judgment debtors to the decree who have not challenged it. The applicant is not the successor to the estate of the recorded owner or representing the other defendants.
28. Service of summons and hearing notices to the defendants is not disputed. The affidavits of service have not been challenged. As held in *Shadrack Arap Baiywo vs. Bodi Bach* (1987) eKLR, a presumption of service exists, and the burden lies on the party questioning it to show that the return was incorrect. Even if one of the defendants passed on, the cause of action only abates against that party if substitution does not take place within a year. The 3rd - 6th defendants were said to have sold and allowed the respondent to occupy the suit land, which, as per the certificate of confirmation of grant, they were beneficiaries.
29. The applicant does not represent the 3rd – 6th defendants. Her capacity to do so has been challenged. She has not responded to the issue at all. In *Daykio Plantation vs. National Bank of Kenya and others* (2019) eKLR, the court observed locus standi was the right to appear and meant a place of standing without which a party cannot be heard, whether or not he has a case worthy of hearing.
30. In this application, the applicant has not been authorized to replace the estate administrator of the late Aribu Bolwa or perhaps to act for the estate's beneficiaries. I find the application lacking merits. The same is dismissed with costs.



**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 27TH DAY OF SEPTEMBER 2023.**

HON. CK NZILI

ELC JUDGE

