



REPUBLIC OF KENYA



**Karinga v Kamau (Environment & Land Case 350 of 2017)  
[2022] KEELC 3905 (KLR) (23 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3905 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 350 OF 2017  
BM EBOSO, J  
AUGUST 23, 2022**

**BETWEEN**

**WILFRED WAWERU KARINGA ..... PLAINTIFF**

**AND**

**LENNY KANINI KAMAU ..... DEFENDANT**

**RULING**

**COURT**

1. In light of the clerical error alluded to in paragraph 1 of the Ruling dated today, the error in the preceding Ruling dated August 23, 2022 is corrected by the court *suo motto* in terms of the correct designation of parties to this suit. Wilfred Waweru Karinga is the plaintiff while Lenny Kanini Kamau is the defendant. Lastly, the Court Registry shall replace the defective file folder forthwith. A fresh copy of the corrected Ruling shall be dispatched to Kenya Law Report alongside this order.

Dated at Thika this 19th Day of June 2023

B M EBOSO

JUDGE

1. The plaintiff instituted this suit against the defendant in 2017. His case was that in 1995, he sued one Joseph Muigai Macharia in Kiambu SPMC Civil Case No 2736 of 1995, seeking an order of transfer of land parcel number Lari/Maringi/T156 [the suit property] into his name. The final decree in the said suit was passed in his favour in December 2006. When he presented the said decree to the Land Registrar, he discovered that Joseph Mungai Macharia had transferred the suit property to the defendant during the pendency of Kiambu SPMC Civil Case No 2736 of 1995.
2. Consequently, he sought a declaration that the transfer of the suit property to the defendant by Joseph Macharia Muigai during the pendency of Kiambu SPMC Civil Case No 2736 of 1995 was null and



void. Further, he sought an order cancelling the said transfer. Lastly, he sought an order transferring the land into his name.

3. The defendant filed a statement of defence dated May 4, 2017 in which he averred that he bought the suit property from Joseph Muigai Macharia at Kshs 65,000 and he was registered as proprietor of the land on December 27, 1995. It was his case that there was no inhibition in the relevant parcel register at the time of purchase.
4. Hearing of the case commenced on July 3, 2019 before Gacheru J The plaintiff testified and was cross-examined by the defendant's counsel, Mr Macharia. Upon re-examination, the plaintiff closed his case. On that day, the defendant's counsel informed the court that the plaintiff was on his way to court but had not arrived in court and could not be reached on phone. The court granted the defendant a last adjournment. Hearing of defence case was adjourned to October 15, 2019. On October 15, 2019, the defendant did not attend court to give evidence and his advocate, once more, pleaded with the court to give the defendant yet another last adjournment. Upon considering the application, the court found that the defendant had been accommodated sufficiently and directed parties to file their written submissions.
5. In the intervening period, the defendant's advocates filed an application dated November 2, 2019, seeking leave to cease acting for the defendant. The defendant's advocate, Mr Macharia K Karanja, swore an affidavit of service deponing that he duly served the application on the defendant on December 3, 2019. Consequently, on February 18, 2020, the Deputy Registrar granted the law firm the plea for leave to cease acting for the defendant.
6. When the matter was subsequently listed before Gacheru J on April 28, 2020, she once again gave the defendant a last chance to tender defence evidence on June 22, 2020. There was no attendance on June 22, 2020 and September 30, 2020. On November 23, 2020 Gacheru J listed the matter for mention on April 14, 2021 for the purpose of taking judgment date. Judgement was eventually delivered by Gacheru J on July 29, 2021.
7. On or about April 25, 2022, the defendant brought a notice of motion dated April 21, 2022, seeking an order setting aside the Judgment rendered on July 29, 2021. Further, he sought an order consolidating this suit with Kiambu SPMC Civil Case No 2736 of 1995. He further sought an order granting him leave to amend his defence and bring a counterclaim. The said application is the subject of this ruling.
8. The application was supported by the defendant's affidavit sworn on April 21, 2022, in which he deposed that the Judgment rendered on July 29, 2021 was procured unprocedurally and with the specific aim and intent of unjustly depriving him of the suit property. He added that he was never served with a hearing notice relating to the suit herein. He further deposed that he was never notified about Kiambu SPMC Civil Case No 2736 of 1995.
9. The plaintiff opposed the application through a replying affidavit sworn on May 11, 2022 and grounds of opposition of even date. He deposed that the applicant entered appearance in this suit on May 4, 2017 through M/s Wanyoike & Macharia Advocates. He added that the court severally indulged the defendant and gave the defendant an opportunity to tender evidence to no avail. He further deposed that through his advocate, the plaintiff duly notified the defendant about the Judgment through a letter dated September 23, 2021 and served him with the bill of costs on February 1, 2022. He contended that the plea for an order of consolidation was incompetent because Kiambu SPMC Civil Case No 2736 of 1995 was concluded long time ago. The plaintiff deposed that the application under consideration was triggered by his response to the defendant's application in Kiambu SPMC Civil Case No 2736 of 1995 in which the defendant sought an order setting aside the Judgment of the Magistrate Court. He urged the court to reject the application.



