Kitavi alias Muthoka Kitabi & another v Church of Jesus Christ of Latter-Day Saints-Kenya Registered Trustees & 10 others (Environment & Land Case 116 of 2009) [2023] KEELC 21489 (KLR) (14 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21489 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 116 OF 2009

A NYUKURI, J

NOVEMBER 14, 2023

BETWEEN

ANTONY MUTHOKA KITAVI ALIAS MUTHOKA KITABI ..... 1ST APPLICANT

WELLINGTON MBOLE MBINDYO ..... 2ND APPLICANT

AND

THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS-KENYA REGISTERED TRUSTEES ..... 1ST RESPONDENT

FRANCIS NZIOKA NTHENGE ..... 2ND RESPONDENT

NDANGAU MULI ..... 3RD RESPONDENT

HANNA KARANJA ..... 4TH RESPONDENT

SIMON KINYUA ..... 5TH RESPONDENT

ANNE MBURU ..... 6TH RESPONDENT

MUTUA KUNUTHIA ..... 7TH RESPONDENT

JOHN KITONYI NZIOKA ..... 8TH RESPONDENT

PATRICIA MUMBUA NGULI ..... 9TH RESPONDENT

NGUTA NDETI ..... 10TH RESPONDENT

MUTISO MUTYAUVYU ..... 11TH RESPONDENT

RULING

1. Before court is a Notice of Motion application dated 21st November 2022 filed by the tenth Defendant and the Intended Interested Party seeking the following orders;

    a. Spent.

    b. That this Honourable Court be pleased to allow the 2nd Applicant to be joined in the case as an interested party.

    c. That this Honourable Court be pleased to set aside its judgment dated 9th November 2017 and subsequent orders.

    d. That this Honourable Court be pleased to give leave to the Applicants to file their responses to the suit.

    e. Spent.

    f. That the Honourable Court be pleased to restrain the 1st Respondent from evicting the Applicants, demolishing houses, putting beacons, erecting permanent wall or in any manner whatsoever from disrupting the Applicants or their tenants peaceful use of the suit property being Athi River Makadara unsurveyed Plot No.16 which is within Plot No.337/1612 pending the hearing of this suit.

    g. Cost of the application.

2. The application is based on grounds on the face of it and supported by the Affidavits of the Applicants, which were both sworn on 21st November 2022. The 10th Defendant deposed that the two Applicants are administrators of the estate of the late Jesse Kitavi Musembi, who was their father. Further that the parcel of land which is referred to as unsurveyed Plot No. 16 is within the 1st Respondent's Parcel No. 337/1632 which now belong to both Applicants which they inherited from their father Jesse Kitavi Musembi.

3. He stated that he came to learn of the suit in October 2022 when the 1st Respondent tried to evict his tenants from the land, armed with a court order showing that they owned the land. The deponent stated that that he was surprised to find his name on the court orders yet he had not been served with any court documents, which prompted him to ask his advocates to look up the case, only for them to find that it had been concluded. It was his averment that the land had been allocated to his late father by Athi River Urban Council in 1970. He stated that the suit property had a dispute that led to formation of a taskforce by the government in 2011 to solve the dispute. He deposed that the taskforce had recommended that the 2.5 acres be excised from Plot No. 337/1612 as they were erroneously joined thereto. He stated that instead the 1st Respondent was given the entire land.

4. He further stated that they had occupied the land since 1970 and that they have tenants thereon, which are houses built by his father and that they have also been paying land rents and rates to the County Government. He also averred that the 1st Respondent had been bringing goons to the suit property to scare away the tenants to vacate the houses and that the 1st Respondent wanted to put up a perimeter fence. He also stated that he met the 1st Respondent who confirmed to him that he wanted to demolish the house thereon and build a wall as they claim that the whole land belongs to them.

