



**Mweke v Parkut (Environment and Land Appeal 5 of 2017)
[2022] KEELC 2732 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 5 OF 2017
MN GICHERU, J
JUNE 29, 2022
FORMERLY NAIROBI ELC APPEAL NO. 7 OF 2016**

BETWEEN

JOHN MUTHUSI MWEKE APPELLANT

AND

MOSOI PARKUT RESPONDENT

RULING

1. This ruling is on the Notice of Motion dated 21st September, 2021. The motion is brought under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 9 Rule 9 (b), Order 10 Rule 11, Order 42 Rules 13 and 17 read together with Order 5 Rules 15 and 16 and Order 42 Rules 18 and 23 of the *Civil Procedure Rules*.
2. The motion seeks the following main prayers;
 - a. That leave be granted to the firm of Nchogu, Omwanza & Nyasimi Advocates to come on record for the Applicant in place of Munyasya and Company Advocates.
 - b. That the ex parte judgment delivered on 26/11/2021 and any consequential orders issued thereafter including the order issued on 24th May, 2021 be set aside and the Appeal be heard afresh.
 - c. That leave be granted to the Respondent to file written submissions with respect to the appeal.
3. The application is supported by sixteen (16) grounds and a supporting affidavit by the Applicant which has one annexure, namely, a boundary dispute summons dated 7th September, 2021.



The gist of the grounds and the supporting affidavit is that the Applicant was condemned unheard because he was not served with the mention dates of 16th June, 2020 and 16th September, 2020. He was also not served with the judgment date of 22/11/2020.

He only became aware of the said judgment when the area chief told him that judgment would be executed on 20/9/2021. This was on the eve of implementation of the said judgment and decree.

The Applicant concludes by saying that he has critical arguments to raise in the case and that land matters are very emotive and a party who craves to be heard should not be denied a hearing.

4. The notice of motion is opposed by the Respondent who has sworn a twenty (23) paragraph replying affidavit with three (3) annexures.

In the affidavit, the Respondent deposes that the Applicant's advocate has always been served with all court processes and acknowledged receipt as per the hearing notice dated 5th May, 2021.

The Court would also always confirm service of pleadings and process every time the matter was mentioned before it.

The Respondent adds that on 10/12/2020, he served the Applicant who is his neighbor with the Court order but he took no action.

Finally, the Respondent says that the Court order has been implemented and it is now too late to go back.

5. I have carefully considered the Notice of Motion in its entirety including the grounds, affidavits, annexures and the entire record.

I find that the application dated 21st September, 2021 has no merit for the following reasons;

Firstly, I find that the Applicant's counsel was duly served with the hearing notice dated 5th May, 2021. The copy annexed to the Respondent's affidavit is clearly stamped Munyasya and Company Advocates and stamped 6th May, 2021.

I am also satisfied that the Applicant was served with the Court order by the Respondent on 10/12/2020 and took no action. This deposition in the Respondent's replying affidavit is not controverted by any evidence from the Applicant. It is totally unchallenged.

Secondly, the Applicant has not demonstrated what the so called critical arguments are. The judgment by Ochieng-Judge, covered all the relevant issues. It did not leave out any hanging issue. It was comprehensive and thorough. If the Applicant was to succeed in having the judgment set aside, he needs to show the critical arguments at this stage and not later. He cannot convince the Court without showing what it is that he intends to prove or what the Court left out in its judgment of 26th November, 2020.

For the above reasons, I dismiss prayers 4 and 5 of the Notice of Motion dated 21st September, 2021. I, however, allow prayer 3 because I find that the Applicants former counsel was served as per the affidavit of service by George Nyaora dated 25/11/2021.

Costs to the Respondents.

Dated signed and delivered virtually at Kajiado this 29th day of June, 2022.

M.N. GICHERU

JUDGE

