



REPUBLIC OF KENYA



Lukase & another v Njiru Mihango Farmers Housing Scheme & another (Environment & Land Case 1088 of 2016) [2022] KEELC 2698 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1088 OF 2016**

LC KOMINGOI, J

MAY 12, 2022

BETWEEN

WYCLIFFE LUKASE 1ST PLAINTIFF

BETTY HABWE 2ND PLAINTIFF

AND

NJIRU MIHANGO FARMERS HOUSING SCHEME 1ST DEFENDANT

LIYO CHANDO 2ND DEFENDANT

RULING

1. This is the notice of motion dated 3rd September 2021 brought under article 159 of *the Constitution*, order 6, order 10, rules 6, 10 and 11 of the Civil Procedure Rules, sections 1, 1A, 3 and 3A of the Civil Procedure Rules and all enabling provisions of the law.
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the Judgment and decree issued in this case as against the 2nd Defendant and is hereby set aside and all consequential orders be vacated.
 5. That the 2nd Defendant be granted unconditional leave to defend this case and the 2nd Defendant's draft annexed defence be deemed as having been filed and served with the leave of the court.
 6. That costs hereof be provided for in any event.
2. The grounds are on the face of the application and are set out in paragraphs 1 to 9.



3. The application is supported by the affidavit of Liyo Chando, the 2nd Defendant/Applicant, sworn on the 3rd September 2021.
4. The Application is opposed. There is a replying affidavit sworn by Betty Habwe, the 2nd Plaintiff/Respondent sworn on the 26th October 2021.
5. On the 8th November 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.
6. I have considered the notice of motion, the affidavit in support, I have also considered the affidavit in response, the written submissions and the authorities cited. The issues for determination are:-
 - i. Whether the judgment dated 9th October 2019, decree and all consequential orders ought to be set aside.
 - (ii) Who should bear costs of this application?
7. It is the 2nd Defendant's/Applicant's case that he was not served with copies of plaint and summons to enter appearance in respect of this suit. He stated that he learnt of the existence when he was served with the application in ELC Misc. Application No E127 of 2021. In paragraph 15 of the supporting affidavit he states:-

“That I have now developed it with permanent structures, which is my matrimonial home where I have been living uninterrupted with my family”.
8. I have perused the notice of motion dated 2nd July 2021. It seeks orders of eviction against the 2nd Defendant/Applicant herein from Plot No 633 within Mihango Area.
9. It is not in doubt that the 2nd Defendant/Applicant herein resides on Plot No 633 within Mihango Area.
10. It is the Plaintiffs'/Respondents' case that the 2nd Defendant/Applicant was duly served with copies of plaint and summons to enter appearance but he neglected to enter appearance and/or file defence within the stipulated period. I have gone through the affidavit of Kelvin Balongo, Court Process Server sworn on 3rd October 2016. He states that the 2nd Defendant herein was pointed out by the 2nd Plaintiff who knew him. I find that the Plaintiffs/Respondents have demonstrated on a balance of probabilities that the 2nd Defendant/Applicant was served with copies of plaint and summons to enter appearance in this matter.
11. Be that as it may, the 2nd Defendant/Applicant is on the suit plot. He ought to explain how he got there. This can only happen if he is given an opportunity to ventilate his claim. I have seen the Draft Defence which is annexed to the application.
12. It is the Plaintiffs contention that the documents attached are in respect of a different plot number and that the draft defence does not raise triable issues.
13. In the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 the Court of Appeal, Duffus J stated thus:-

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, a defence on merits



does not mean, in my view, a defence that must succeed, it means as Sheridan, J. put it a “triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

14. Similarly, in the case of Jimnah Mwangi Irungu v Emily Wambui WairimU [2021] eKLR, the court stated that:-

“He refers to the case of John Engineering and Design Limited [2016] eKLR where it was held:-

Courts of law are enjoined by the principles of natural justice to ensure that unless it cannot be avoided, all its judgments and decisions are made after hearing all the parties concerned in the matter before it. A decision reached after hearing of parties on merit is more suitable than one made exparte.”

15. I am guided by the above authorities in finding that the 2nd Defendant/Applicant deserves an opportunity to be heard on his defence.

16. In conclusion, I find merit in this application and the same is allowed in the following terms:-

- (a) That the judgment dated 4th October 2019, the decree and all consequential orders are hereby set aside on condition that the 2nd Defendant/Applicant pays to the Plaintiffs a throw away costs of Kshs.15,000 within (21) days from the date of this ruling.
- (b) That the Draft Annexed Defence be deemed to be duly filed upon payment of the requisite fees.
- (c) That parties do comply with order 11 of the Civil Procedure Rules

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 12TH DAY OF MAY 2022.

L. KOMINGOI

JUDGE

In the presence of:-

Ms Muema for Mr. Banda for the Plaintiffs

No appearance for the 1st Defendant

Mr. Makori for the 2nd Defendant

Steve - Court Assistant

