



Nyakundi & another v Embakasi Ranching Co. Ltd & another (Environment & Land Case E117 of 2021) [2022] KEELC 3833 (KLR) (17 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E117 OF 2021**

MD MWANGI, J

MAY 17, 2022

BETWEEN

ASSA KIBAGENDI NYAKUNDI 1ST PLAINTIFF

LYDIA NYAKUNDI 2ND PLAINTIFF

AND

EMBAKASI RANCHING CO. LTD 1ST DEFENDANT

WAIRIMU NGANGA 2ND DEFENDANT

RULING

(On the exercise of the court’s inherent jurisdiction to remedy a procedural flaw, to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them)

Background

1. This matter was scheduled for Judgment in accordance with the court’s direction issued on 17th March 2022, after the hearing of the case and filing of submissions on behalf of the Plaintiffs. However, and upon a keen perusal of the court record, in the course of writing the judgement, the court came across a rather serious procedural flaw that unless rectified would render any judgment made by the court irregular.
2. It is after evaluating the legal options available that the court made a decision to instead make this ruling and give appropriate directions in order to remedy the flaw and prevent a miscarriage of justice.

Basis of the Court’s Action

3. The Court of Appeal in the case of *Kenya Power & Lighting Company Ltd v Benzene Holdings Ltd t/a Wyco Paints* (2016) eKLR, described the inherent jurisdiction of the court as a residual intrinsic



authority which the court may resort to in order to put right that which would otherwise be an injustice.

4. The court's inherent jurisdiction is reserved under sections 1, 1A, 3 and 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#).
5. The Court observed that section 3A of the [Civil Procedure Act](#) appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice to be met or to prevent abuse of the process of the court. This power has been broadened by the introduction in the year 2009 of overriding objective in sections 1A & 1B and in the year 2010 by Article 159 of the [Constitution](#).
6. The Court of Appeal in the above cited case and in an attempt to define the scope and extent of the inherent powers of the court made reference to the [Halsbury's Laws of England](#), 4th Edn. Vol. 37 Para. 14 where the authors expounded it as follows;

"The jurisdiction of the court which is comprised within the term 'inherent' is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

7. This suit was filed by the Plaintiffs herein, Assa Kibangendi Nyakundi and Lydia Nyakundi by way of an originating summons (OS) dated 29th March 2021. Alongside the OS, the Plaintiff had also filed a Notice of Motion application of the same date under the provisions of Order 40 Rule 1 of the [Civil Procedure Rules](#). The Notice of Motion was seeking for injunctive orders against the Defendant, Embakasi Ranching Company Ltd and the then interested party, Ms. Wairimu Nganga.
8. At that stage, Embakasi Ranching Company Ltd was the only Defendant. Ms. Wairimu Nganga was then referred to as the interested party.
9. The Notice of motion application of 29th March 2021 had been filed under Certificate of Urgency. When it was placed before Justice Eboso on 31st March 2021, he ordered that the Application be served for inter parties hearing on 5th May 2021.
10. Before the date for inter partes hearing (5.5.2021), the Plaintiffs filed yet another application dated 6th April 2021 under certificate of urgency praying for orders to allow them serve the notice of motion application dated 29th March 2021, the supporting affidavits together with the annexures thereto upon the interested party by way of registered post and or advertisement in a newspaper of national-wide circulation. Their basis was that they had been unable to effect personal service upon her.



