



**Maina v Mariru Park Limited & another (Environment & Land Miscellaneous Case 355 of 2011) [2022] KEELC 13464 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13464 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND MISCELLANEOUS CASE 355 OF 2011**

**JO MBOYA, J  
OCTOBER 6, 2022**

**BETWEEN**

**JOSEPH GATENE MAINA ..... PLAINTIFF**

**AND**

**MARIRU PARK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ABDI MWENDA ABDULRHAMAN ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide the Notice of Motion Application dated the April 14, 2022, the 2<sup>nd</sup> Defendant/Applicant herein has approached the court seeking for the following Reliefs;
  - i. ....Spent.
  - ii. There be a stay of the Judgment delivered on the February 20, 2018 and all consequential orders pending the hearing and determination of this Application.
  - iii. The Judgment delivered on the 20th February 2018 be and is hereby set aside and the 2<sup>nd</sup> Defendant is granted unconditional Leave to Defend the suit.
  - iv. Costs of the Application be provided for.
2. The Subject Application is premised on the grounds alluded to in the body thereof and same is further supported by the affidavit of the 2<sup>nd</sup> Defendant/Applicant sworn on the April 14, 2022. For clarity, the deponent of the supporting affidavit has attached various annextures thereto.
3. Following the service of the subject Application, the Plaintiff/Respondent duly responded thereto by filing a Replying Affidavit sworn on the June 16, 2022 and in respect of which the Plaintiff/Respondent has enumerated various reasons, inter alia imploding the Doctrine of latches.



### **Deposition by the parties:**

- i. The 2<sup>nd</sup> Defendant's/applicant's Case:
4. Vide Supporting affidavit sworn on the April 14, 2022, the deponent has averred that same entered into a lawful Sale Agreement with the 1<sup>st</sup> Defendant herein whereupon same bought and purchased Plot number 187 Mariru Park Ltd, Mwiki Kasarani.
5. The deponent has averred that upon purchasing the suit property, same was taken to the ground by a Director of the 1<sup>st</sup> Defendant and thereafter same entered upon and took possession of the suit property.
6. On the other hand, the deponent has added that upon taking possession of the suit property, same commenced to and started the construction of a Three bedroomed house, which house is stated to have been completed on or about the November 22, 2009.
7. Besides, the deponent has averred that other than the Three bedroomed house, which same constructed on the suit plot, same has also constructed two-one bedroomed Units and a bed-seater on the suit property.
8. Be that as it may, the deponent has averred that on or about the August 10, 2011, same was served with Summons to enter appearance and Plaint, pertaining to and concerning the subject matter.
9. Pursuant to and upon being served with the summons to enter appearance, the deponent has averred that same was obliged to and indeed handed over the summons to enter appearance and the Plaint to his nominated advocate, namely, M/s Njiru Mbogo and Company Advocates with instructions to enter appearance and to file the requisite pleadings on his behalf.
10. At any rate, the deponent has further added that same also availed and supplied his advocates with all the supporting documents pertaining to and concerning his ownership over and in respect of the suit property.
11. Other than the foregoing, the deponent has added that after instructing his advocates, same kept checking with the advocate to authenticate and confirm the status of the suit. However, the deponent has averred that during the various occasions, when he checked the status of the suit with his advocates, same was informed that no hearing date have been taken and that when a hearing date will have been fixed, the advocate would get in touch.
12. Be that as it may, the deponent have further averred that despite the various efforts to ascertain whether a hearing date had been set or fixed, no substantive information was forthcoming from his previous advocate.
13. However, the deponent has also averred that the situation relating to lack of status update and information persisted until on or about March 2022, when same was served with a Draft Decree, arising from and pertaining to the subject matter.
14. Upon being served with the Draft Decree in respect of the subject matter, the deponent has averred that same proceeded to and instructed his current advocates on record, who thereafter took up the matter and made various enquiries, to ascertain the steps if any that had been taken by his previous advocates.
15. Further, the deponent has added that after he instructed his current advocates, same made efforts and thereafter ascertained that indeed no Defense was ever filed on his behalf by the previous advocate.