5. He stated that he wished to defend the suit since he had not been aware of it and prayed that the court restrains the planned evictions by the 1st Respondent. He attached a certificate of confirmation issued on 10th December 2020, the judgment of this court, a purported allotment letter, taskforce report, photographs of houses, receipts for building materials and receipts for rent payment.

6. Wellington Mbole Mbindyo the second Applicant deposed that he was a co- administrator with the 10th Defendant in regard to the estate of his grandfather Jesse Kitavi Musembi. That the deceased was given land in the 1970s by Athi River Urban Council and that he is also a beneficiary of the property in dispute. He stated that he was not aware of this suit and only became aware after the 1st Respondent's attempt to evict them from the suit property. That they have permanent structures which were built by the deceased on the suit property and that they have been paying rates to the County Government. He stated that the 1st Respondent had threatened them with eviction and had brought a surveyor on the suit property to establish the boundary of the land.

7. He further stated that the 1st Respondent had brought workers on the suit property to put up a wall but that they chased them away.

8. The Application is opposed. Only the 1st Respondent opposed the application.

9. The 1st Respondent filed their replying affidavit dated 19th January 2023 and sworn by one Jadmaire Ndivo, a registered trustee of the 1st Respondent. He deposed that the first Respondent is the registered owner of the Land Registration No. 337/1632 situated in Machakos County, having purchased the same from Trupki Limited in August 2005, and registered on 9th March 2006.

10. She stated that the 1st Respondent filed this suit against the first Applicant and the other Defendants in 2008 owing to the former's unsuccessful attempts to erect a boundary wall around the suit property and that with the leave of court, all the Defendants were served by substituted service by advertisement on 9th July 2009. Further that he sought judgment against the 1st Applicant (the 10th Defendant in the case) for failing to enter appearance or file any defence whilst all the other Defendants responded to the suit, including the 1st Applicant's brother. She stated that if the 1st Applicant had occupied the suit property, he would have reasonably been aware of the Plaintiff's claim and that recently the 2nd Applicant admitted that both Applicants herein were aware of the 1st Respondent's ownership as early as November 2008.

11. He also averred that in a ruling and also the judgment delivered in the said suit, the court had made a determination that the Defendants' alleged occupation of the suit land did not give them any legal rights to the land and that the Plaintiff's registration as the owner of the land gave them absolute rights thereof.

12. The deponent maintained that it was not true that the Applicants were aware of this suit in 2022 because, in Machakos HCCC No. 45 of 2006:Willy M. Kimeu & 19 Others v Mavoko Municipal Council, Trupki Limited & The Commissioner of Lands, the 1st Applicant gave instructions for filing that suit where they sought injunctive orders; that since the 1st Respondent attempted to exercise their rights in 2008 by commencing construction of a wall around the suit property, then if the Applicants were in occupation they ought to have known that there was a dispute and therefore that the Applicants' claim is an afterthought aimed at preventing the 1st Respondent from enjoying the fruits of their judgment; that all the Defendants were served by substituted service and that no justification has been given why the 1st Applicant failed to enter appearance; that in regard to the taskforce report made in 2011, if the 1st Respondent's title was being challenged in December 2011, the Applicants did not challenge the 1st Respondent's title, despite the recommendations in the report; that no legal right

can be conferred by recommendations of a taskforce; that for purposes of maintaining good relations, the 1st Respondent initiated negotiations since 2014, which progressed in 2017 after entry of judgment and that all the Defendants including the 1st Applicant took part in the negotiations, culminating in amicable settlement with all the Defendants save the 1st Applicant.

13. He further deponed that in July 2022 there were negotiations between the 1st Respondent and the 2nd Applicant and that the 2nd Applicant had promised to meet the deponent in their Nairobi office, only for him to receive the instant application. He stated that the application was filed in bad faith to pressure the 1st Respondent to agree to the Applicants' terms.

