



REPUBLIC OF KENYA



**Kamunya v Kaikai & another (Environment & Land Case 18 of 2013)
[2022] KEELC 4847 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4847 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 18 OF 2013
CA OCHIENG, J
SEPTEMBER 20, 2022**

BETWEEN

MICHAEL KIBOI KAMUNYA PLAINTIFF

AND

MARY KAIKAI AKA KASHAMBI KAIKAI 1ST DEFENDANT

BRIGHTSUN PROPERTIES LIMITED 2ND DEFENDANT

RULING

1. What is before court for determination is the 1st defendant's Notice of Motion Application dated the February 21, 2022 brought pursuant to article 50 of the *Constitution*, sections 3 and 3A of the *Civil Procedure Act*; order 14 rule 1 and order 51 rule 1 of the *Civil Procedure Rules*. The defendants seek the following orders:
 1. that this honourable court be and is hereby pleased to set aside/vacate the orders of October 27, 2021.
 2. that this honourable court be and is hereby pleased to issue summons to the Kajiado County Land Registrar.
2. The application is supported by the affidavits of Winfred Clarkson Ochieng and Stephen Lesantos Larabi and grounds that this matter came up for hearing on October 27, 2021 and during that time, the advocate who was in conduct of the matter one Hon Stephen Larabi had just been appointed as a magistrate by the Judicial Service Commission. Further, following his appointment, Hon Larabi instructed counsel at Machakos to attend to the matter. They claim the counsel appeared at the court but the matter had already been called and orders issued. They explain that at the time of the said hearing, it is only the Land Registrar's testimony that was remaining. They reiterate that the inadvertent absence of the 1st defendant's counsel should not be meted on the 1st defendant.



3. The plaintiff opposed the instant application by filing a Replying Affidavit sworn by Stanley Kingara, his advocate where he explains that on September 29, 2021, the defense counsel applied for adjournment and the matter was rescheduled for hearing on October 27, 2021. He insists Mr Ochieng who appeared on September 29, 2021 was aware of the hearing date. Further, on October 27, 2021 the defense counsel did not attend court. He contends that no evidence has been produced to confirm Mr Larabi was appointed as a magistrate and if he indeed he had been appointed, then he could not instruct a counsel as claimed. He states that the 1st defendant was served with the plaintiff's submissions on November 30, 2021 and no explanation has been tendered on why she did not immediately make the instant application before this court. He reiterates that the plaintiff will be prejudiced as he already filed and served his submissions and this in essence means the 1st defendant will craft his evidence to remedy issues raised therein.
4. The 1st defendant filed a Supplementary Affidavit sworn by Winfred Clerkson Ochieng where he explains that Mr Larabi was the advocate in conduct of the matter and he held his brief in court on September 29, 2021 to seek an adjournment so as to summon the Land Registrar. He avers that Mr Larabi was transcending to the Judiciary in the capacity as a magistrate and waiting swearing hence he instructed an advocate in Machakos but when the said advocate arrived, the matter had already been called and directions given. He states that on October 27, 2021, he was out of town handling a matter, being Bungoma CR No E372 of 2021, R Vs Victor Nyongesa and Patrick Juma. He confirms that Hon Larabi was subsequently sworn in and posted to Nyahururu. He reiterates that the only issue remaining is the production of the report dated the September 28, 2010 and it is in the interest of justice if the application was allowed.

The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the Notice of Motion Application dated the February 21, 2022 including the respective affidavits and rivalling submissions, the only issue for determination is whether the order issued by this court on October 27, 2021 should be set aside and the District Land Registrar/Surveyor summoned to produce the report dated the September 28, 2010.
6. The 1st defendant in her submissions reiterated her averments as per the affidavits and stated that she should not suffer consequences of actions that are excusable and beyond her control. Further, that failure to attend the hearing was due to sufficient cause and the orders of October 27, 2021 should hence be set aside. To support her arguments, she relied on the following decisions: *Philip Ongom, Capt vs Catherine Nyero Owota Civil Appeal No 14 of 2001* (2002) UGSC 16; *Wachira Karani vs Bildad Wachira* (2016) eKLR; *Mbogo vs Shah* (1968) EA 93 and *CMC Holdings Limited vs James Mumo Nzioki* (2004) eKLR.
7. The plaintiff in his submissions reiterated his averments as per the Replying Affidavit and explained the proceedings in this matter and insists there is no evidence to suggest that the 1st defendant was denied a fair hearing. He avers that that Mr Ochieng took the hearing date for the October 27, 2021. Further, that the Supporting Affidavits do not indicate when Mr Larabi was appointed as a magistrate. He further submits that the name of the advocate sent to hold brief is not indicated in the affidavit and the said advocate has not sworn any affidavit. He insists that he will be greatly prejudiced since he already filed his submissions and that the application is premised on provisions of law which are not relevant. Further, that authorities cited are directed at instances where a party seeks to set aside *ex parte* judgment.



8. The grounds upon which an order of the court may be reviewed or set aside is stipulated in section 80 of the [Civil Procedure Act](#) as well as order 45 of the Civil Procedure Rules.

Section 80 of the [Civil Procedure Act](#) provides that:

Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9. While order 45, rule 1(1) of the Civil Procedure Rules stipulates thus:

Any person considering himself aggrieved - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

10. In this instance, the 1st defendant seeks for the court to set aside the orders issued on October 27, 2021 and issue summons to the District Land Registrar to produce a report dated September 28, 2010 which was prepared by the District Surveyor. The plaintiff has vehemently opposed the application insisting it will be prejudiced if the orders sought are granted since he already filed his submissions. I note the report dated the September 28, 2010 which is sought to be produced was already filed in court. Further, I have perused the pleadings as well as proceedings herein and note the fulcrum of the dispute revolves around alleged encroachment and boundaries. Further, both the Plaintiff and 1st defendant claim ownership over their respective portions of land.

11. In the case of *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

This discretion (to set aside *ex parte* proceedings or decision) is intended so to be exercised to avoid injustice or 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.”(emphasis added)

12. Further, Mativo J in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR described sufficient cause as follows:

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

13. Based on the facts as presented while relying on the legal provisions cited above and associating myself with the quoted decisions, I opine that the 1st defendant has actually demonstrated sufficient cause as the counsel who was handling the matter was employed as a magistrate by the Judiciary. Further,



from the pleadings herein, it is my considered view that the evidence of the District Land Registrar or Surveyor is key to assist the court arrive at a just and proper determination of the matter. Further, I opine that since the report sought to be produced was already filed in court, the plaintiff must have had a chance to peruse it. It is trite that matters do not belong to counsels and I note the 1st defendant including a witness had already testified and the only evidence remaining was for the District Surveyor who is an expert witness. In the interest of justice while relying on article 50 of the *Constitution*, I will exercise my discretion by proceeding to set aside the orders issued on October 27, 2021 and direct that the District Land Registrar or Surveyor be summoned to produce the report in court. It is my considered view that except for having filed submissions, the plaintiff has not demonstrated what prejudice he will suffer if the orders issued on October 27, 2021 are set aside. I opine that he can be compensated by way of costs and granted leave to file supplementary submissions if need be.

14. In the circumstances, I allow the Notice of Motion application dated the February 21, 2022 and proceed to set aside the orders issued on October 27, 2021. I further direct that the 1st defendant's case be reopened to enable her summon the District Land Registrar or District Surveyor, Kajiado to produce the report dated the September 28, 2010.

I award the costs of the Notice of Motion Application dated the February 21, 2022 to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG

JUDGE

