



**Mbondo & another (Suing on Behalf of the Estate of Elijah Mbondo Ntheketha)  
v County Government of Machakos; Musyoki (Interested Party) (Environment &  
Land Case 181 of 2014) [2023] KEELC 20732 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20732 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 181 OF 2014  
CA OCHIENG, J  
OCTOBER 16, 2023**

**BETWEEN**

**SERAH MUTHIO MBONDO ..... 1<sup>ST</sup> PLAINTIFF**

**RICHARD MUEMA MBONDO ..... 2<sup>ND</sup> PLAINTIFF**

**SUING ON BEHALF OF THE ESTATE OF ELIJAH MBONDO NTHEKETHA**

**AND**

**COUNTY GOVERNMENT OF MACHAKOS ..... DEFENDANT**

**AND**

**ROSE MUENI MUSYOKI ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the Defendant's Notice of Motion Application dated the 27<sup>th</sup> March, 2023 where it seeks the following Orders:
  1. Spent
  2. That the firm of Mutua Nyongesa Muthoka Advocates be granted leave to come on record for the Defendant/Applicant after Judgment.
  3. Spent
  4. That this Honourable Court be pleased to set aside the Judgment dated 18<sup>th</sup> September, 2020 and the Decree dated the 11<sup>th</sup> March, 2021 arising from the said Judgment.
  5. That this Honourable Court be pleased to re-open the case for de novo hearing on a priority basis.



6. That this Honourable Court be pleased to grant the Applicant an opportunity to participate in the trial by defending the suit, filing its list of witnesses, witness statements together with a list and bundle of documents to enable the court determine on whose property the bus park sits.
  7. That the costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of James Kathili, its County Attorney, where he deposes that this matter proceeded *ex parte* and Judgment was delivered on that basis on 18<sup>th</sup> September, 2020, against the Defendant. He confirms that when this matter was filed, the Defendant appointed the firm of O.N. Makau & Mulei Advocates to come on record and act on its behalf. Further, that the Defendant provided all the relevant documents in relation to the suit herein to the said law firm so as to file all the pleadings in court. He states that the aforementioned firm did come on record and filed a Defence in the matter where it raised serious triable issues but it failed to file witness statements, list of witnesses nor a list and bundle of documents. He states that the aforementioned firm for unknown reasons ceased to act for the Defendant and the matter proceeded *ex parte* without representation nor participation by the said Defendant. Further, Judgment was delivered against the Defendant herein since the Plaintiffs' evidence was uncontroverted. He contends that when the Judgment was delivered, the Defendant instructed the law firm of Nyamu & Nyamu Advocates to take over the conduct of the matter and apply to set aside the said *ex parte* proceedings and proceed to defend it. Further, that the firm of Nyamu & Nyamu Advocates accepted instructions to act for the Defendant vide a letter received on 16<sup>th</sup> July, 2021 but failed to carry out the instructions. He avers that the Defendant has now instructed the firm of Mutua Nyongesa Muthoka Advocates to come on record, on its behalf. He insists that the suit property is not occupied or used by the Defendant as alleged. He denies that the Defendant has encroached on the suit property as alleged and states that the Matatu Stage at Tala Market is distinct from the said suit property. Further, that the property being used as a Matatu Stage is no. 309 which belongs to the Defendant, having purchased it from its original owner in the year 2000 vide its predecessor the Town Council of Kangundo. He explains that the Plaintiffs are now in the process of executing the impugned Decree against the Defendant and the same ought to be stayed. Further, that the Plaintiffs have extracted a Notice to Show Cause why the County Secretary and Chief Officer Finance, should not be committed to civil jail for failure to pay the sum of Kshs. 91,230,686 which was scheduled for hearing on 29<sup>th</sup> March, 2023 under a Miscellaneous Judicial Review Application No. E011 of 2021. He reiterates that the Defendant stands to suffer great prejudice if the *ex parte* Judgment is executed. Further, that the payment of large sums of money to the Plaintiffs will amount to unjust enrichment. He reaffirms that the aforementioned sum which the Plaintiffs seek, will be paid from public money and can never be recovered as it is a huge sum of money. He argues that the Defendant purchased an alternative and neighbouring plot to the suit land from one Mutiso Soo on 20<sup>th</sup> September, 2000 after the Plaintiffs through Elijah Mbondo Ntheketha failed to give authorization for the use of their land.
3. The Plaintiffs opposed the instant Application by filing a Replying Affidavit sworn by Serah Muthio Mbondo where she deposes that the Application has been brought very late in the day, in bad faith and can only be construed as intending on denying the Plaintiffs the fruit of the Judgment. She explains that the proceedings herein commenced in 2014 and the Defendant duly entered appearance having appointed a firm to represent it and filed documents. She explains that in the course of the proceedings herein, the Defendant failed to instruct its Advocates properly culminating in the said Advocates filing an Application to cease acting dated the 18<sup>th</sup> March, 2019 which was allowed on 18<sup>th</sup> June, 2019. Further, a hearing date was scheduled on 13<sup>th</sup> November, 2019 and her Advocates were directed to serve the Defendant, which they did, vide a Hearing Notice dated the 1<sup>st</sup> August, 2019 that was duly received by the Defendant on the said date. She insists that the Defendant is hence guilty of indolence



