



REPUBLIC OF KENYA



**Namukana & another v Manyonge & another (Civil Case 224 of 2013)
[2022] KEELC 15008 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15008 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
CIVIL CASE 224 OF 2013
BN OLAO, J
NOVEMBER 24, 2022**

BETWEEN

FLORENCE NAFULA NAMUKANA 1ST PLAINTIFF

DOUGLAS WAMUKOTA 2ND PLAINTIFF

AND

DAUDI MUSA MANYONGE 1ST DEFENDANT

WACHILONGA WANYAMA MANYONGE 2ND DEFENDANT

RULING

1. This ruling was due on October 13, 2022. However, following my transfer to Busia ELC on October 3, 2022 and the attendant disruptions, it was not possible to deliver it as scheduled. The delay is regretted but was un-avoidable in the circumstance.
2. Florence Nafula Namukana and Douglas Wamukota (the plaintiffs herein) moved to this court vide their plaint dated July 3, 2013 and filed on August 7, 2013 seeking the main remedy that Daudi Musa Manyonge and Wachilonga Wanyama Manyonge (the defendants herein) be evicted from the land parcel no Bokoli/bokoli/1502 (the suit land). They also sought an order for costs and interest.
3. The basis of the plaintiff's case is that whereas they are the registered proprietors of the suit land and on which they have lived since 2001, the defendants had, without any colour of right, invaded it in March 2010 claiming to have bought a portion thereof measuring 100 feet x 100 feet from one Wanyonyi Wamukota.
4. The defendants filed separate defences in which they denied that the suit land is the property of the plaintiffs and that they had trespassed thereon.
5. When the hearing came up on November 6, 2017, a date which had been taken by consent of all the parties, there was no appearance by the defendants or their counsel. Mukunya J, having been satisfied



that the hearing date had been taken by consent and there was no appearance by the defendants or their counsel nor had any explanation been proffered for their absence, proceeded to hear the plaintiffs' case. And vide a judgment delivered on December 18, 2017, the judge found for the plaintiffs as prayed in their plaint and a decree followed.

6. The defendants have now moved this court vide their Notice of Motion dated December 16, 2020 and premised under the provisions of order 12 rules 7, 22 and 21 of the Civil Procedure Rules. They seek the following orders:
 1. Spent.
 2. Spent.
 3. That the *ex-parte* judgement entered herein be set aside and the defendants be allowed to defend this suit in terms of the draft defence attached.
 4. Spent.
 5. That the costs of this application be provided for.
7. The application is predicted on the grounds set at therein and is supported by the affidavit of Daudi Musa Manyonge(the 1st defendant).
8. The basis of the application is that the defendants did not have an opportunity to defend themselves and neither was service of the hearing notice effected upon their counsel M/s Situma & Company Advocates nor the defendants personally. That no notice of judgment was served upon them and they only learned about it when the firm of Damsey Auctioneers visited them with a proclamation notice. That the only hearing notice served upon them was the one dated April 1, 2015 when the matter was set for hearing on December 7 2015 (the appellant erroneously states that the hearing was due on December 1, 2013).
9. Annexed to the affidavit are the following documents:
 1. Notice of appointment of advocate – DMM-1.
 2. Hearing notice dated April 17, 2015 – DMM II.
 3. Proclamation notice issued by Damsey Auctioneers dated December 15, 2020 – DMM III (a).
 4. Taxation notice dated December 13, 2019 - DMM III (b).
 5. Decree issued on December 1, 2020 – DMM III (c).
 6. Judgment dated December 18, 2017 – DMM III (d).
 7. Statements of defence by the defendants – DMM IV.
10. The application is opposed and Mr J S Khakula, counsel for the plaintiffs, has filed a replying affidavit dated February 2, 2021 in which he has averred, *inter alia*, that having been served, the defendants entered appearance and filed defences on October 18, 2013 and October 24, 2013. And on October 27, 2014 they appointed the firm of Situma & Company Advocates to act for them. That although the hearing of the case was fixed for December 1, 2015, the court did not sit and the parties were informed that the hearing was rescheduled for December 4, 2015 before Mukunya J. On that day however, it was stood over generally.
11. On June 7, 2017, counsel wrote to the firm of Situma & Company Advocates inviting them to the registry to take a mutually convenient date (annexture JSK 1). The hearing date was taken by consent



for November 6, 2017 when it was heard in the absence of the defendant and their counsel and a judgment was delivered on December 18, 2017. The plaintiffs then filed and served their Bill of Costs upon the firm of Situma & Company Advocates on March 27, 2018 and taxation notices were subsequently served on August 23, 2018, November 5, 2018, September 16, 2019 and January 20, 2020 – annexures 2,3,4,5 and 6. The defendants cannot therefore claim that they were not aware about the judgement until the auctioneers moved in to proclaim their property.

12. When the application was placed before me on December 18, 2020, I directed that it be canvassed by way of written submissions to be filed on or before January 19, 2021. However, it was not until February 10, 2021 that the plaintiff filed his submissions. And although the defendants’ counsel was accommodated for various reasons so as to comply, he did not do so. Finally, on July 27, 2022, the deputy registrar placed the file before me for directions. I directed that ruling would be delivered by way of electronic mail on October 12, 2022 but on October 3, 2022, I was transferred to Busia ELC thus necessitating a further delay.
13. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by Mr J s Khakula for the plaintiffs.
14. It is common ground that this suit proceeded to hearing *ex-parte* on November 6, 2017 before Mukunya J who delivered a judgement in favour of the plaintiff on December 18, 2017. And although Daudi Musa Manyonge the 1st defendant has averred in paragraph 7 of his supporting affidavit:-

7: “That there has been no other subsequent hearing notice slated for November 6, 2017 served upon us or my advocate.”,

the record is very clear that the hearing date of November 6, 2017 was taken by consent in the registry on June 9, 2017 in the presence of counsel for both parties. This has also been confirmed by Mr J s Khakula in paragraph 9 of his replying affidavit.

