



Shung'ea & another v Mutonyi & 6 others (Environment and Land Case Civil Suit 261 of 2017) [2022] KEELC 14826 (KLR) (16 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 261 OF 2017
MN GICHERU, J
NOVEMBER 16, 2022**

BETWEEN

SERAH NOTI SHUNG'EA 1ST APPLICANT

DANIEL PITITIK SHUNG'EA 2ND APPLICANT

AND

ISAIAH MUTONYI 1ST DEFENDANT

ISAAC WANJOHI 2ND DEFENDANT

JULIUS WANJOHI MWANGI 3RD DEFENDANT

FAITH NJERI MWANGI 4TH DEFENDANT

FRED PERTET 5TH DEFENDANT

SIMON MUKURIA MUTHEE 6TH DEFENDANT

MARY WANJIRU KIARIE 7TH DEFENDANT

RULING

1. This ruling is on the notice of motion dated 3/2/2022. The motion is by the Plaintiffs and is brought under Order 10, Rule 11, Order 19 Rule 2(1) and 22, Order 51, Rule 15 *Civil Procedure Rules* and Section 1A and 3 A of the [Civil Procedure Act](#). It seeks two orders as follows.
 - i. That the proceedings of 3rd February, 2022 be set aside.
 - ii. That the Plaintiffs be allowed to re-open their case and be heard or proceed.
2. The motion is supported by four grounds, two affidavits and four annexures. The gist of the above material is that when the case proceeded on 3/2/2022, neither the Plaintiffs nor their counsel were present because they thought that their case would be on 7th and 10th February. The main cause of this



confusion over dates was counsel who held brief for the Plaintiffs' counsel on 30/9/2021 when the hearing date was taken.

Instead of the counsel holding brief taking the correct dates of 3/2/2022 and 10/2/2022, he took the wrong dates of 7th and 10th February, 2022.

Secondly, even though the counsel for the first and second Defendants served a hearing notice on the Plaintiffs' counsel on 12th January, 2022 at 10.20 am, the secretary who received the hearing notice, one Grace, left the Plaintiffs' counsel's employment on the same date. The Plaintiffs' counsel never saw the hearing notice.

3. The application by the Plaintiffs is opposed by the first and second Defendants and the first Defendant has sworn a replying affidavit dated 2nd June, 2022 with four annexures in which he replies thus.

Firstly, even though the current application was filed on 4th February, 2022, it was not until 16th May, 2022 at 4:34 PM that it was served upon counsel for the first and second Defendants by email.

The inordinate delay in serving the counsel for the first and second Defendants is not well-explained.

Secondly, it is not true that secretary by the name of Grace left the firm of the counsel for the Plaintiffs because she is the one who received the physical copy of the written submissions served by the counsel for the two Defendants on 4/5/2022 at the firm of the Plaintiffs' counsel as can be seen at the top right hand corner of annexure IG 3.

Thirdly, the said secretary has not filed any affidavit to deny service or confirm leaving the Plaintiffs' counsel's firm.

Finally, the Plaintiffs and their advocates have been lethargic in prosecuting this case which lethargy has been greatly prejudicial to the rights of the Defendants to access justice and for a fair and speedy resolution of this dispute which is 10 years old having started 10 years ago in Machakos.

4. Only the counsel for the first and second Defendants filed written submissions on 14/9/2022. No submissions have been filed by the Plaintiffs' counsel within the set timeline of 20/9/2022 or even later.

5. In the submissions, learned counsel for the two Defendants raised the following issues.

Firstly, it is urged that the copy of diary has not been annexed to show the wrong entry and therefore, the burden of proof on the Plaintiffs to prove this particular point has not been discharged.

Secondly, the issue of Grace, the secretary who received the hearing notice on 12/1/2022, then left the Plaintiffs' counsel's firm, the same day and was back again in May, 2022 to sign for the hardcopy submissions has been raised.

Thirdly, failure to serve the current notice of motion for three and a half months has raised curiosity.

It is urged that even though the court's discretion in setting aside the proceedings of 3/2/2022 is unfettered, it should not be exercised in favour of the Plaintiffs because of the failures on their part that have been identified in the replying affidavits and the issues raised above by counsel.

6. I have carefully considered the application dated 3/2/2022 including the affidavits, grounds, annexures, submissions and the case law cited therein.

I agree with the submissions by counsel for the first and second Defendants that the court has wide discretion in this matter which is unfettered. It is also true that the Plaintiffs and their counsel have not been diligent in prosecuting their case as can be seen from their failure to attend court twice, failure to attach evidence of the diary to the supporting affidavit to this application, failure to come clean on



service of the hearing notice served on 12/1/2022, failure to serve the current application in good time, failure to file any submissions in this case among other failures.

All these failures occasion hardships on the diligent parties and impede on their rights of access to justice and speedy resolution of the dispute.

I will, very reluctantly allow the notice of motion dated 3/2/2022 but only in a limited manner.

- a. The court will consider all the Plaintiffs' witness statements and documents in making its final decision.
- b. The Plaintiffs' counsel will be allowed to file and serve written submissions but within reasonable time of 30 days only.
- c. Otherwise the application dated 3/2/2022 is dismissed for lack of merit and with costs to the Defendants.

This order to apply to ELC 189/2017.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF NOVEMBER, 2022.

M.N. GICHERU

JUDGE

