



**Kiniu v Ndungu and Murigi both t/a Annrose Nursery and
Primary School & another (Environment & Land Case 179 of 2009)
[2023] KEELC 21872 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21872 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 179 OF 2009
LN MBUGUA, J
NOVEMBER 21, 2023**

BETWEEN

JOSEPH NDICHU KINIU PLAINTIFF

AND

**ANNE WAIRIMU NDUNGU AND STANLEY NDUNGU MURIGI BOTH T/A
ANNROSE NURSERY AND PRIMARY SCHOOL 1ST DEFENDANT**

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

RULING

1. The 2nd Defendant's Notice of Motion application dated 18.4.2023 is for determination. They seek a review/setting aside of the judgement delivered on 23.6.2022 and all consequential orders. It also seeks orders that the firm of M/s Macharia Gakuo & Co. Advocates be granted leave to come on record on their behalf.
2. The application is based on grounds on its face and on the supporting affidavit sworn on 5.6.2023 by Jack Kamau Wachira, who describes himself as the 2nd Defendant's surveyor and employee. He avers that the instant suit was never brought to the 2nd Defendant's attention.
3. He contends that the 2nd Defendant has learnt that crucial facts were misrepresented to the trial court, hence the erroneous judgment and there is a need to set the same aside. He points out that the court erred by finding that all properties known as Nairobi /Block 105/1927, Nairobi Block 105/1928, Nairobi/Block 105/916 and Nairobi Block 105 /1916 are one and the same, while indeed the said parcels are different and distinct from each other and they all bear their separate title documents.
4. That the properties known as Nairobi Block 105/1916 and Nairobi Block 105/1917 are totally distinct from Nairobi Block 105/1927 and Nairobi block 105/1928 and the same belong to Stanley Ndungu



- Murigi who is the genuine allottee hence the title documents in regard to both parcels ought not to be cancelled.
5. The application is opposed by the Plaintiff vide his replying affidavit sworn on 5.6.2023. He avers that the 2nd Defendant was served with summons herein and had instructed the firm of Ngata Kamau & Co. Advocates who were served with pleadings herein. He further argues that the application is resjudicata following the 1st Defendant's application for stay dated 26.9.2022 filed at the Court of Appeal.
 6. He also argues that the alleged owner of the suit parcel Susan Wanjiru Ndungu is known to him as the 1st Defendant's daughter, of which mother & daughter acted in cahoots with the 2nd Defendant to transfer the suit property to the said daughter.
 7. He also avers that on 1.7.2019, Hon Justice B.M Eboso summoned the chairman of the 2nd Defendant to attend court on 3.2.2020 and the summons and order were served upon the 2nd Defendant.
 8. In response to the replying affidavit, Jack Kamau Wachira swore a further affidavit on 23.10.2023 averring that the 2nd Defendant is willing to point out the location of the Respondent's properties which are distinct from the suit land. He also avers that the firm of Ngata Kamau & Co. Advocates has never entered appearance in this matter on behalf of the 2nd Defendant.
 9. I have considered all the arguments raised herein including the rival submissions. The 2nd Defendant seeks to set aside/review the judgment dated 23.6.2022 on the basis that they were not served with summons, hence they were not aware of these proceedings. Thus the issue for determination is whether the said judgment should be set aside.
 10. This suit was filed via a plaint dated 23.8.2009 against the 1st Defendant, but the plaint was amended on 16.11.2009 and further amended on 9.10.2018. The 2009 amendments brought the 2nd Defendant on board, of which the Plaintiff took out fresh summons dated 20.11.2009.
 11. It is trite that he who alleges must prove. The burden therefore lies with the 2nd Defendant to prove that it was never served with summons herein. In the judgement entered on 23.6.2022, this court observed at paragraph 4 that, "the 2nd Defendant did not enter appearance."
 12. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd V Augustine Kubede* (1982-1988) KAR page 1036, the Court of Appeal while dealing with an appeal against refusal to set aside ex parte judgment in default stated as follows;

"The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties".

Also see *Jomo Kenyatta University of Agriculture and Technology V Musa Ezekiel Oebal* (2014) eKLR CA 217/2009, *Shah V Mbogo & Another* (1967) EA 116.
 13. Were the 2nd defendants aware of this suit?. I find that the 2nd defendants have not categorically denied that one Wamwari and a Mr. Kimani were their chairperson and their director at some time, as these persons appear to have been served with some suit documents. The applicants have not given rebuttal evidence, particularly, the names of their directors and chairpersons during the subsistence of the suit.
 14. Further, on 1.7.2019, the court (Judge Eboso sitting) issued an order for the Chairman of the Applicant to appear before the court. They were served. The deponent in the application at hand was mute on this issue.



15. Finally, I find that the deponent has simply made a general averment at paragraph 7 of his supporting affidavit averring that “ it has recently come to the 2nd defendant’s knowledge that this matter was heard and determined”. I pose the question: How recent? Instead of giving a tangible account of how and when they made the discovery of this suit, the deponent delved into the merits of the dispute by adducing evidence in the platform of affidavit. Considering that judgment herein was delivered more than a year ago on 23.6.2022, then it was crucial for the applicants to demonstrate the manner in which they allegedly discovered this suit. This is another tell tale sign that the applicants do not deserve the exercise of this court’s discretion in their favour.
16. All in all, I find that the application by the 2nd defendant is not merited, the same is hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Nganga for Plaintiff

M/s Masaki for 1st Defendant

Macharia Gakuo for 2nd Defendant

Court Assistant: June

