



REPUBLIC OF KENYA



KENYA LAW
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Kingeche & another (Suing on her behalf and as the administrator of the Estate of the Late David Mbagu Kingeche (Deceased) & 4 others v Karura Farmers Company Limited & 8 others (Environment & Land Case 3017 of 1990) [2023] KEELC 20929 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20929 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 3017 OF 1990

LN MBUGUA, J
OCTOBER 19, 2023

BETWEEN

DAVID MBAGU KINGECHE & HANNAH NYAMBURA MBAGU (SUING ON HER BEHALF AND AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE DAVID MBAGU KINGECHE (DECEASED) 1ST PLAINTIFF
AGNES NYAMBURA MUGO (SUING ON HER BEHALF AND AS ADMINISTRATOR OF THE ESTATE OF THE LATE JAMES MUGO WAWERU (DECEASED) 2ND PLAINTIFF
KARUTHI KARANJA 3RD PLAINTIFF
HANNAH NYAMBURA MBAGU 4TH PLAINTIFF
HENRY WAINAINA KARIUKI 5TH PLAINTIFF

AND

KARURA FARMERS COMPANY LIMITED 1ST DEFENDANT
SAMUEL KUNGU 2ND DEFENDANT
FESTUS KADENGE 3RD DEFENDANT
GRACE GATHURI 4TH DEFENDANT
PETER MUGO MBUTHIA 5TH DEFENDANT
PETER MARERI 6TH DEFENDANT
FLORENCE WANGUI 7TH DEFENDANT
BENJAMIN MATHINGI 8TH DEFENDANT
PETER MUNGAI 9TH DEFENDANT



RULING

1. There are 2 pending applications for determination in this matter. The 1st one is the formal one brought forth by the 2nd and 9th Defendants dated 11.5.2023. These Defendants also made an oral application on 25.9.2023 arguing that the 2nd Plaintiff's replying affidavit sworn on 20.9.2023 and the written submissions of even date should be struck out for late filing. On 25.9.2023, counsel for the 1st, 3rd and 4th plaintiffs indicated that they would rely on their earlier Replying Affidavit dated 24.5.2023. I have not seen any Submissions of the said plaintiffs. The issue is hence put to rest and the court will consider the response of the plaintiffs in terms of their replying affidavit of 24.5.2023.
2. On the main application, the 2nd and 9th Defendants seek stay of proceedings of 10.5.2023 in order for the case to be heard afresh. The applicants argue that they have attended every court session save that their advocate mis-diarized the date of hearing as 11.5.2023 instead of 10.5.2023.
3. It is argued that the 2nd and 9th Defendants have always been ready and willing to participate in these proceedings thus the dispute should be determined on its merit.
4. The application is opposed by the 1st, 3rd and 4th Plaintiffs vide the 3rd Plaintiff's replying affidavit sworn on 24.5.2022. He avers that since the Advocate for the 2nd and 9th Defendants admit that he was in court on 22.5.2022 with his clients when the hearing dates herein were taken by consent, then the only plausible inference in the coincidence that both the Advocate and his client got the wrong dates is that the 2nd and 9th Defendants have never been keen to have this matter brought to a conclusion and that their advocate is just feigning endorsing of a wrong date in his diary as a ploy to defeat the ends of justice.
5. I have considered all the issues raised herein including the submissions of the applicants. In particular, the court has keenly perused the litigation history as far as the proceedings of the court are concerned.
6. Courts have discretion to set aside ex-parte orders provided that sufficient cause is shown. In *Wachira Karani v Bildad Wachira* [2016] eKLR It was held that:

“Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application”.
7. The records indicate that on 3.11.2022, by consent of the parties, hearing was fixed for 10.5.2023, 11.5.2023 and 21.6.2023. On 10.5.2023, neither counsel for the 2nd and 9th Defendants, nor his clients were present in court. The matter hence proceeded in their absence.
8. However, prior records do not paint the 2nd and 9th Defendants as indolent parties. They have been active participants in the matter. Their counsel has explained the circumstances under which they failed to attend court on 10.5.2023. I have also considered that subsequent to discovering that there was an error, they filed this application immediately.
9. This is a rather old matter, being 33 years old. However, the records do indicate that the plaintiff had their fair share of causing the delay, so much so that at some point, the suit was dismissed but was reinstated. To this end, I will allow the application in the following terms:
 - i. That the proceedings of 10.5.2023 are hereby set aside on condition that the applicants pay thrown away costs to the respondents totaling to ksh.120,000 within 30 days from the date of delivery of this ruling.



- ii. In the event of none compliance, the court will proceed to give directions on the delivery of the judgment.
- iii. That the applicants are granted an opportunity to cross examine the witnesses who testified on 10.5.2023 and thereafter, they will be at liberty to tender their evidence.
- iv. That the case shall not be adjourned at the instance of the applicants.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

