



REPUBLIC OF KENYA



**Makwae v Ongera & 14 others (Miscellaneous Case 92 of 2021)
[2023] KEELC 22598 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22598 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
MISCELLANEOUS CASE 92 OF 2021
JM KAMAU, J
OCTOBER 31, 2023**

BETWEEN

SHADRACK NYABAERI MAKWAE PLAINTIFF

AND

DAVID M OMOGANDA ONGERA & 14 OTHERS DEFENDANT

RULING

1. On 31/5/2022 this Court delivered Judgment wherein the parcels of land known as West Mugirango/ Bosamaro/1468 and West Mugirango/ Bosamaro/ 1469 were declared the properties of the Plaintiff/ Decree Holder and the same were to be transferred to the said Decree Holder after the cancellation of the said Titles together with all the sub divisions therefrom.
2. On 7/6/2022 the Judgment Debtors lodged a Notice of Appeal at Kisumu and subsequently applied for the following orders on 20/6/2022:

“That pending the hearing and determination of the Appeal, orders of stay of execution of the Judgment and Decree dated 31/5/2022 be granted by the Court ”
4. The Application was opposed and after hearing the same inter parties the Court gave the following orders: -
 - a. There shall be a stay of execution of the Judgment of this Court dated 31/5/2022 on condition that Title documents in respect of LR. Nos. West Mugirango/Bosamaro/1468 and West Mugirango/ Bosamaro/ 1469 and all the resultant Title Deeds that emanated from the parcels of land known as LR. Nos. West Mugirango/Bosamaro/1468 and 1469 are deposited in Court within the next 30 days from the date hereof failure to which these orders will automatically lapse.
 - b. The intended Appeal shall be filed within the next ninety (90) days hereof.



c. The costs of this Application shall await the outcome of the intended Appeal.

5. These orders were given in open Court on 25/8/2022.

On 23/11/22, about 3 months from the date of the Ruling on the stay of execution Application, the Defendants brought another Application in Court.

In the said Application the Applicants prayed for orders that: -

1. This Honourable Court be pleased to grant leave to the Applicants to enlarge time to deposit their original Titles Deeds for parcels Nos. West Mugirango/Bosamaro/1468.1469, 2248, 2249, 2250 and 2251 as ordered by the Court order dated the 25th August 2022 out of time.
2. Costs of this Application be in the cause.
6. The reasons advanced for the Application are contained in the grounds supporting the said Application and the Affidavit of Japhet Osoro Kaosa, the Applicants' Advocate.
7. In a nutshell, the Advocate owned up to the mistake in the failure to deposit the Title Deeds in time or at all by not informing the Applicants to deposit the said Documents in Court as ordered and that consequently mistakes of counsel cannot be visited on the client. He also deponed that the Appeal had already been filed in Kisumu and annexed an unstamped copy of the Memorandum of Appeal without the case number. He concluded that the Respondents would suffer no prejudice. In a supplementary Affidavit sworn on 27/7/2022 Mr. Osoro, Advocate deponed that the Title Deeds the Applicants were ordered to deposit in Court were now ready and even indicated that they had been attached to the supplementary Affidavit and marked "JOK" but which were actually not attached to any of the Affidavits.
8. The above Application was opposed by the Decree Holder vide a Replying Affidavit sworn on 21/6/2023 and filed in Court on 27/6/2023 on the ground that the Application is frivolous and an abuse of the process of the Court since the Applicants were not keen on observing the Court Orders.
9. When this Application came up for Hearing on the 20/2/2023 counsel for the Applicants did not turn up in Court and the said Application was dismissed with costs. The same was however reinstated on 13/6/2023 on condition that the Judgment Debtors paid the throw away costs of Ksh.7,500/- to the Decree Holder within 7 days from the date of the Ruling. When the matter came up for Hearing the Decree Holder told the Court that the same were yet to be paid.
10. The Court ordered both counsel to appear in open Court on 3/10/2023 and argue this Application. But Mr. Osoro for the Applicants chose to do it online. Unfortunately, he was not audible and the Court asked him to come to Court at 10.30 am. This was at 9.15am and when the matter was called out at 10.30 am he had not arrived and the matter kept being flagged out until 11.45 am.
11. Although Mr. Osoro was not in Court to argue the Application, the Court nevertheless decided to consider his submissions in spite of the fact that they were filed when the Court had given contrary directions.
12. To begin with, the Application is defective in that the same has been brought under section 27 of the [Limitation of Actions Act](#) (cap 22 Laws of Kenya. The Section provides for the extension of time when a suit is time barred but not in a case where one has failed to act pursuant to a Court order. It has a sub-title:

Extension of limitation period in case of ignorance of material facts in actions for negligence, etc.”



