



**Mukoma v Kabiti & 2 others (Environment & Land Case 149 of 2017)
[2023] KEELC 22056 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22056 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 149 OF 2017
BM EBOSO, J
NOVEMBER 29, 2023
(FORMERLY NAIROBI HIGH COURT CIVIL SUIT NO. 307 OF 1998)**

BETWEEN

JOHN JOSEPH MUKOMA PLAINTIFF

AND

MICHAEL KARANJA KABITI 1ST DEFENDANT

JOSIAH MBURU NJUMBI 2ND DEFENDANT

PATRICK KAMAU NJUBI 3RD DEFENDANT

RULING

1. The plaintiff initiated this suit in the High Court at Nairobi through a plaint dated 12/2/1998. The plaint was amended on 4/3/1998. His case was that he was the registered owner of land parcel number Gatamaiyu/Kamburu/714 [hereinafter referred to as “the suit property”]. He contended that the defendants had unlawfully encroached on the suit property, adding that they had caused a caution to be registered against the land, thereby occasioning him loss and damage. Through his amended plaint, the plaintiff sought the following reliefs against the defendants: (i) an order vacating the caution; (ii) damages for encroachment and trespass on the land; (iii) any other alternative relief that the honourable court might deem fit; and (iv) costs of the suit.
2. The defendants entered appearance on 24/3/1998 and subsequently filed their defence on 8/4/1998. Their case was that the suit property originally belonged to their late father who registered the land in the name of the plaintiff to hold it in trust for the family. They added that they had been in occupation of the land and had been cultivating the land for more than 20 years as at 1998. The suit was subsequently transferred to Thika ELC by Bor J on 7/2/2017. The suit was heard *ex-parte* by Gacheru J on 19/3/2018. The court [Gacheru J] subsequently rendered an *ex-parte* Judgment on 24/5/2019. Through the *ex-parte* Judgment, the court vacated the caution that had been lodged on the land register



- relating to the suit property. Further, the court condemned the defendants to pay the plaintiff general damages of Kshs 500,000 for trespass. Lastly, the court awarded the plaintiff costs of the suit.
3. The plaintiff prepared a bill of costs which came up for taxation before the taxing officer of the court on 19/9/2022, 18/10/2022 and 9/11/2022. Mr Gakaria attended court on behalf of the defendant on 18/10/2022 and 9/11/2022. On 18/10/2022, Mr Gakaria informed the court that he did not have instructions and intimated that he wanted to apply for leave to cease acting for the defendants. On 9/11/2022, Mr Gakaria intimated to the court that he had prepared an application for leave to cease acting, adding that the 2nd defendant had visited him. He sought time to get in touch with the 1st defendant.
 4. Subsequent to that, the defendants, through the law firm of Macharia Gakaria & Associates, filed a notice of motion dated 21/11/2022, seeking an order setting aside the expert Judgment of the court rendered on 24/5/2019. They further sought leave to file their list of documents, list of witnesses and witness statements within 14 days from the date of the order. The said application is the subject of this ruling. The application was anchored on the grounds outlined in the notice of motion and was supported by the affidavit of Michael Karanja Kabiti, sworn on 21/11/2022. It was canvassed through written submissions dated 12/5/2023.
 5. The 1st defendant deposed that the impugned *ex parte* Judgment was entered in this suit on 24/5/2019 due to non-attendance of their counsel from the firm of M/s Macharia Kenneth & Associates Advocates when the suit came up for hearing. They added that his counsel's non-attendance was caused by improper service of the hearing notice by the plaintiff who served the hearing notice upon advocates who were not on record for them. The defendants contended that failure to attend the hearing was not due to negligence on their part, The defendants further contended that upon learning that *ex parte* Judgment had been entered in the matter, they instructed M/s Macharia Gakaria & Associates Advocates to take over the matter. The defendants added that it was in the interest of justice that the *ex parte* Judgment be set aside and the suit be set down for hearing interpartes, given that they had a strong case against the plaintiff.
 6. The plaintiff opposed the application through his replying affidavit sworn on 23/1/2023; written submissions dated 23/1/2023; and supplementary submissions dated 23/6/2023. He contended that he instituted the suit in 1998, adding that since then, the defendants had failed to attend court on numerous occasions, including 7/4/2003 when the case was heard *ex parte* and the court rendered an *ex parte* Judgment in his favour. He contended that the defendants subsequently sought an order setting aside the *ex parte* Judgment through their application dated 28/6/2005 which was allowed on 24/4/2008. He added that the defendants had consistently failed to appear during various court sessions despite having been served with notices.
 7. The plaintiff contended that service of notices upon the defendants had always been proper and was done on the defendants' advocates who were on record at the time, M/s Macharia Kenneth & Associates Advocates, adding that the said firm was the same as M/s Macharia Gakaria & Associates Advocates. He added that the two firms operated from the same office on 2nd Floor, Shankardass House, Nairobi, and shared the same postal address, to wit, 70662-00400 Nairobi, as evidenced by the various documents on the court record. He further contended that documents addressed to M/s Macharia Kenneth & Associates Advocates had severally been received by M/s Macharia Gakaria & Associates Advocates with no objection from the advocates and that the two firms had presented themselves as one and the same.
 8. The plaintiff added that when his Bill of Costs came up for taxation before the Deputy Registrar of this court, Mr Gakaria of M/s Macharia Gakaria & Associates Advocates was present and indicted