16. In this regard, the deponent has stated that the failure to file an appropriate Statement of Defense was a mistake on the part of his previous advocate and that such a mistake ought not to be visited upon himself.
17. In any event, the deponent has added that same lawfully and legitimately purchased the suit property from the 1<sup>st</sup> Defendant and that on the basis of the lawful purchase and acquisition of the suit property, same therefore has a valid Defense to the Plaintiffs claim.
18. Premised on the foregoing, the deponent has therefore stated that it would be appropriate to set aside and vary the Default Judgment that was entered against same and thereafter to afford unto him an opportunity to be heard in respect of the subject claim.
19. Consequently, the deponent has implored the court to find and hold that the circumstances leading to the entry and endorsement of the Default Judgment and the consequential orders, were neither deliberate nor intentional.

**b. Response by the plaintiff/respondent:**

20. The Plaintiff/Respondent herein opposed the application and in this regard same filed a Replying affidavit sworn on the June 16, 2022.
21. According to the Plaintiff/Respondent, the Defendants herein, inclusive of the 2<sup>nd</sup> Defendant/Applicant were duly and lawfully served with the Summons to enter appearance and Plaintiff, pertaining to and in respect of the subject matter.
22. Further, the Plaintiff/Respondent has averred that having been duly and lawfully served, it was incumbent upon the 2<sup>nd</sup> Defendant/Applicant to take necessary and appropriate steps to ensure that the requisite pleadings and responses, where appropriate, are duly filed with accordance with the law.
23. At any rate, the Plaintiff/Respondent has added that even when and where the responses were duly filed in accordance with the law, it was still incumbent upon the 2<sup>nd</sup> Defendant/Applicant to follow up with his advocate or legal counsel and to ascertain the status/progress of the matter.
24. Nevertheless, the Plaintiff added that as pertains to the subject matter, the 2<sup>nd</sup> Defendant/Applicant failed to take appropriate steps and actions to ensure that his interests were duly protected, either by his nominated advocate or even by himself.
25. Other than the foregoing, the Plaintiff/Respondent has added that even after the 2<sup>nd</sup> Defendant/Applicant allegedly instructed the firm of M/s Njiru Mbogo and Company Advocates, same does not appear to have followed up with the said law firm to ascertain the progress and status of the subject suit.
26. In this regard, the Plaintiff/Respondent has averred that the conduct of the 2<sup>nd</sup> Defendant/Applicant was devoid of due diligence and hence same ought not to benefit from the equitable discretion of the court.
27. Finally, the Plaintiff/Respondent has added that following the lapse of time, one of his critical witnesses and indeed the person who sold unto to him the suit property, has since passed on.
28. Consequently, the Plaintiff/Respondent has added that in the absence of the vendor who sold the suit property unto him, the setting aside of the subject Judgment would indeed subject same to undue prejudice, detriment and inconvenience.



29. In view of the foregoing, the Plaintiff/Respondent has therefore implored the court to find and hold that the 2<sup>nd</sup> Defendant/Applicants application is defeated by the Doctrine of laches as well as want of diligence on the part of the 2<sup>nd</sup> Defendant/Applicant.

### **Submissions by the parties:**

#### **a. Applicant's submissions:**

30. The Applicant herein filed written submissions dated the July 4, 2022 and in respect of which the Applicant herein has raised two pertinent issues for consideration.
31. First, the Applicant has contended that the failure and or neglect to enter appearance and file Statement of Defense in respect of the subject matter was as a result of a mistake on the part of his duly instructed advocate and not his mistake.
32. Further, Learned Counsel for the Applicant has added that the mistake in question was inadvertent and excusable and that such a mistake ought not to be visited upon the Litigant.
33. On the other hand, counsel for the Applicant has added that the impugned mistake was not a calculated attempt by or on behalf of the 2<sup>nd</sup> Defendant/Applicant to delay, obstruct or otherwise frustrate the Due process of the court.
34. Secondly, Counsel for the 2<sup>nd</sup> Defendant/Applicant has submitted that the subject matter touches on and or concerns ownership of land. Consequently, the counsel for the Appellant has implored the court that owing to the nature of dispute, it would be appropriate and expedient to have the dispute heard and determined on merits.
35. At any rate, Learned Counsel for the Applicant has submitted that it is imperative to afford the 2<sup>nd</sup> Defendant/Applicant an opportunity to be heard, in accordance with and adherence to the provisions of Article 50(1) of the [Constitution 2010](#).
36. Finally, counsel for the Applicant has invited the court to find and hold that the setting aside of the impugned Judgment shall not cause or occasion any prejudice to the Plaintiff/Respondent. In any event, counsel for the Applicant added that whatever prejudice, if any, is compensable in monetary terms by an award of costs.
37. In support of the foregoing submissions, Learned Counsel for the Applicant has cited various decisions, *inter-alia* [Patel v East Africa Cargo Handling Services Ltd](#) [1974] EA page 75, [William Mtumauta Methanga v Baikiamba Kirimania](#) [2017] eKLR, [Sebei District and Administration v Gasyali & Others](#) [1968] EA 300, [Mbaki & Others v Macharia & Macharia](#) [2005] 2 E A page 206, [Philip Keipto Chewolo & Another v Augustine Kubende](#) [1988]eKLR and [Patriotic Cards Ltd v James Kipchirchir Sambu](#) [2018]eKLR.