11. The Application dated 6th April 2021 was considered by Justice S. Okong'o and allowed on 7th April 2021. The orders issued by Justice Okong'o directed as follows: -
 - a. Leave is granted to the Applicants to serve the Originating Summons and the notice of motion both dated 29th March 2021 together with the affidavits filed in support thereof and a notice of hearing thereof upon the interested party by way of substituted service through advertisement once on a week day in the Daily Nation or the Standard Newspaper.
 - b. That the interested party shall enter appearance within 15 days from the date of advertisement.
12. On 5th May 2021, the Notice of motion application was argued by Mr. Nyakundi, the 1st Plaintiff in person before Justice Eboso, after the court was satisfied that the Defendant and the interested party had been duly served. The Application was allowed in terms of prayer 2 pending the hearing and determination of the suit.
13. The court on the same day made further orders to the effect that:-
 - i. That because the interested party is the current registered proprietor (of the suit property), she will be made a 2nd Defendant as opposed to being designated as an interested party.
 - ii. The Plaintiff shall amend the Complaint accordingly within 14 days.
 - iii. The hearing of the main suit shall be on 10th March 2022.
 - iv. That the Plaintiff to serve hearing notice through a prominent notice in the Daily Nation or the Standard Newspaper on a week day.
14. Occasioned by the transfer of justice Eboso from ELC Milimani Law courts, the matter was mentioned before Lady Justice Mbugua on 7th December 2021. She ordered a mention before the Deputy Registrar on 20th January 2022 for the purpose of re-allocating the file to another court and issuance of a fresh hearing date. The Judge also ordered that the date for hearing be served by way of substituted service through an advertisement in a newspaper of national circulation.
15. The Deputy Registrar on 20th January 2022, re-allocated the matter to this court. On the mention date, the court noted that this being an Originating Summons, directions under Order 37 of the Civil Procedure Rules had not been given by the court. The matter was therefore set down for directions under order 37 of the Civil Procedure Rules on 8th February 2022.
16. On the 8th February 2022, Mr. Ayora Advocate appeared for the Plaintiffs. The Plaintiffs requested that the matter be set down for hearing as an undefended cause since the Defendants had been served but had failed to enter appearance. Directions could not however be given on the said date since the originating summons filed by the Plaintiffs and the supporting affidavits were missing from the court record. The Plaintiffs' Advocate was ordered to avail hard copies of the same on 9th February 2022, the following day.
17. On 9th February 2022, directions were given to the effect that this matter proceeds to hearing as an undefended cause since the Defendants were served by way of substituted service but did not enter appearance. That is how the matter ended up being heard on 28th February 2022.
18. From the court's record however, it is apparently clear that the orders of Hon. Justice Eboso issued on 5th May 2021 were never complied with. The amended originating summons filed on 6th May 2021 and the hearing notice were never served as directed by the court on 5th May 2021.



19. This is a serious procedural flaw or oversight that has come to the attention of the court before delivery of the Judgement.
 20. Having discovered this procedural flaw, this court cannot just close its eyes and fold its hands in resignation. The court has an option at its disposal for the sake of safeguarding the due process of the law. The court's option as explained in the case of *Kenya Power & Lighting Company Ltd v Benzene Holdings t/a Wyco Paints (supra)*, is to resort to its residual powers for the sake of ensuring the ends of justice are met.
 21. Accordingly, this court, exercising its inherent jurisdiction, declares the proceedings of 28th February 2022 a mistrial, as a result of the serious procedural oversight – failure to serve the 2nd Defendant with the pleadings as ordered by the court on the 5th May 2021.
 22. While this initiative by the court, on its own motion may seem unusual and unprecedented, it is not far-fetched. In addressing the issue of irregularly entered judgements, it is now well settled that a court of law may act suo moto and set aside such a judgement. The court does not have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion.
 23. The Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu v Marios Philotas Ghika & another* [2016] eKLR, held that:-

“In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment.

The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v Attorney General* [1986 – 1989] EA 456).”
 24. Similarly in this case, I adopt the same perspective that a court of law has a duty to take appropriate action, as in the instant case, to remedy an irregularity that may result to an injustice. The consequences of the procedural flaw in this matter would be as serious as those of an irregularly entered judgement; condemning a Defendant without notice of the allegations against her or affording her an opportunity to be heard in response to those allegations.

The court must act in order to preserve the integrity of the judicial process and the rules of natural justice.
 26. I accordingly direct that this case starts *de novo*. A mention date will be set down for further directions to ensure due compliance with the orders of the court.
 27. I make no orders as to costs.
- It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MAY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Ayora for the Plaintiffs

N/A for the Defendants

Court Assistant: Hilda

M.D. MWANGI

JUDGE