It is worded as follows: -

- (1) Section 4(2) does not afford a defence to an action founded on tort where—
 - (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and [Rev. 2012] CAP. 22 Limitation of Actions 17 [Issue 1]
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
- (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
 - (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
 - (b) in either case, was a date not earlier than one year before the date on which the action was brought.
- (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.”

13. The relevant law in this kind of Application is section 95 of the *civil procedure Act* (Cap 21 laws of Kenya) which provides that:

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired”

14. The same is at the discretion of the Court and can be granted even if the time set has already expired. The procedure for the same is set out under Order 50 Rule 6 of the *Civil Procedure Rules* as follows: -

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to



enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

15. The Court can also give conditions to be met for the granting of such extension.
16. The Title Deeds that the Applicants wish to deposit in Court were to be so deposited on or before 25/9/2022. The intended Appeal ought to have been filed by 25/11/2022 latest. There is no evidence that the Appeal has ever been filed although there is a certificate of delay showing that the proceedings were ready by 5/10/2022. What has been presented to Court is a Memorandum of Appeal, with no Court stamp from the Court it is said to have been so filed and no case number.
17. Coming to the failure to deposit the Title Deeds in Court within the time given by the Court, the Applicants have not given any reason as to why they never complied with the Court order. It is their counsel who decided to swear the Affidavit on their behalf in a contested matter contrary to Order 19 Rule 3 of the Civil Procedure Rules. The Applicants whether they were informed by their counsel on record of what the Court ordered them to do or not, should have sworn Affidavit (s) to state that they were not aware of the stay granted by the Court and the conditions attached thereto. Mr. Osoro should not have sworn it for them. In the case of Raila Odinga & others vrs I. E. B.C. the supreme Court held that; -Raila Odinga & Others -vrs- William Ruto & Others presidential Election Petition Nos. E001, E002, E003, E004, E005, E007 & E008 of 2022 (consolidated) at paragraphs 135 to 137 Supreme Court of Kenya held that: -

The Affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed evidence to the contrary. All the Forms 34A attached to those Affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the public portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective Affidavits was not only inadmissible, but was also unacceptable. It has been established that none of the agents on whose behalf the Forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two had gone ahead to depone on matter that were not within their knowledge. It is noting that the two are Advocates of the High Court and are on record as representing the 1st Petitioner in the Petition before us.

This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients in contentious matters, like the one before us, because they run the risk of unknowingly swearing, to falsehoods and may also be liable to cross-examination to prove the matters deponed to.

- 137) In stating so, we echo the words of Ringera, J in *Kisya Investment Limited & Others Vrs Kenya Finance Corporation Ltd HCCC No. 3504 of 1993* (Unreported) that "It is not competent for a party's Advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the Advocate courts an adversarial invitation to step (down) from his privileged position at the Bar, into the witness box. He is liable to be cross-examined on



his depositions. It is impossible and unseemly for an Advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) order XVIII Rule 3 (1) (now order 19 rule 3 of the *Civil Procedure Rules* failing to disclose who the sources of his information are and the grounds of his belief.”

18. Secondly, it is hard to believe that since the timelines were given on 25/8/2025 till the Application was filed on 23/11/2022, a period of about 3 months, the Applicants were not bothered to know what the Court had ruled in respect to their Application for stay of execution whose supporting Affidavit they had sworn on 10/6/2022. Again, a period of more than 5 months. For more than 5 months the Applicants were never bothered about what the Court decided on the Application. This is unreasonable and inordinate delay. For such kind of clients, the Court cannot exercise its discretion in their favour for equity aids the vigilant and not the indolent.
19. The upshot of the forgoing is that the Defendants' Application dated 23/11/2022 is accordingly dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 31ST DAY OF OCTOBER 2023.

HON. MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: - Brenda

Mr. Kimaiyo for the Plaintiff

Osoro for the Defendants