14. He also stated that the Applicant had failed to give any justification for orders sought as the hardware receipt, Athi River Urban Council Receipt, bill and property rates payment request had no nexus with the suit property; that the Applicant had not exhibited any nexus between Plot No. 16 with the suit property and that no triable issues had been demonstrated.

15. As regards the Applicants allegation that they own 2.5 acres of the suit property, he stated that the entire suit property measures 4.4 acres and that the structures claimed by the Applicants are on 0.35 acres, occupied by third parties who are not tenants and that therefore their claim on the 1st Respondents property is unsubstantiated and without any legal or factual basis. He also stated that the confirmation of grant does not give the Applicants right over the suit property but allows them to protect the deceased's estate and that the 2nd Applicant has not shown any documents to show his interest in the suit property. He stated that the 1st Respondent has not threatened to evict anyone as it has pursued amicable settlements.

16. He stated that if the orders sought are allowed the 1st Respondent will suffer grave miscarriage of justice as it has been 17 years since it acquired the suit property and that the Applicants have been aware of this suit for 12 years but chose not to participate in the proceedings herein and that the judgment applies in rem.

17. He attached a copy of title, plaint, Daily Nation Advertisement dated 9th July 2009, Memorandum of Appearance and defence and notice of change of advocates, instruction note, letter dated 21st August 2009 to the Deputy Registrar, ruling dated 27th February 2012, judgment delivered on 9th November 2017, proposed development of perimeter wall survey, and agreements with those on the suit property.

18. In a rejoinder, the Applicants jointly filed a Supplementary Affidavit dated 7th February 2023. They reiterated that their claim was not on the whole but a portion of the suit property, and that the co-defendants are unknown to them and their names were maliciously included in the suit so as to get the land without their knowledge. They stated that they have never been aware of any previous court case as alleged and that the said 11th Defendant is not the Applicants' brother.

19. The 1st Applicant stated that the instruction note produced by the 1st Respondent was a forgery and that he was not aware of HCC No. 45 of 2006. He stated that he was aware of the 1st Respondent's claim on the suit property and that is why he appeared before the taskforce in 2011. They conceded that the 1st Respondent had approached them to have the matter amicably solved and that the later started threatening them with eviction and constructing a wall on the property. They also deposed that the Respondent had not addressed the report by the taskforce properly, yet all the relevant stakeholders were involved in the process. They stated that the individuals who had entered into agreement with the 1st Respondents are in occupation of the remaining portion and not their portion. They attached a draft defence.

20. The Application was canvassed by way of written submissions. On record are the Applicants' submissions dated 20th February 2023 and the 1st Respondent's submissions dated 24th February 2023.

Applicants' submissions

21. The Applicants submitted that the 2nd Applicant ought to be joined to the suit as one of the Administrators of the estate of late Jesse Kitabi as he is a beneficiary of the suit property. Counsel referred to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and the case of John Harun Mwau v Simone Hayson & 2 Others; Attorney General & 2 Others (Interested Parties) (2021) for the proposition that the 2nd Applicant had demonstrated that he was more than a mere Interested Party as he owned the suit property and that therefore he was a necessary party to these proceedings.

22. On the question of setting aside the judgment on record, counsel argued that the power to set aside judgment is discretionary and should be exercised to avoid injustice and hardship resulting from accident, inadvertent or excusable mistake. Counsel contended that although service had been by substituted service by advertisement, the Applicants were never aware of this suit and only became aware when the 1st Respondent began constructing a wall on the suit property. Counsel conceded that there were negotiations since 2014 but that the 1st Respondent never made the Applicants aware of the suit herein.