as no explanation has been advanced as to why it failed to instruct any advocate to represent it. She argues that in delivering the Judgment, the Court had the benefit of the Statement of Defence as well as the Defendant's List and Bundle of Documents dated the 28<sup>th</sup> May, 2018. She avers that in proceeding with the instant suit, they have incurred substantial expenses. She contends that the Defendant has not provided any proof to confirm it sought an update on the proceedings herein and hence cannot blame its advocate for its indolence. She insists that the instant Application in its entirety is improper having been prepared by an Advocate who has no audience in the proceedings herein. Further, that the court is functus officio in this matter as it already rendered a Judgment. She reiterates that the Defendant cannot purport to want to set aside the Judgment dated the 18<sup>th</sup> September, 2020 simply because it refused to participate in the proceedings.

4. The Interested Party Alice Mwelu Mbondo in opposing the instant Application swore an Affidavit where she deposes that the Defendant was properly represented in the proceedings herein until their Advocates withdrew but the Plaintiffs continued serving it. She insists that the Defendant has all along been served with the Court processes and even after Judgment was entered, they were served with Judgment and Decree but never bothered to settle the decretal amount. She explains that on 5<sup>th</sup> April, 2023, the High Court in Machakos allowed an Application for a Notice to Show Cause against the Finance Officer and he was ordered by Court in the aforementioned Judicial Review to make payments within thirty (30) days failure of which he would be arrested and committed to Civil Jail. She maintains that the Defendant has been using their land for years and still continues to use it and its staff collect revenue therefrom.
5. The Defendant filed a Supplementary Affidavit sworn by its County Attorney James Kathili where he reiterates the averments as per his Supporting Affidavit and insists that the instant Application has been brought in the earliest opportunity that was available to the Defendant. He avers that the delay in filing the Application to set aside the Judgment was occasioned by the Defendant's erstwhile counsel on record. Further, that the matter indeed proceeded *ex parte* but failure to attend court was not deliberate. He denies that the Court relied on its Defence and documents. He reaffirms that there is no prejudice in reopening this case so as to hear it on merit and this Application is not meant to delay justice but to ensure justice is done by preventing payment of over Kshs. 90 million from public coffers. He contends that there is a prayer seeking leave to come on record for the Defendant and this court is not functus officio.
6. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

7. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the following are the issues for determination: Whether the firm of messrs Mutua Nyongesa Muthoka Advocates should come on record for the Defendant. Whether the Court should set aside the Judgment dated the 18<sup>th</sup> September, 2020 including the Decree dated the 11<sup>th</sup> March, 2021 arising from the said Judgment and reopen this case de novo.
8. The Defendant in its submissions reiterated its averments as per the two Affidavits and claimed the Plaintiffs' case is a boundary issue as they seem to confuse their land with its land. It averred that the Plaintiffs instituted their claim thirty (30) years after the alleged taking over of the land by the Government and this is contrary to the Statute of Limitation. It contended that it has an arguable Defence being that the suit property claimed by the Plaintiffs is different from the one where Tala Bus Park stands. To support its averments, it relied on the following decisions: Mureithi Charles & Another v Jacob Atina Nyagesuka (2022) eKLR; *Bouchrad International Services Limited vs M'mwereria* (1987) KLR 193; *Evans vs Bartlam* (1937); *Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd vs*



Augustine Kubende (1982 – 1988) KAR and Gulf Fabricators v County Government of Siaya (2020) eKLR.

9. The Plaintiffs' in their submissions argued that the Defendant had not advanced any sufficient reason to warrant the setting aside of a Judgment delivered on 18<sup>th</sup> September, 2020, almost three (3) years ago. They contended that prayer No. 2 in the Defendant's Application is defective as there was already the firm of Nyamu & Nyamu Advocates on record for the Defendant which had not been discharged formally neither have they consented to having Mutua Nyongesa Muthoka being on record in their place. They insisted that the instant Application is not only mischievous but aimed at defeating the course of justice and denying them the fruits of Judgment. Further, that it was an abuse of the court process as no advocate who purported to represent the Defendant herein sought to set aside the Judgment. They averred that the Defendant through its various representatives alluded to the transitions happening at the County in terms of the end of tenure and the heavy financial constraints it experienced and sought time within which to offset the Decretal sum. They made reference to paragraph 4 of the impugned Judgment and insisted that although the matter proceeded *ex parte*, the trial Judge considered the Defendant's documents on record. They claimed the Defendant herein is attempting to amend and raise new issues, post Judgment. They argued that the Defendant had not met the threshold to warrant setting aside a Judgment delivered almost three years ago. Further, from the documents placed before Court, by the Defendant, it only served to demonstrate that it was aware of the proceedings and it has not shown if there was excusable mistake and/or error. To buttress their averments, they relied on the following decisions: Galaxy Paints Company Limited v. Falcon Guards Limited Court of Appeal Case Number 219 of 1998; Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR and Mureithi Charles & Another v Jacob Attina Nyagesuka [2022] eKLR.
10. The Interested Party in her submissions reiterated the averments in her Replying Affidavit and insisted that even though the Defendant claims the Bus Park is on a different parcel of land, it has not annexed its title to that effect. She argued that the instant Application is not bona fide but simply informed by the impending enforcement orders of arresting the Finance Officer of the County Government of Machakos. Further, that the Defendant's Application is baseless and unsubstantiated. To support her averments, she relied on the following decisions: Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others (2017) eKLR; Mbutia Macharia v Annah Mutua Ndwiga & Another (2017) eKLR; Levi Simiyu Makali v Koyi John Waluke & 2 others (2018) eKLR; Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd (2018) eKLR; Thorn PLC v Macdonald (1999) CPLR 660 and Kimani v Mc Connell (1966) EA 545.
11. As to whether the firm of messrs Mutua Nyongesa Muthoka Advocates should come on record for the Defendant. The aforementioned firm seeks to come on record for the Defendant after the entry of Judgment and issuance of a Decree. The Plaintiffs and Interested Party have opposed this prayer. As per the provisions of Order 9 Rule 9 of the Civil Procedure Rules, it states that:

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”