15. Setting aside of *ex-parte* judgments is a daily occurrence in our courts. It has been stated severally that in setting aside such *ex-parte* judgements or orders, the court exercises a discretionary jurisdiction. Such discretion being judicial, is exercised on the basis of evidence and sound legal principles. The court considers all the circumstances of the case before and after the judgement being challenged. It must also be remembered that the court will only exercise it’s discretion in favour of setting aside any judgement in order to avoid an injustice, or hardship resulting from accident, inadvertence or excusable mistake or error. Such discretion is not meant to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice – see *Pitbon Waweru Maina v Thuku Mugiria* C a Civil Appeal no 27 Of 1982, *Patel v E a Cargo Handling Services Ltd* 1974 E a 75, *Shah v Mbogo* 1967 E A 116 and *Shabir Din v Ram Parkash Anand* 1955 22 E A CA 48 among other cases.
16. And whereas article 50 (1) of the *Constitution* guarantees a right to be heard, it has also been stated that where that right is availed to a party, it should not be squandered. In the case of *Union Insurance Company of Kenya Ltd v Ramazan Abdul Dhanji* C a Civil Application No 179 of 1998, the Court of Appeal stated that:

“the law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it.” Emphasis mine.

It must also be noted that being a discretionary remedy, the defendants were required to make a full and frank disclosure and approach this court with clean hands.



17. What then are the circumstances in this case?
18. As stated above, the defendant's case is that they were not aware of the hearing date. On the face of the Notice of Motion, the defendants have pleaded thus:
1. "That the defendants did not have an opportunity to defend themselves."
 2. "That there was no service effected upon the firm of Ms Situma & Company Advocates nor the defendants themselves."

In paragraph 7 of the supporting affidavit, the 1st defendant has averred as follows:

7: "That there has been no other subsequent hearing notice slated for 6.11.2017 served upon us or my advocate as alleged."

In response to that averment, Mr J s Khakula has deponed in paragraph 9 of his replying affidavit that:

9: On 9.6.2017 this suit was fixed by consent by a clerk from our firm and a clerk from the firm of Situma & Company Advocates for hearing on 6.11.2017."

As I have already stated above, the record shows that on June 9, 2017, this hearing date was taken in the registry with the consent of both parties. The same is signed by one Briton on behalf of Mr Khakula Advocate and one Ben on behalf of Mr Situma Advocate. And when the case came up for hearing before Mukunya J on November 6, 2017, the judge confirmed that indeed the defendants' counsel was aware about the hearing date as it had been taken by consent. It cannot therefore be factually correct for the defendants to allege that they "did not have an opportunity to defend themselves" or "that there was no service effected" upon their advocate or on them personally. That date having been taken in the registry by consent of their counsel on June 9, 2017, no further service upon their counsel or themselves was necessary. Did they expect the plaintiff to fish them out from wherever they went hiding and drag them to court for the hearing? Clearly, the defendants are dishonest and have "deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice" *Shah v Mbogo (supra)*.

19. Secondly, the 1st defendant has averred in paragraph 9 of his supporting affidavit that he "only learned about the extend of this matter after the Damsey Auctioneers visited and proclaimed property." Again that cannot be true because after the suit had been heard and judgement delivered, a decree followed and the plaintiffs also filed their Bill of Costs dated March 20, 2018. That Bill of Costs was eventually taxed on December 11, 2019 on the deputy registrar. There is a taxation notice dated November 25, 2019 addressed to the firm of Situma & Company Advocates notifying them that the said Bill of Costs would be taxed on December 11 2019 at 9 a.m. The said notice was duly served upon the said firm but was received under protest with remarks that they "do not have further instructions from our client. Notice too short." Having filed a Notice of Appointment of Advocate dated October 27, 2014 to act on behalf of the defendants, the firm of Situma & Company Advocates were, and still are, on record for the defendants to date. Indeed when Mr Kundu appeared before Hon Mwenda the Deputy Registrar on July 27, 2022, he stated as follows:

"That defendant has withdrawn instructions. It has been 8 months. I might seek leave to cease acting."

No evidence has been placed before this court to demonstrate that the defendants withdrew instructions from their counsel and to-date no application has been filed by the said firm to cease acting for them. That means therefore that the defendant's having been served through



their counsel on record, must have known about this taxation of the plaintiffs' Bill of Costs. And, as night follows day, they and their counsel must have known that execution would follow. They cannot feign ignorance of this judgment as far back as December 2, 2019 when their counsel was served with the taxation notice. That is the time they should have moved to court. The delay of 12 months in filing this application is not only inordinate but has also not been explained. Again, that can only be interpreted as designed to "obstruct or delay the course of justice." The plaintiffs are entitled to enjoy the fruits of their judgement and while that can be delayed by setting aside the said judgement, it must be based on reasonable grounds. I do not see that the defendants have demonstrated any such grounds. They had an opportunity to be heard but for reasons best known to themselves, they did not utilize it. They are not deserving of the orders sought in their Notice of Motion.

20. The up-shot of all the above is that the Notice of Motion dated December 16, 2020 is devoid of merit. It is accordingly dismissed with costs to the plaintiffs.

BOAZ N OLAO

JUDGE

24TH NOVEMBER 2022

Ruling dated, signed and delivered at BUSIA ELC on this 24th day of November 2022 by way of electronic mail in keeping with the COVID-19 pandemic guidelines with notice to the parties.

BOAZ N OLAO

JUDGE

24TH NOVEMBER 2022

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