that they wanted to make an application to cease acting, an application they would not make without having been on record. He added that the defendants could not therefore purport not to have been aware of the hearing notice yet proper service was effected on their advocates notifying them of the hearing date of 19/3/2018. He added that the defendants had been given ample time since 1998 to put in the relevant documents but had failed to do so.

9. I have read the entire record relating to this suit, including all the pleadings and instruments appointing advocates in the suit. The case of the defendants is that whereas the hearing notice relating to the hearing of 19/3/2018 was properly addressed to their advocates, M/s Macharia Kenneth & Associates Advocates, it was erroneously served on a wrong law firm, M/s Macharia Gakaria & Associates Advocates. They attribute their non-attendance to the above error on part of the process server. Two key issues fall for determination in the application. The first issue is whether the defendants were duly notified about the hearing of 19/3/2018. The second issue is whether the criteria upon which our trial courts exercise jurisdiction to set aside an *ex parte* judgment has been satisfied. Before the above issues are disposed, there is need to ascertain the law firm which is on record for the defendants. There is also need to ascertain whether the notice of motion under consideration is properly before this court. Parties did not, however, address the court on this particular issue.
10. A perusal of the court record reveals that the defendants appointed M/s Macharia Kenneth & Associates Advocates through a notice of appointment dated 23/5/2005. There is no notice of change of advocates filed by the firm of Macharia Gakaria & Associates on behalf of the defendants prior to delivery of Judgment in this suit. Similarly, there is no evidence of leave that was granted to the firm of Macharia Gakaria & Associate to come on record post-Judgment.
11. The application to be determined revolves around the question of service of hearing notice that was addressed to M/s Macharia Kenneth & Associates but was received by M/s Macharia Gakaria & Associates. The latter firm presented the application that is before court but there is no evidence that they are properly on record. The question as to whether or not the said firm is properly on record has a bearing on the competency of the application. That question requires evidence which, regrettably, the court is not seized of.
12. For the above reasons, the court will not pronounce itself on the merits of the application at this point. The court will instead direct the firm of Macharia Gakaria Associates to file and serve an affidavit placing before the court relevant evidence on when they came on record, including the order granting them leave, the official receipt relating to the instruments of appointment and service of the relevant instrument. Parties will thereafter be granted the opportunity to address the court on the issue. For now, the order reserving a ruling date for the application dated 21/11/2022 is vacated. Directions on a fresh ruling date will be issued once the court confirms that it is seized of a competent application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH NOVEMBER 2023

SIGNED

B M EBOSO

JUDGE

In the presence of:

Ms Njuguna for the Plaintiff/ Respondent

Court Assistant: Hinga

CORRECTED, DATED AND SIGNED AT THIKA THIS 29TH DAY OF JANUARY 2024



B M EBOSO

JUDGE

In the presence of:-

Court Assistant: Pamela Osodo