23. Counsel faulted service by advertisement on the ground that they were on the suit property. Reliance was placed on the case of Ephraim Njugu Njeru v Justine Bedan Njoka Muturi & 2 Others [2006] eKLR. Counsel argued that the draft defence demonstrated that the Applicants had a triable defence to the 1st Respondent's claim. On the prayer for restraining orders, they placed reliance on the case of Giella v Cassman Brown Co. Ltd [1973] EA 358 and argued that they had established a prima facie case, that they will suffer irreparable harm if the injunction is not granted and that the balance of convenience was in their favour. They cited several cases and the law in support of their submissions

1st Respondent's submissions

24. On their part, counsel for the 1st Respondent submitted that the issue to be determined was whether the application for setting aside judgment entered on 9th November 2017 is merited in view of the Applicants' conduct. While relying on the reasoning in the cases of David Wepukhulu Kasambula & Another v Robert Sundwa Wangolo [2018] eKLR and Kenya Power and Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR, counsel argued that there is no procedure provided in law for setting aside a final judgment like the judgment herein and that an aggrieved party's option is to seek review under Order 45 or appeal under Order 42 of the Civil Procedure Rules. Counsel was of the view that as the Applicants have not sought for review or appeal of the judgment, then their application ought to be dismissed.

25. Counsel maintained that the application did not disclose any good ground for setting aside the impugned judgment, nor had they offered any explanation for their failure to defend the suit despite being served and only filing the instant Application five years after judgment was delivered. It was their contention that the Applicants' attempt to revive the suit reeks of bad faith and attempts to frustrate the 1st Respondent's' right to its judgment. It was also their opinion that the Respondent stood to suffer great injustice if the orders sought are granted and that the Applicants had not met the threshold set out in the Giella v Cassman Brown case.

26. It was submitted for the 1st Respondent that the Applicants have no basis to claim the suit property as the allotment letter relied upon was in respect to unsurveyed plot and no evidence was given to show

that the same was within the 1st Respondents land. Further that it is trite that an allotment letter is not a document of title to land. Counsel relied on Section 26 of the *Land Registration Act* to argue that being the registered proprietors of the suit property, they had a title protected in law as no fraud was demonstrated by the applicants as shown in the court's ruling of 27th February 2012 and the judgment of this court. In that regard reliance was placed on the case of Shadrack Kuria Kimani v Stephen Gitau Nganga & Another [2017] eKLR.

27. As regards the Applicants' inaction, counsel submitted that the Applicants were aware of the 1st Respondent's bid to exercise their proprietary rights as early as 2008 when they began constructing a wall, when the Defendants including the 1st Applicant objected, and that those objections led to the filing of this suit. Counsel also pointed out that the 2nd Applicant had admitted having been aware of the 1st Respondent's ownership of the suit property in 2008, that the 1st Applicant instructed the firm of Mutua Advocates to represent him in Machakos HCCC No. 45 of 2006 as shown in the instruction note and that the 1st Respondent served all the Defendants herein by advertisement in the Daily Nation newspaper. Counsel relied on the case of Silas Kithiira v Timothy Mugambi [2021] eKLR for the proposition that substituted service is as effectual as personal service. Counsel maintained that the Applicants made false allegations in their affidavit which amounted to abuse of the court process.

28. Counsel also submitted that there was inordinate delay in filing the application herein and relied on the case of Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR. Further, counsel argued that the 1st Respondent stood to suffer greater injustice if the orders sought are allowed and that there must be an end to litigation. That this suit has been in court for 13 years before judgment was delivered and that no reason has been given as to why judgment should be set aside 5 years after delivery. To buttress that point, reliance was placed on the case of Patrick Gathenya v Esther Njoki Rugiri & Another [2008]e KLR. Counsel also argued that the Applicants had not met the threshold for grant of temporary injunction.

Analysis and determination

29. The court has considered the application, the response thereto and the rival submissions by the parties. The issues arising for determination are as follows;

    a. Whether there is justification to set aside judgment entered herein;

    b. Whether the 2nd Applicant should be joined to these proceedings.