12. In relying on the legal provisions cited above, noting that it is the Court mandated to grant leave for an Advocate to come on record in a matter after delivery of Judgment, I will proceed and allow the aforementioned law firm to come on record for the Defendant.
13. As to whether the Court should set aside the Judgment dated the 18<sup>th</sup> September, 2020 including the Decree dated the 11<sup>th</sup> March, 2021 arising from the said Judgment and reopen this case de novo.
14. The Defendant has sought to set aside the Judgment dated the 18<sup>th</sup> September, 2020 and the Decree dated the 11<sup>th</sup> March, 2021 which has been opposed by the Plaintiffs and the Interested Party. On setting aside a Judgment, I wish to make reference to Order 10 Rule 11 of the Civil Procedure Rules which stipulates thus:

“Where Judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

15. On perusal of the Court record, I note the Defendant had filed a Statement of Defence and the matter proceeded for hearing on 13<sup>th</sup> November, 2019. Further, throughout the proceedings, the Defendant had an advocate on record until the 18<sup>th</sup> June, 2019 when the aforementioned law firm ceased acting for it. I note the Defendant was served with a Hearing Notice which it duly received on the 1<sup>st</sup> August, 2019. After the hearing, Justice Angote proceeded to enter Judgment in favour of the Plaintiffs which is the subject of the instant Application. The Defendant claims they instructed another law firm of messrs Nyamu and Nyamu Advocates to come on record for it but they failed to heed to the said instructions to apply to set aside the ex parte Judgment. It is trite that setting aside a Judgment is discretionary so long as a party can demonstrate sufficient cause.
16. In the case of Wachira Karani v Bildad Wachira [2016] eKLR the Court while dealing with the issue of setting aside of a Judgment observed that:

“The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel v East Africa Cargo Handling Services*[12] where Duffus, V.P. stated; “The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”

17. The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated “sufficient cause” to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase “Sufficient cause” mean. The Supreme Court of India in the case of *Parimal vs Veena* observed that:-

“Sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been



“not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”

18. The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it.”

19. In *Patel v E.A. Cargo Handling Services Ltd* [1974] EA75 at page 76 C and E the court held as follows: -

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.”

20. Further, in the case of *Mwangi S. Kimenyi v Attorney General & another* [2014] eKLR it was held that:

“Consequently, upon the analysis of all legal considerations, it is clear the direction the court is taking on this matter. But before I close, I will re-state; the acceptable test is that;

- 1) When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the Defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties.
- 2) Invariably, what should matter to the court, is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues;
  - 1) whether the delay has been intentional and contumelious;
  - 2) whether the delay or the conduct of the plaintiff amounts to an abuse of the court;
  - 3) whether the delay is inordinate and inexcusable;
  - 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and
  - 5) what prejudice will the dismissal cause to the plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”

21. In this instance, I note the current Application was filed on 27<sup>th</sup> March, 2023 while the impugned Judgment had been delivered on 18<sup>th</sup> September, 2020. The Defendant except for claiming the Judgment should be set aside as they are not on the suit property and that public funds should be saved, has not demonstrated why it took more than two (2) years to seek to set aside the impugned Judgment and Decree. Further, it has not furnished court with an Affidavit from Nyamu & Nyamu Advocates to confirm the allegations made against them. From the court proceedings, I find that the Defendant had



been indolent in proceeding with this matter. Further, it only proceeded to file the instant Application when the Plaintiffs *vide* Miscellaneous Judicial Review Application No. E011 of 2021, had extracted a Notice to Show Cause why the County Secretary and Chief Officer Finance, should not be committed to civil jail for failure to pay the sum of Kshs. 91,230,686. To my mind, and from the Defendant's conduct, I find the instant Application has been filed after an inordinate and unexplained delay, which cannot be excused.

22. In the circumstances, while associating myself with the decisions I have cited and relying on legal provisions I have quoted, I decline to set aside the Judgment delivered on 18<sup>th</sup> September, 2020.
23. In the foregoing, I find the instant Notice of Motion Application partially successful and will only allow prayer No. 2. The rest of the prayers sought are declined.
24. Costs of the Application is awarded to the Plaintiffs and Interested Party.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16<sup>TH</sup> DAY OF OCTOBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