#### **b. Plaintiff's/respondent's Submissions**

38. On his part, Learned Counsel for the Plaintiff/Respondent filed written submissions dated the July 27, 2022 and in respect of which same similarly identified two issues for determination.
39. First and foremost, counsel for the Plaintiff/Respondent submitted that having been duly and lawfully served with the summons to enter appearance and Plaintiff in respect of the subject matter, it behooved the 2<sup>nd</sup> Defendant/Applicant to take appropriate and necessary steps to protect and vindicate his rights in respect of the subject matter.



40. However, despite the need and necessity to exhibit and display diligence, the 2<sup>nd</sup> Defendant/Applicant adopted a lacklustre approach in the execution of his mandate in the matter.
41. On the other hand, counsel for the Plaintiff/Respondent added that even from the contents of the Supporting affidavit, the general conduct of the 2<sup>nd</sup> Defendant/Applicant does not speak to exercise Due diligence and due care.
42. Secondly, counsel for the Plaintiff/Respondent has submitted that owing to the lapse of time, his crucial and critical witness, namely, Lucy Waithira Kimani who sold the suit property unto him, has since passed on.
43. Following the death of the said critical witness, the counsel for the Plaintiff/Respondent has submitted that the setting aside of the impugned Judgment, would therefore expose same to serious prejudice, detriment and grave Injustice.
44. In any event, counsel for the Plaintiff/Respondent has added that the nature and kind of prejudice that the Plaintiff/Respondent would suffer would not be compensable in monetary terms, even by an award of costs.
45. Be that as it may, Counsel for the Plaintiff/Respondent has also submitted that even if the court were to be inclined to exercise discretion, same can only be exercised on the basis of sufficient cause, established and proven by the Applicant.
46. However, counsel for the Plaintiff/Respondent has contended that no sufficient cause or basis has been established by the 2<sup>nd</sup> Defendant/Applicant to warrant the setting aside of the impugned Judgment.
47. Contrarily, counsel for the Plaintiff/Respondent has added that the subject application has been mounted with undue and inordinate delay, which delay has not been explained or at all. In this regard, counsel for the Plaintiff has therefore impleaded and relied on the doctrine of laches.
48. In support of the foregoing submissions, counsel for the Plaintiff/Respondent has cited and relied upon various decisions including *Sanzu Investment Ltd v The commissioner of Lands* [1995]eKLR, *Tana & Ardhi River v Jeremiah Kimigho Mwakio & 3 Others* [2015]eKLR, *Prime Bank Ltd versus Paul Otieno Nyamondi* (2014)eKLR, *Kingsways Tires & Automat Ltd v Rafiki Enterprises Ltd* (1995)eKLR and *Family Bank limited v Titus Mugambi Muriungi & Another* [2021]eKLR.

### **Issues for determination**

49. Having reviewed the Application dated the April 14, 2022, the Supporting affidavit thereto and the Replying affidavit in opposition thereof; and having similarly considered the written submissions filed on behalf of the Parties, the following issues do arise and are thus germane for determination;
  - i. Whether the 2<sup>nd</sup> Defendant/Applicant has established Sufficient cause or basis to warrant the setting aside of the impugned Judgment.
  - ii. Whether the subject Application is barred by the Doctrine of Laches.
  - iii. Whether the Plaintiff/Respondent shall suffer undue Prejudice and grave Injustice, if the subject Application were allowed.



