



REPUBLIC OF KENYA



**Chonga v Janji & 4 others (Environment & Land Case 12 of 2017)
[2023] KEELC 22204 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22204 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 12 OF 2017
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

JUSTIN MWANGO CHONGA PLAINTIFF

AND

MWAROME MUNGA JANJI 1ST DEFENDANT

LUTU CHIBO MUNDU 2ND DEFENDANT

SALIM CHIBO MUNDU 3RD DEFENDANT

GEORGE MUNGA JANJI 4TH DEFENDANT

REGISTRAR OF LANDS (KILIFI) 5TH DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 3rd July, 2023 by the Defendant seeking the following orders:
 1. That this application be and is hereby certified as urgent and service thereof be dispensed with in the first instance and the same be heard ex parte for purposes of prayer 2, 3, 4, 5 and 6 hereof;
 2. That the firm of Marinda & Company Advocates be granted leave to come on record for the Applicants.
 3. That this Honourable Court be pleased to stay execution of the default judgment entered herein and the consequential Decree pending the inter partes hearing and determination of this application.
2. The application is supported by the grounds at the foot thereof and by the two sworn affidavits of the 3rd defendant filed on different dates. The grounds upon which the said application is brought are that the decree in this matter was arrived at without participation by any of the defendants leading to their



being condemned unheard in contravention of their constitutional rights and also the rules of natural justice; that the defendants only came to learn of this matter when the plaintiff came with the local chief to demand the title deed sometime in May 2023; that the defendants may suffer irreparable injury upon the execution of the decree; that the defendants have been in occupation of the suit property for a lengthy period; that the letter from the chief purporting to evidence service upon the defendants has inconsistencies and cross-examination is necessary; that they have a strong defence and should be allowed to defend the suit unconditionally; that the plaintiff stands to suffer no prejudice perchance the orders sought are granted.

3. The plaintiff filed his sworn affidavit dated 29/9/2023 in response to the motion. He deponed that the defendants were served with summons to enter appearance and hearing notices and so they were aware of the suit but ignored it to delay its hearing; that the defendants have perjured themselves in that they allege non service yet they entered appearance in person in February 2017 but failed to file defence; that the delay in responding to the suit has been inordinate and is unexplained; that in the circumstances the court ought to exercise its discretion judiciously; that the defendant ought to have followed up the matter with their advocate as the case belongs to them, yet they waited until they were prompted by the plaintiff's action to execute the judgment 3 years after the decree was issued; that the prayers for stay of execution have been overtaken by events the decree having been executed and a title deed issued. A copy of the title deed issued on 9/1/2023 has been exhibited and it shows that the plaintiff is now the registered owner of the land known as Chonyi /Bedzombo/ Kitsoeni /689.
 - a. The issues that arise for determination are as follows:
 - b. Should a stay of execution order issue?
 - c. Should the judgment of this court be set aside and the defendants be allowed to file their statement of defence?
4. The court record shows that the 1st - 4th defendants filed their memoranda of appearance in the present case but filed no defence. However, I would have expected that the respondent would have demonstrated that as per their legal entitlement after having filed appearance, they were served with a hearing notice for the hearing scheduled for 18/10/2021. It is the correct legal position that a person who has filed appearance should be served with a hearing notice for the formal proof of a case even where they have failed to file defence and they are entitled to cross-examine the witnesses for the claimant. For that reason alone the application dated 3/7/2023 must succeed. I therefore grant the same and order as follows:
 - a. The judgment entered against the defendants on 23/11/2021 the decree and all consequential orders are hereby set aside.
 - b. The 1st -4th defendants are granted leave to file their statement of defence
 - c. The defendants shall file and serve their statement of defence witness statements, lists of documents and all copies of all documents they require to rely on at the hearing as well as lists of witnesses and written witness statements within 30 days of this order.
 - d. The plaintiff shall be at liberty to respond by filing further documents upon service by the defendants.
 - e. In view of the conduct of the defendants in this matter of tarrying to file defence they shall bear the costs of the present application.
 - f. This matter shall be mentioned on 29/2/2024 for confirmation of compliance and for issuance of a hearing date.



**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 14TH
DAY OF DECEMBER, 2023.**

MWANGI NJOROGE

JUDGE, ELC, MALINDI

