



**Ruto v Kimani & 2 others (Environment & Land Case 211 of 2016)
[2023] KEELC 21892 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 211 OF 2016
LA OMOLLO, J
NOVEMBER 30, 2023**

BETWEEN

JOEL KIPKOECH RUTO PLAINTIFF

AND

SACKEY PETER KIMANI 1ST DEFENDANT

JOHN WACIRA CHIRI 2ND DEFENDANT

JOSEPH NGANGA KANG'ETHE 3RD DEFENDANT

RULING

Introduction

1. This ruling is in respect of the 2nd Defendant/Applicant's Notice of Motion application dated 20th March, 2023. The said application is expressed to be brought under Sections 3, 3A, 1A and 1B of the [Civil Procedure Act](#).
2. The application is filed under Certificate of Urgency and seeks the following prayers;
 - a. Spent
 - b. That this honorable court be pleased to set aside the proceedings so far undertaken in this case and grant leave to the 2nd Defendant to file his statement of Defence, List of Witnesses, Witnesses Statements and list (with copies attached) of his documents so that the case can be heard de novo.
 - c. That the costs of this motion be costs in the cause.
3. The application is based on the grounds on its face and supported by the affidavit of John Wacira Ciri. The supporting affidavit is sworn on 20th March, 2023.



Factual Background

4. The Plaintiff/Respondent commenced the present proceedings vide the Plaint dated 15th June, 2016 that was amended on 9th June, 2022 where he sought the following prayers;
 - a. That a permanent injunction to restrain the Defendants together with their representatives, agents, servants, employees and/or anyone claiming through them from encroaching onto disposing, transferring and/or in any way adversely dealing in land parcels number [particulars withheld]
 - b. A declaration that the Plaintiff was the rightful owner of Land Reference Number [particulars withheld] and the subsequent subdivisions measuring approximately 0.3938 hectares.
 - c. A declaration that the subdivision of LR Number [particulars withheld]) into four portions namely [particulars withheld]) is illegal, null and void.
 - d. An order of cancellation of the sub-divisions and registration of the 2nd and 3rd Defendants as the owners of the subdivisions.
 - e. An order directing the Land Registrar to consolidate the four titles to wit [particulars withheld] into one or in the alternative an order directing the Land Registrar to register the Plaintiff as the proprietor of the four subdivisions namely [particulars withheld] in place of the Defendants.
 - f. Costs of this suit.
 - g. Any other relief that this honorable court deems fit.
5. On 22nd March, 2023 the court directed that the application under consideration be heard on 17th April, 2023.
6. On 17th April, 2023 the court directed that the application be heard by way of written submissions.
7. On 30th May, 2023, parties confirmed having filed their submissions and the application was reserved for ruling.

The 2nd Defendant/Applicant's Contention.

8. The 2nd Defendant/Applicant contends that he was served with the summons to enter appearance in July 2022 from the firm of M/S B.O Okango & Co. Advocates.
9. The 2nd Defendant/Applicant also contends that he instructed the firm of M/S Ouma & Co. Advocates to represent him and on 7th July 2022 a Memorandum of Appearance dated 6th July 2022 was filed.
10. The 2nd Defendant/Applicant further contends that by 15th July, 2022 he had delivered to the firm of M/S Ouma & Co. Advocates all the documents necessary for filing his defence.
11. It is his contention that the said Advocate informed him that he had filed his Statement of Defence and all the other documents and shared the same with counsel for the Plaintiff/Respondent.
12. It is also his contention that he only came to learn that Mr Ouma had not filed his Defence and other compliance documents when the matter came up for Defence hearing on March, 2023.
13. It was further his contention that he did not get any response from Mr Ouma when he asked why his documents were yet to be filed.



14. He contends that he had no choice but to change legal counsel and so he instructed the firm of M/S Karanja Mbugua & Company Advocates to represent him in place of M/S Ouma & Co. Advocates.
15. He also contends that he has a very strong defence in this matter and he should be given the opportunity by this court to file the said defence and other compliance documents.
16. He further contends that he should not be punished for his former lawyer's omissions and since it was just the Plaintiff/Respondent who had given his evidence, he should be recalled after he has filed his defence and compliance documents.
17. It is his contention that any inconvenience caused by his request can be atoned by payment of throw away costs.
18. He ends his deposition by stating that the court has the power to grant such orders as to give all the parties in this case the opportunity to present their cases and for the court to make a fair and well-informed decision.

The Plaintiff/Respondent's Response.