## Analysis and determination

### **Issue number 1. whether the 2<sup>nd</sup> defendant/applicant has established sufficient cause or basis to warrant the setting aside of the impugned Judgment.**

50. It is common ground that the 2<sup>nd</sup> Defendant/Applicant was duly and lawfully served with the summons to enter appearance and Plaintiff in respect of the subject matter. For clarity, service of the said summonses is duly acknowledged and admitted.
51. Having been duly served with the summons to enter appearance and Plaintiff, it behooved that 2<sup>nd</sup> Defendant/Applicant to take appropriate steps and actions to ensure that his interests, if any, to the disputed property, were duly taken care of and protected.
52. To this end, it was incumbent upon the 2<sup>nd</sup> Defendant/Applicant to not only instruct and retain an Advocate, but to also follow up with the nominated advocate and ensure that diligent efforts were put in place toward protecting the 2<sup>nd</sup> Defendant's/Applicant's interests.
53. Even though the 2<sup>nd</sup> Defendant/Applicant contends that same made various follow ups with his erstwhile Advocate, there is no credible evidence to vindicate that any such efforts were ever made.
54. Be that as it may, assuming that such efforts were made (for which no evidence has been availed), if the previous advocates was not diligent then the Applicant herein ought to have been pro-active and should have taken appropriate action or measures, to salvage the lapses, inaction or neglect on the part of the previous counsel.
55. Notwithstanding the foregoing, there is also the critical aspect relating to the amount of time that was taken by the 2<sup>nd</sup> Defendant/applicant before the filing of the current application. Surely, the Applicant herein cannot be serious to contend that between the year 2011, when same was served with summons to enter appearance, he did not know of the status and position of a suit concerning his interest over the suit property.
56. In my humble view, even where a Party has retained or instructed an advocate, it is still incumbent upon the client (in this case), the Applicant to be pro-active and to follow up of the progress of the suit.
57. Sadly, the 2<sup>nd</sup> Applicant herein does not appear to have followed up with his previous advocate or at all to ascertain the status of the subject matter.
58. Certainly, if the 2<sup>nd</sup> Defendant/Applicant was diligent and proactive, it would not have taken the Applicant herein up to 31<sup>st</sup> March 2022, to discover that indeed Judgment had long been entered in respect of the subject suit.
59. To my mind, the conduct of the 2<sup>nd</sup> Defendant/Applicant speaks of a person who was neither bothered nor concerned with the status of the suit. In this case, the conduct exhibited by the Applicant herein is one that is replete and wrought with negligence, inaction and want of due diligence.
60. To this end, I find and hold that the Applicant herein has not established a sufficient cause or basis to warrant the intervention of the court and in any event, the exercise of discretion. Nevertheless, sufficient cause entails exercise of Due diligence, which diligence has not been displayed in this matter.
61. On the other hand, it suffices to note that even where Parties are represented by Advocates, it behooves the Party to remain proactive and to make appropriate follow ups with his/her nominated advocate.



62. To this end, it is appropriate to invoke and adopt the holding of the Court of Appeal in the case of *Habo Agencies Ltd versus Wilfred Odhiambo Musingo* (2015)eKLR, where the court observed as hereunder; It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.
63. In short, the 2<sup>nd</sup> Defendant/Applicant herein has failed to place before the court any explanation or reason, sufficient in terms of bona fides, to warrant the intervention of the court, either in the manner sought or at all.

**Issue number 2. whether the subject application is barred by the doctrine of latches.**

64. There is no gainsaying that the subject suit was filed and/or lodged in the year 2011 and thereafter the summons to enter appearance were extracted and duly served.
65. It is also important to underscore that the duration between the lodgment of the suit and the current application comprises of or constitutes a duration of approximately 11 years. Clearly, there has been a substantial lapse of time or duration.
66. Notwithstanding the foregoing, the 2<sup>nd</sup> Defendant/Applicant herein, other than stating that same instructed an advocate to enter appearance and file pleadings on his behalf, same has however not displayed any good efforts on his part to ensure that the instructions, if any, were diligently and timeously executed.
67. However, the point that I wish to make at this juncture is that despite being aware of the existence of this suit, the 2<sup>nd</sup> Defendant/Applicant herein did not take certain actions timeously or at all.
68. If anything, the action of filing the subject application, has been taken after a long and inordinate duration, which duration by itself speaks to latches on the part of the Applicant.
69. To my mind, the nature and kind of delay, that befalls the 2<sup>nd</sup> Defendant/Applicant herein, is one that militates against exercise of Equitable Discretion.
70. In any event, by virtue of the longevity or length of delay, one would believe that the Applicant herein had given up in the defense of his interests over the suit property and by extension waived his rights thereto. Such a belief, would not be out of place.
71. In respect of this matter, I am of the considered view and persuasion that both the Doctrine of latches and waiver, are therefore relevant and instructive.
72. To this end, I take succour in the holding in the case of *748 Air Services Limited v Theuri Munyi* [2017] eKLR, where the court held as hereunder;

“Closer home in the case of *Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd* [2007] eKLR the Court stated thus:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”



This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited v Development Finance Company of Kenya Limited*, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the *Halsbury's Laws of England, 4<sup>th</sup> Edition*, Volume 16. At page 992 waiver has been defined as follows:-

„Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right.