10. The application was canvassed through written submissions dated May 18, 2022, filed through the firm of Wanjiru Nguru & Associates Advocates. Counsel submitted that the issue that fell for determination in the application was whether the court had the powers to issue the orders sought. Counsel argued that there was no return of service on court record and that the defendant lacked capacity to leverage on internet and the other changes that were introduced by the Judiciary due to COVID 19.
11. On the plea for consolidation of this suit with Kiambu SPMC Civil Case No 2736 of 1995, counsel submitted that the defendant was neither made a party to the said suit nor notified about it. Counsel for the defendant submitted that the plaintiff had employed “mercenary and ambush tactics” in an attempt to acquire the suit property. Counsel argued that a consolidation of the two suits would result in the settling of the dispute conclusively.
12. The plaintiff filed written submissions dated May 25, 2022 through M/s G M Muhoro Advocates. Counsel for the plaintiff submitted that the issue that fell for determination was whether there were sufficient grounds for the setting side of the Judgment rendered on July 29, 2021. Counsel submitted that the contention that there was no return of service filed in court and that the defendant was not aware of the proceedings was not bonafide because the defendant had an advocate who participated in the hearing. Counsel argued that it was the defendant who spurned multiple opportunities granted to him to attend court and defend the suit. Counsel submitted that no sufficient reason had been advanced to warrant the setting aside of the Judgment in this suit.
13. On the plea for an order of consolidation, counsel submitted that an order of consolidation was not available because Kiambu SPMC Civil Case No 2736 of 1995 was determined long time ago. Counsel urged the court to dismiss the application.
14. I have considered the application, the response to the application, and the parties’ respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The following three key issues fall for determination in the application: (i) Whether the applicant has satisfied the relevant criteria for setting aside a Judgment such as the one in this suit; (ii) Whether the applicant has satisfied the criteria for consolidation of suits; and (iii) Whether the applicant has satisfied the criteria upon which courts grant leave to amend pleadings. I will make brief sequential pronouncements on the three issues in the above order.
15. The first issue is whether the applicant has satisfied the criteria for setting aside a judgment such as the one in this suit. The Court of Appeal outlined the following relevant principle in *James Kanyita Nderitu & another v Marios Philota Ghikas & another* [2016] eKLR:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (supra), *Patel v E A Cargo Handling Services*



Ltd (1975) EA 75, Chemwolo & Another v Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).”

16. Suffice it to state that, the court’s discretionary jurisdiction to set aside a regular judgment is unfettered. The discretion must, however, be exercised judiciously and based on clear principles and evidence.
17. The impugned Judgment was neither an ex-parte nor a default judgment. I say so because the applicant entered appearance and filed a defence. Through his counsel, the applicant cross-examined the plaintiff. Upon the plaintiff closing his case, the applicant elected not to attend court to present evidence. Indeed, in an affidavit sworn on November 21, 2019 by the applicant’s advocate [Mr Macharia K Karanja] in support of the advocate’s plea for leave to cease acting for the applicant, the applicant’s advocate made the following depositions about the applicant’s attitude towards this case:
  - “2. That the defendant instructed our firm to act for him in this matter and we filed defence on his behalf.
  3. That the matter thereafter came to court for mention for pretrial and it was later fixed for hearing on July 3, 2019.
  4. That on the hearing date I talked to the defendant and he informed me that he was on the way coming and he would be in court by 10.00 a.m. hence the matter was confirmed for hearing.
  5. That thereafter I called him and he never picked my calls and the matter proceeded in his absence at noon and he later on alleged he got unwell that he never came to our office to avail any documents or pay our fees.
  6. That I also informed him of the hearing date on October 15, 2019 on phone when the matter was scheduled for defence hearing and he promised to be available.
  7. That on October 14, 2019 before I left office at 5.00 pm I called the defendant on mobile no 0721 686880 and confirmed he will be available for hearing only for him to fail to turn up on the hearing date.
  8. That on October 15, 2019 before the commenced (sic) I talked to the defendant and he claimed he was on the way coming but the time the matter was to proceed he was not in court nor was he picking my calls and the defence case was closed in his absence.
  9. That the matter is scheduled for submissions on December 3, 2019 and I pray that we be allowed to cease acting for him in this matter for want of instructions.”
18. It is clear from the above depositions by the applicant’s advocate that the applicant was the author of the predicament he now finds himself in. He elected not to have his day in court. Indeed, a perusal of the applicant’s affidavit in support of the application under consideration does not disclose any specific occasion when the applicant was not notified about the proceedings in this suit. The contention that the Judgment rendered by Gacheru J on July 29, 2021 was procured unprocedurally and with the specific aim of unjustly depriving the applicant of the suit property is, in my view, not supported by the evidence before this court. Given the above conduct of the applicant, I do not think he can be said to have met the criteria for the court’s exercise of judicial discretion to set aside a judgment similar to the one in this suit. That is my finding on the first issue.



19. The second issue is whether the applicant has satisfied the criteria for consolidation of suits. The applicant sought an order consolidating this suit with Kiambu SPMC Civil Case No 2736 of 1995. Both suits were conclusively determined. The judgment in Kiambu SPMC Civil Case No 2736 of 1995 was rendered in a Magistrate Court about two decade ago and has not been set aside by the Magistrate Court which rendered it. Secondly, I have in the preceding paragraph made a finding that the applicant has failed to satisfy the criteria for setting aside the Judgment in this suit. In the above circumstances, it follows that no consolidation order can issue in relation to the two determined suits.
20. The last issue is whether the applicant has satisfied the criteria upon which courts exercise jurisdiction to grant leave to amend pleadings. The applicant's plea for an order setting aside the Judgment in this suit has failed. It follows that the plea for leave to amend pleadings and bring a counterclaim in this suit cannot succeed because such an order is only available in a pending suit.
21. The result is that the defendant's application dated April 21, 2022 is rejected for lack of merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF AUGUST 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

**Mr Ndungu for the Plaintiff**

**Court Assistant: Ms Osodo**

**CORRECTED AT THIKA THIS 19TH DAY OF JUNE 2023**

**B M EBOSO**

**JUDGE**