19. The Plaintiff/Respondent filed Grounds of Opposition on 27th March 2023 in response to the 2nd Defendant/Applicant's application.
20. The said grounds are as follows;
 - a. That the application is bad in law.
 - b. That the application is brought in bad faith and with the sole aim of delaying the matter from being concluded.
 - c. That the Applicant has not shown sufficient cause why the matter should be ordered to start de novo.
 - d. That the Applicant was all along represented by counsel and at no point was there any indication that the Applicant was not aware of the ongoing proceedings.
 - e. That matters do not belong to Advocates who are merely agents of instructing clients and it was incumbent upon the Applicant to be making regular follow ups with the counsel to monitor the progress of his case. (Sic)
 - f. That a diligent litigant is supposed to keep track of his/her matter at every stage and claim that the failure to file defence is a mistake of counsel is no justification for setting aside the proceedings so far taken in this matter.
 - g. That it is not every mistake of counsel that can recuse a litigant since a litigant who is aggrieved by a mistake of his counsel can have recourse in law against his counsel as opposed to using the excuse against an otherwise innocent party in a matter.
 - h. That it is dishonest and even malicious on the part of the Applicant to wait until the Plaintiff has closed this case and seek to file a defence which is tailor made to suit the Plaintiff's claim.
 - i. That setting aside is in the discretion of judicial officers and can only be exercised in deserving cases and this is not such a case.
 - j. That one of the principle considerations in the dispensation of justice is that cases ought to be determined without unreasonable delay. Therefore, to order the matter to start de novo where



no justifiable reasons are advanced would run a fowl that principle. This Honorable Court must eschew such a conduct.

- k. That this honorable court must refuse to come to the aid of indolent litigants to avoid abuse of judicial process.

Issues for Determination.

21. The 2nd Defendant/Applicant filed his submissions on 17th May, 2023 while the Plaintiff/Respondent filed his submissions on 19th May, 2023.
22. The 2nd Defendant/Applicant submits that he does not need to suffer injustice because his erstwhile Advocates failed him in this case.
23. He also submits that he had done everything in his ability as expected of him and had trusted his advocates to diligently represent him.
24. The 2nd Defendant/Applicant relies on the judicial decisions of Philip Chemwolo vs Augustine Kubende [1986] KLR 492; (1982-88) KAR 103 and Belinda Murai & 6 Others vs Amos Wainaina [1978] KLR in support of his arguments.
25. The Plaintiff/Respondent in his submissions relies on the judicial decisions of Mbogo v Shah [1968]EA 93, Patel vs EA Cargo Handling Service Ltd (1974) EA 75 and submits that setting aside of proceedings is discretionary.
26. The Plaintiff/Respondent also submits that the court has to consider whether the 2nd Defendant/Applicant has a reasonable defence.
27. The Plaintiff/Respondent further submits that the 2nd Defendant/Applicant blamed his failure to file a statement of defence and all the relevant compliance documents on his previous counsel.
28. The Plaintiff/Respondent relies on Edney Adaka Ismail vs Equity Bank Limited [2014]eKLR and Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002 among other judicial decisions before submitting that in addition to blaming his previous advocates for failure to file his Statement of Defence, the 2nd Defendant/Applicant has to demonstrate the steps that he took in order to follow up the matter with his previous advocates.
29. The Plaintiff/Respondent further relies on the judicial decision of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 Others, Kitale HC ELC No. 72 of 2019 and submits that the 2nd Defendant/Applicant has not indicated whether he has a reasonable defence and has not even annexed a draft statement of defence.
30. In conclusion, the Plaintiff/Respondent submits that when he testified Mr Ouma for the 2nd Defendant cross examined him and since the matter has been pending for over six years, it is fair and just that it be concluded without further delay.

Analysis and Determination.

31. After considering the application, the response thereto and the rival submissions filed herein, the issues that arise for determination are whether the 2nd Defendant/Applicant should be granted the orders sought in his application and who should bear the costs.
32. The 2nd Defendant/Applicant is seeking orders that the court sets aside previous proceedings in the matter, grant him leave to file his Statement of Defence & accompanying documents and for an order for the matter to start de novo.



33. The 2nd Defendant/Applicant is seeking the said orders on the ground that his former advocates informed him that they had filed the requisite documents but when the matter came up for hearing he realized that they had not.
34. The 2nd Defendant/Applicant is seeking that the court sets aside the previous proceedings already undertaken in the matter.
35. The 2nd Defendant/Applicant admits that he had instructed MS. Ouma & Company Advocates to represent him which firm entered appearance but did not file any other document
36. The Plaintiff/Respondent opposes the said application on the ground that the 2nd Defendant/Applicant has always been represented by counsel.
37. The Plaintiff/Respondent also argues that the 2nd Defendant/Applicant has to demonstrate the steps he took to ensure that the said documents were filed and served in addition to blaming his advocates on record.
38. A perusal of the court record shows that when the matter proceeded for hearing of the Plaintiff/Respondent's case on 7th December, 2022, Mr. Ouma was present representing the 2nd Defendant/Applicant and he cross-examined the Plaintiff/Respondent.
39. As argued by counsel for the Plaintiff/Respondent, the 2nd Defendant/Applicant was represented in the matter and has not laid a basis for the setting aside of the said proceedings.
40. It is my view therefore that the failure to file a Statement of Defence by the 2nd Defendant/Applicant is not sufficient reason to set aside previous proceedings in the matter.
41. The 2nd Defendant/Applicant is also seeking leave to file his Statement of Defence and other documents. As indicated before, he blamed his previous Advocates on record for failing to file the said documents within time.
42. The Plaintiff/Respondent opposes the grant of the said leave on the ground that he has already closed his case and that the 2nd Defendant/Applicant is seeking to file a Statement of Defence tailor made to suit his claim.
43. Order 7 Rule 1 of the Civil Procedure Rules provides as follows;
 - “ 1. Where a Defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an Affidavit of Service.”
44. Order 7 Rule 5 of the Civil Procedure Rules provides as follows on the documents that accompany a defence or counterclaim;
 - “ 5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—
 - (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
 - (b) a list of witnesses to be called at the trial:



