



**Lune v Okwero & another (Environment & Land Case  
116 of 2017) [2022] KEELC 3673 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3673 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 116 OF 2017**

**JO OLOLA, J**

**MAY 12, 2022**

**BETWEEN**

**HASSAN MELE LUNE ..... PLAINTIFF**

**AND**

**ACHIENG JOHANA ..... 1<sup>ST</sup> DEFENDANT**

**WANDERA JOHANA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated March 3, 2021, Achieng Johana Okwero and Wandera Johana (the Defendants/Applicants) acting in person pray for orders:
  2. That this Honourable Court do issue a temporary stay of execution of the Judgment and order made by this Court on March 13, 2020 pending the hearing of this application inter-partes;
  3. That pending the inter partes hearing of this application, the Honourable Court do set aside orders all together and the matter be fixed for hearing on its merits; and
  4. That the costs of this application be provided for.
2. The application which is supported by an affidavit sworn by the 1<sup>st</sup> Defendant Achieng Johana Okwero is premised on the grounds that:
  - (i) The Defendants had instructed an Advocate to act for them in this matter but despite paying the said Advocate in full and giving them proper instructions, they have neglected to represent the Defendants in the matter;
  - (ii) The mistakes and negligence of an Advocate should not be visited upon an innocent litigant;



- (iii) The Defendants have a good defence and counter claim with high chances of success and it is in the interest of justice that they are not condemned unheard due to mistakes that are not of their own;
  - (iv) That the Defendants have lived on the suit land from 1996 to-date and have no other land or home;
  - (v) That the Defendants stand to suffer substantial loss unless the orders sought are granted; and
  - (vi) The Plaintiff is now in the process of executing the Judgment and it is in the interest of equity and justice that the orders sought be granted.
3. Hassan Mele Lune (the Plaintiff) is opposed to the application. In his Replying Affidavit sworn and filed herein on 11<sup>th</sup> March 2021, the Plaintiff avers that the said application is *res judicata* the Defendant's Notice of Motion dated 25<sup>th</sup> April, 2019.
  4. The Plaintiff further avers that the Defendants and their Advocates have never attended Court on the numerous occasions the case was mentioned and no reasons have been given to account for their continuous absence in Court. The Plaintiff further avers that the Defendants attempt to blame their Advocates is an afterthought and the same is not supported by any cogent evidence.
  5. The Plaintiff avers that the Defendants claim that they only became aware of the Judgment on 5<sup>th</sup> January, 2021 is not true as they had on 25<sup>th</sup> April, 2019 filed an application seeking to arrest delivery of the Judgment and for the case to be re-opened and be reheard.
  6. I have carefully perused and considered the application and the response thereto. I have similarly considered the submissions filed herein by the Defendants in person and the Learned Advocates for the Plaintiff.
  7. The Defendants have sought an order for stay of execution and for the Judgment delivered herein on 13<sup>th</sup> March, 2020 to be set aside. The Plaintiff however opposes the application on the grounds that the same is *res judicata* the Notice of Motion filed by the Defendants former Advocates dated 25<sup>th</sup> April, 2019.
  8. I have looked at the said Notice of Motion dated 25<sup>th</sup> April, 2019. The same sought an order arresting the delivery of the Judgment herein and to have the matter re-opened, heard and determined on merit. While it is true that some of the issues raised therein to justify the re-opening of the case may be similar to the issues raised by the Defendants herein, it was clear to me that the said application was never heard and finally determined.
  9. From the record herein, it is apparent that the said application which was filed on a skeleton file was heard on May 23, 2019 after which it was fixed for a Ruling on October 24, 2019. Before the Ruling could however be delivered, the impugned Judgment was delivered and on March 16, 2020 the Court noted that the application had been overtaken by events and no Ruling was therefore rendered.
  10. That being the case, I was not persuaded that the application herein offends Section 7 of the [Civil Procedure Act](#) which bars the Court from trying any suit or issue where the matter directly and substantially in issue had been directly and substantially in issue in a former suit between the same parties and had been heard and finally decided. The questions of *res judicata* does not therefore arise herein.



11. Turning to the Defendants' application, the general rule is that Courts have discretionary power to set aside an *ex-parte* Judgment where the applicant provides reasonable grounds so to do. The main aim of the Court in this regard is to ensure that justice prevails.
12. As was stated in *Patel v E.A. Cargo Handling Services Limited* (1974) EA 75, 76 BC:

“This discretion is intended to be exercised to avoid injustice of hardship resulting from accident, 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.”
13. In the matter before me, the Defendants aver that while they did instruct their Advocates and recorded statements to be filed in Court, the said Advocate neither filed the same nor did he attend Court when the matter was scheduled for hearing. It is therefore the Defendants case that they were unaware of the proceedings herein and only came to learn of the same on 5<sup>th</sup> January, 2021 upon being served with a letter requiring them to vacate the suit land.
14. In support of their case, the Defendants have annexed copies of receipts showing payments made to their former Advocates on record Messrs Michira Messah & Company Advocates and this Court was therefore not in doubt that they had duly instructed Counsel. It was however clear from a perusal of the record herein that the said Advocates did not attend Court on the occasions when the matter came up for hearing.
15. That being the case, this Court was minded to give the benefit of doubt to the Defendants and to agree that the said Law Firm did not represent them as they had expected and that as a result, they may not have been aware when the suit came up for hearing. It is a widely accepted principle of law that a litigant should not suffer due to an oversight on the part of his or her Advocate.
16. That being the case, I am persuaded that there is merit in the Defendants' application. However, given that the plaintiff was not to blame for the mistakes of the defence Counsel, the Defendants must bear the costs incurred by the Plaintiff in the previous proceedings.
17. In the circumstances I allow the application and set aside the Judgment delivered herein on March 13, 2020 on the condition that the Defendants shall pay the Plaintiff's thrown away costs assessed as KShs.30,000/- within 30 days from today.
18. In default, the application shall stand dismissed with costs to the Plaintiff.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

In the presence of:

Mr. Shujaa for the Plaintiff

No appearance for the Defendants

Court assistant - Kendi

**J. O. OLOLA**

**JUDGE**