The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?."

73. In short, the Applicant herein has been indolent in pursuit of his rights to or interest over the suit property, if any. Consequently, a Party who have been guilty of indolence cannot now be rewarded with exercise of Equitable Discretion in the manner sought.

**Issue number 3. whether the plaintiff/respondent shall suffer undue prejudice and grave injustice, if the subject application were allowed.**

74. Other than the delay by and on behalf of the 2<sup>nd</sup> Defendant/Applicant in filing and mounting the subject Application, there is also the contention by the Plaintiff/Respondent that his key, albeit critical witness in respect of the subject matter has since passed on.
75. For coherence, the Plaintiff/Respondent stated that the vendor, namely, Lucy Waithira Kimani, who sold the suit property unto him has since passed on and that with the death of the said witness, the Plaintiff/Respondent will not be able to benefit from the critical evidence that was within the knowledge of the said witness.
76. In the premises, the Plaintiff/Respondent has contended that if the impugned Judgment were to be set aside, same would suffer undue prejudice and grave injustice, which in the estimation of the Plaintiff/Respondent, would not be compensable in monetary terms.
77. Suffice it to point out that allowing the subject application would essentially roll back the time and the clock back to the pre-trial stage and hence the Parties would be called upon to start all over again.



78. Whereas in exceptional circumstances, the court may be obliged to intervene and to ensure that a suit is determined on merits, it must be taken into account that it is also important to ensure that suits and/or disputes are brought to a close/ conclusion expeditiously, timeously and with due promptitude.
79. Essentially, courts more than ever before, are now called upon to give meaning and life to the provisions of Article 152(b) of the Constitution 2010 and where appropriate, to facilitate Expeditious Disposal of Suits/ Matters.
80. To this end, the dictum of the Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the Honourable Court held as hereunder;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a license to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellant’s advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

81. In the premises, it is my finding and holding that the setting aside of the impugned Judgment, would by itself occasion undue prejudice and detriment to the Plaintiff/Respondent. For clarity, the Plaintiff/Respondent, would be called upon and be exposed to further anxiety that comes along with the pendency of civil proceedings.
82. Consequently, the age of the subject matter and the length of delay, prior to and before the filing of the subject application militates against the exercise of the discretion sought.

### **Final disposition**

83. In my considered view, the conduct of the 2<sup>nd</sup> Defendant/Applicant herein towards and in the prosecution of the subject matter was devoid and bereft of the requisite diligence and promptitude.
84. Having not displayed and or exhibited the requisite diligence and reasonable care, the 2<sup>nd</sup> Defendant/Applicant must be therefore left to shoulder the consequences of his neglect, inaction or inadvertence.
85. Nevertheless, it must be observed that the 2<sup>nd</sup> Defendant/Applicant is not without recourse. For clarity, if same truly instructed and retained counsel, who failed to diligently execute his instructions, then the 2<sup>nd</sup> Defendant/Applicant can very well find succor in the holding in the case of National Bank Of Kenya Limited v E. Muriu Kamau & another [2009] eKLR, where the court observed as hereunder;

The law is that an advocate who holds himself out to his client as having adequate skills and knowledge to conduct the case he is instructed owes a duty to his client both in contract and tort. Where the advocates is in breach of his contractual duty to his client or where he fails to use proper care towards the fulfillment of the instructions he was given, he is liable in damages in so far as the client suffers the loss”.



86. Notwithstanding the foregoing, I come to the irresistible conclusion that the Application dated the April 14, 2022 is devoid and bereft of merits.

87. Consequently, same be and is hereby Dismissed with costs to the Plaintiff/Respondent.

88. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Kevin/ Benson Court Assistant**

**Mr. Ndungu Kimani for the 2<sup>nd</sup> Defendant/Applicant.**

**Mr. Karoki for the Plaintiff/Respondent**

**No appearance for the 1<sup>st</sup> Defendant**

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