- (c) written statements signed by the witnesses except expert witnesses; and
- (d) copies of documents to be relied on at the trial. Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.”

45. While considering the provisions of Order 7 Rule 5 of the Civil Procedure Rules, the court in the judicial decision of Johana Kipkemei Too v Hellen Tum [2014] eKLR stated as follows;

“It will be seen from the above that both Plaintiff and Defendant are supposed to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, but this needs to be at least 15 days before the pre-trial conference contemplated in Order 11 Rule 7. In practice the courts conduct the pre-trial conference through a mention, where parties confirm that they are ready to proceed and that they have exchanged the requisite documents.

There is no provision in the rules that permits the court to accept a list of witnesses or documents filed outside the time lines provided in Order 3 Rule 7 and Order 7 Rule 5. The provisions of Order 3 and Order 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he will face at the trial. There is however no clear cut provision setting out the consequences of failure to comply. The Rules do not state that such party will be debarred from relying on witnesses or documents which were not furnished at the filing of the pleadings, or later filed with the leave of the court. But *the Constitution* under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is allowed to hide his evidence and ambush the other party at the hearing.”

- 46. A perusal of the court record indicates that on 2nd June 2022, the Plaintiff/Respondent was granted leave to amend his plaint and serve the same within seven days.
- 47. On 7th July, 2022, Mr. Ouma was present in court representing the 2nd Defendant/Applicant and he sought for time to file the requisite documents.
- 48. When the matter was subsequently mentioned on 21st July, 2022 and on 22nd September, 2022 to confirm compliance with Order 11 of the Civil Procedure Rules, Mr. Ouma counsel for the 2nd Defendant/Applicant was not present.
- 49. As aforementioned, when the Plaintiff/Respondent gave his evidence on 7th December, 2022 Mr Ouma counsel for the 2nd Defendant/Applicant was present and he cross-examined the Plaintiff/Respondent.
- 50. The 2nd Defendant/Applicant alleged that he supplied his previous Advocates with all the documents and was surprised to find out that the said documents together with the Statement of Defence had not been filed.



51. In *Teacher Service Commission v Ex-parte Patrick M Njuguna* [2013] eKLR the court cited the judicial decision of *John Onger Mariaria & 2 Others vs. Paul Matundura* Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163 where it was held that;

“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders ... Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him ... Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone ... Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent”.

52. In the present matter, even though the 2nd Defendant/Applicant has blamed his previous Advocates on record for failing to file his statement of defence and the requisite documents, he has failed to demonstrate any steps that he undertook to ensure that the said documents were filed.

53. Further, the 2nd Defendant/Applicant has not annexed a draft of the said defence and the documents he intends to rely on to the application under consideration.

54. In the judicial decision of *Johana Kipkemei Too v Hellen Tum* (supra) the court held as follows;

“the Plaintiffs will be greatly prejudiced if I am to allow this application by the Defendant. The Plaintiffs have already closed their case and will not have an opportunity to rebut the new evidence. It will be unfair to the Plaintiffs, if I am to allow the Defendant, at this late stage of the proceedings, to fundamentally alter the character of her case, to one that the Plaintiffs never contemplated when tabling their evidence. In essence, the trial will end up being unfair to the Plaintiffs and will violate the provisions of Article 50(1) of *the Constitution*.”

55. Similarly, in the present matter, the Plaintiff/Respondent has already testified and closed his case and it is my view that he will suffer great prejudice if the 2nd Defendant/Applicant was allowed to file his Statement of Defence and documents at this stage of the proceedings.

Disposition.

56. In the result, I find that the 2nd Defendant/Applicant’s application dated 20th March, 2023 lacks merit and is hereby dismissed with costs.

57. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF NOVEMBER, 2023

L. A. OMOLLO

JUDGE

In the presence of:

Mr. Karanja Mbugua for the 2nd Defendant/Applicant

Mr. Akango for the Plaintiff/Respondent.



Mr. Gekonga for 1st defendant/Respondent

