



**M'mwithimbu v M'kiambati & another (Environment & Land Case 36 of 2018) [2022] KEELC 14778 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14778 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 36 OF 2018  
CK YANO, J  
NOVEMBER 16, 2022**

**BETWEEN**

**STANLEY GITONGA M'MWITHIMBU ..... APPLICANT**

**AND**

**STEPHEN M'KIAMBATI ..... 1<sup>ST</sup> RESPONDENT**

**MURIITHI ZACHARY MUTUAMBIA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application for determination is the notice of motion dated September 17, 2021 in which the defendants/applicants seek for orders-;
  - 1) That this application be certified as urgent and be heard on priority and ex-parte in the first instance.
  - 2) That pending hearing and determination of this application, the Honourable court be pleased to order a stay of execution of its decree pursuant to the interlocutory judgment delivered on July 7, 2021 together with all its consequential orders thereto.
  - 3) That pending hearing and determination of this application, the Honourable court be pleased to grant orders of inhibition with respect to land Parcel No. Kiirua/naari/1554.
  - 4) That pending hearing and determination of this application, the Honourable court be pleased to set aside the interlocutory judgment delivered on July 7, 2021.
  - 5) That upon granting the prayers above, this Honourable court be pleased to grant the defendants/applicants leave to file their response to the summons out of time.
  - 6) That the costs for this application be provided for.



2. The application is brought under section 1A and 3A of the Civil Procedure Act, order 10, rule 11, order 21 rule 22 of the Civil Procedure Rules, section 3 of the Judicature Act and other enabling provisions of the law, and is supported by the affidavit of Stephen M. Kiambati and Muriithi Zachary Mutuambia, the defendants/applicants sworn on September 17, 2021 and is based on the following grounds-;
  - a) That the defendant/applicants were never served with court summons and any other relevant pleadings forming this instant suit.
  - b) That the proceedings herein proceeded ex-parte to the detriment of the defendants/applicants.
  - c) That consequently the defendants/applicants were condemned unheard
  - d) That the plaintiff will not suffer any prejudice in case the orders sought are granted as he shall be accorded an opportunity by this Honourable court to file necessary replies if need be.
  - e) That the defendants/applicants however shall be gravely prejudiced if this application is denied since there is a decree to the effect that the Land Registrar do cancel the title deed subject to land Parcel No. Kiirua/Naari/1554 which is registered in the name of the 2<sup>nd</sup> defendant/applicant.
  - f) That this application has been brought without undue delay.
  - g) That it is within the interest of justice that this application be granted as prayed.
3. The record indicates that the firm of Elijah K Ogoti & Co. Advocates for the plaintiff was served on September 21, 2021 but did not file any response. When the matter came up for hearing on October 3, 2022, Ms Soy appeared for the applicants and urged the court to allow the application as prayed since it was unopposed. The court however reserved the matter for a ruling in order to peruse the court record.
4. I have considered the application. The application seeks orders of stay of execution of the decree issued pursuant to an interlocutory judgment delivered on July 7, 2021, an order to set aside the said judgment and leave to be granted to the applicants to file their response out of time as well as an order of inhibition.
5. The principles guiding the court in exercising its discretion in an application such as this are well settled. It is trite that the court has wide powers to grant such orders save that where the discretion is exercised, the court will do so on terms that are just.
6. In the case of *Shah v Mbogob* [1967] EA 116 it was stated-;

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistakes 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.”
7. In the case of *Patel v E.A Cargo Handling Service Ltd* [1974] 1 EA 75 at page 76 Sir Duffus P stated thus-;

“There is no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just.... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as it is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence



that must succeed, it means as Sheridan J put it “triable issue” that is an issue which raises a prima facie defence and which should go on trial for adjudication.”

8. I have perused the court record. This suit was commenced by way of an originating summons dated September 17, 2018. Contemporaneously with the filing of the suit, the respondent filed an application by way of notice of motion dated 17<sup>th</sup> September, 2018 seeking an order of inhibition over the suit land parcel No. Kiirua/naari/1554 until the application is heard and determined and thereafter until the cause is heard and determined. From a perusal of the file, there is an affidavit of service by Elijah K. Ogoti Advocate filed on October 18, 2018 in which he averred that on October 5, 2018 at around 3.30 p.m, he served the respondents/applicants herein with the application dated September 17, 2018 at Kiirua Police Station where they had a related criminal issue with the land, and that the 1<sup>st</sup> respondent signed but the 2<sup>nd</sup> respondent refused to sign. The matter later proceeded ex-parte by way of formal proof hearing resulting into the judgment delivered on July 7, 2021.
9. In this case, the applicants herein have stated that they were never served with the summons. Indeed there is no affidavit of service that confirms that the applicants were served with the originating summons. As already noted, the only affidavit of service filed is in respect of the application. I am therefore persuaded that the applicants herein were never served as required by law to enable them respond to the case.
10. I have also perused the proposed replying affidavits annexed to the affidavit in support of the application herein. The applicants have stated inter alia, that there was a previous case Meru HCCC No. 109 of 2011 between the parties herein which was concluded. It is further stated that the suit land was registered in the name of the 2<sup>nd</sup> applicant in the year 2017 which was a period of less than 5 years by the time the suit for adverse possession was filed. The draft responses as laid down by the applicants in my view do bring out triable issues that would warrant the court to set aside the entire judgment as entered. The respondent has not demonstrate how he will suffer prejudice if the orders sought are granted as its effect would be to allow the court hear and determine the case on merit. The overriding objective of the court would no doubt come to the aid of the applicants.
11. The upshot is that the application is allowed in terms of prayers 2, 3, 4 and 5 thereof. The applicants are directed to file and serve their responses within 14 days from the date of this ruling.
12. Each party to bear their own costs.
13. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF NOVEMBER, 2022**

**In the presence of:-**

**C.A Mwenda**

**MS Soy for defendant/applicants**

**No appearance for Ms Wambulwa for plaintiff/respondent**

**C.K YANO**

**ELC JUDGE**