30. It is not disputed that the 1st Respondent is the registered owner of the land parcel number Registration No. 337/1632 situated in Machakos County, (suit property) of which the Applicants claim a portion thereof. It is also not disputed that all the 11 Defendants herein were served by substituted service, and ten of them entered appearance and defended the suit while the 1st Applicant who was the 10th Defendant did not enter appearance; and the suit was heard to completion and judgment delivered on 9th November 2005 in favour of the 1st Respondent herein as against all the Defendants in this case. The Applicants allege not to have been aware of this suit until 2022 hence their prayer for setting aside of the judgment and joinder of the 2nd Applicant to the suit. Therefore, as the other 10 Defendants took part in the hearing of this suit, the judgment on record is a final judgment as against the 1st to 9th and 11th Defendants, but in so far as the 1st Applicant/10th Defendant is concerned, this judgment is an exparte judgment as against him as he did not participate in the trial.

31. Order 10 Rule 11 of the Civil Procedure Rules provide for setting aside exparte judgment as follows;

Setting aside judgment [Order 10, rule 11.]

> 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.

32. The 1st Applicant has alleged that he was not served. It is however on record that all the Defendants were served by substituted service by advertisement in the Daily Nation newspaper of 9th July 2009. Order 5 of the repealed Civil Procedure Rules, provided that where it was not possible to effect personal service, substituted service including service by advertisement was allowed as a lawful mode of service, and that remains the position to date under Order 5 Rule 17 of the Civil Procedure Rules 2010.

33. The power to set aside an exparte judgment where service was effected, is a discretionary power which must be exercised judiciously. In the case of Yooshin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) the Court of Appeal held as follows;

> Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances.

34. The purpose of applying discretion in circumstances such as those obtaining in this case was discussed in the case of Shah v Mbogo [1969] E.A. 116 at 123 as follows;

> That the discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.

35. I have considered the Applicants allegations that they were not aware of this suit. I note that this suit was filed in 2008, when the 1st Respondent sought to erect a wall on the suit property but was prevented by the Defendants and 2nd Applicant herein. The fact that the two Applicants herein opposed the 1st Respondent's construction of a wall on the suit property is a fact admitted by both Applicants. They also confirm that they were aware that the suit property was registered in the name of the 1st Respondent before the taskforce was set up in 2011. The 1st Respondent alleged that the 1st Applicant was a party in Machakos HCCC NO. 45 of 2006, but the latter denied knowledge of such suit and alleged that the instruction note done to J.N. Mutua & Company Advocates was a forgery. I also note that the Applicants confirmed to have been negotiating with the 1st Respondent since 2014, yet they allege ignorance of this suit. The 1st Respondent has stated that as they are a church and hoped to have a harmonious relation with the Defendants, they were negotiating with all the Defendants including the 1st Applicant and which resulted in agreements with the other Defendants, save the 1st Applicant. In view of these facts, I do not think that a suit filed in 2009 involving 11 Defendants, ten of which had entered appearance, could be kept as a top secret as against the 1st Applicant for 13 years between 2009 to 2022 when the other Defendants in this suit were also involved in the same negotiations which the Applicants concede to have participated in. In addition, while the Applicants alleged that they do not know the other Defendants, they simultaneously stated that their co-defendants are in occupation of the other part of the suit property. Hence, the totality of the circumstances obtaining herein and the conduct of the Applicants show that the Applicants are dishonest persons who have all along been aware of this suit, but chose to keep off these proceedings because they apparently were in possession of a taskforce recommendation made in their favour.

36. The court has taken into account the fact that the depositions in the Applicants' affidavits are not based on any truths, and noting that the 1st Applicant was lawfully served by substituted service, a mode of service allowed in law, it is the finding and holding of this court that service was effected on the 1st Applicant the judgment on record was therefore regularly entered into as against the 1st Applicant and that the 2nd Applicant was aware of this suit although he was not party to the same.

37. Having found that the judgment herein is regular as against the 1st Applicant, this court is enjoined under Article 159 of *the Constitution* to administer substantive justice and therefore despite being satisfied that service was lawfully effected on the 1st Applicant in 2009 as stated above, the court nonetheless must interrogate whether the Applicants intended defence raise any triable issues.

38. In the case of Mureithi Charles & Another v Jacob Atina Nyagesuka [2022] eKLR the court held as follows;

> ...It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication.

39. In the instant matter, the Applicants' claim is based on a letter which the Applicants refer to as a letter of allotment. I have considered that document and the same is dated 15th October 1970, allegedly made by Athi River Urban Council in favour of one Jesse Kitabi. That document is not an allotment letter. It is a commitment by Mr. Jesse Kitabi as a T.O.L (Temporary Occupation Licencee) to comply with several conditions among them, payment of rates, payment of registration fees of Kshs. 10/=, annual rent of Kshs. 45/=, that erection of buildings was not permitted, subdivision was not permitted, and the extend that he would use the land as a plot holder. That in my view, does not amount to an allotment letter and neither does it confer title to the late Jesse Kitabi. No ownership is conferred by a Temporary Occupation Licence. The same documents prohibited construction of buildings and therefore any buildings on the suit property were in contravention of the said Temporary licence. At any rate, even if the document were to be construed as an allotment letter, it is trite that an allotment letter alone is merely an offer and does not confer title.

40. Besides, the attached taskforce report does not contain any basis for the findings and recommendations made and in any event the same cannot confer ownership. In my view therefore, the documents relied upon by the applicants do not confer any ownership of the suit property on them. On the other hand, the 1st Respondents are the registered proprietor of the suit property and holds title based on purchase and transfer from the initial owner of the suit property, one Trupki Limited, and therefore the 1st Respondent's registration is anchored on lawful acquisition.

41. Section 26 of the *Land Registration Act* provides that a certificate of title shall be taken as conclusive evidence of proprietorship and the registered proprietor shall be the absolute and indefeasible owner and shall not be subject to challenge except where it is shown that there was fraud, misrepresentation, illegality, want of procedure or a corrupt scheme. In the instant case, the Applicants have not pleaded fraud, misrepresentation, illegality, want of procedure or corruption as against the 1st Respondent which would have called for the impeachment of their title. Allegations that the 1st Respondent bought the suit property while the Applicants were in occupation do not make the 1st Respondent's purchase of the suit property unlawful. Occupation per se, with no other entitlement under the law as against the title holder cannot confer ownership. Therefore, there is no material placed before this court to suggest any arguable claim by the applicants. In the premises, I find and hold that no triable issue has

been disclosed in the draft defence and therefore setting aside the judgment herein would not be in the interests of justice.

42. On the question of joinder of the 2nd Applicant, Order 1 Rule 10(2) of the Civil Procedure Rules allows joinder of a party as Interested Party, if their presence in the suit is necessary to enable the court determine the real issues in contention. The 2nd Applicant herein deponed that he sought to be joined to this suit on the basis that he is a co-administrator with the 1st Applicant in respect of the estate of the late Jesse Kitavi. Therefore, the 2nd Applicant's claim is one and the same as that of the 1st Applicant. This court has already found as stated earlier in this ruling, that the 2nd Applicant was aware of this suit and as conceded by himself, was involved in objecting to the 1st Respondent's construction of a wall on the suit property in 2008 and in the negotiations with the 1st Respondent and the Defendants herein since 2014. As the 2nd Applicant's claim is for the estate of Jesse Kitavi whose claim has already been found not to disclose any triable issue and the 2nd Applicant having been aware of this suit and not having bothered to seek to be joined, it is the finding of this court that the 2nd Applicant has come to court too late in the day and in any event, even if his participation in this suit were to be allowed, that will not change the findings arrived at in the judgment herein as the claim of the estate of the late Jesse Kitavi has not demonstrated any legal claim on the suit property, or any triable defence.

43. For the above reasons, this court finds and holds that the application dated 21st November 2022 lacks merit and the same is hereby dismissed with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE