



**Waweru & 6 others v Yahya M. Suleiman & Naiman Suleiman t/a Ima Flowers Farm & another
(Environment & Land Case E108 of 2022) [2025] KEELC 1043 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1043 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E108 OF 2022**

JM ONYANGO, J

MARCH 5, 2025

BETWEEN

JULIUS MAINA WAWERU 1ST PLAINTIFF
JOHN KIHARA NJIIRI 2ND PLAINTIFF
JOSEPH WAWERU NGURA 3RD PLAINTIFF
DANIEL NGARI KIIRITHIO 4TH PLAINTIFF
GEORGE MIRIE 5TH PLAINTIFF
GODFREY GICHACHI WAHOME 6TH PLAINTIFF
WINFRED WATIRI WAMBUI 7TH PLAINTIFF

AND

**YAHYA M. SULEIMAN & NAIMAN SULEIMAN T/A IMA FLOWERS
FARM 1ST DEFENDANT**
**FRANCIS MWAURA CHEGE AND PAULINE WANJIRU MUIRURI T/A
PAWAMU BASE INVESTMENT 2ND DEFENDANT**

RULING

1. What I am required to determine is the Defendants' application dated 2nd September 2024 seeking orders that:
 - a. Spent
 - b. Spent



- c. Pending the inter parties hearing and determination of this application, this honourable court be pleased to issue an order to stay execution of the decree issued herein arising from the court judgment delivered on 19th September 2023.
 - d. The honourable court be pleased to set aside the judgment delivered on 19th September 2023 and all consequential orders arising therefrom.
 - e. Leave be granted for the defendants to file statement of defence and this case be heard a fresh on merit.
 - f. Costs of this application be provided for.
2. The application is predicated on the grounds that the Defendants (Applicants) were not aware that the matter proceeded undefended because of the mistaken belief that the Plaintiffs (Respondents) had withdrawn the suit, as informed by Mr. Wanjama T/a Wanjama and Company Advocates (the Applicants' former advocates).
 3. The application is premised on the Supporting Affidavit sworn by Francis Mwaura Chege, the 2nd Defendant on the 2nd September 2024. Francis Mwaura Chege elaborates the said grounds and explains that the Applicants learnt that an adverse Judgment had been entered against them in this suit after Pauline Wanjiru Muiruri's motor vehicle registration No. KCE 565V was attached without a proclamation on 27th August 2024.
 4. Francis Mwaura Chege avers that he forwarded the court proceedings in the matter herein to their former advocates and upon visiting them to inquire on the status of the suit, he was informed that the matter proceeded as undefended and a judgment and decree was issued in the matter against all the Applicants.
 5. He depones that on inquiry as to why no defence was filed and why the matter proceeded as undefended, Mr Wanjama explained to him that the 1st and 4th Respondents had approached him on behalf of the rest of the Respondents with a view to withdrawing the suit given that the titles to their properties had been processed and the rest of the titles were underway. As a result, he opted not to file a defence. He added that the 4th Respondent subsequently withdrew his case.
 6. He contends that a perusal of the court record shows that on 8th November 2022 the court gave directions on the filing of submissions on the Respondents' application dated 20th September 2022. He further contends that he was astonished that the hearing proceeded without a hearing notice being served upon the Applicants and/or their advocates.
 7. He argues that the failure to attend the hearing was a mistake on the part of their advocate which ought not to be visited upon the Applicants. He states that their Statement of Defence raises triable issues which ought to be determined on merits at a full hearing. He adds that the application was filed without undue delay.
 8. The application is opposed by the 1st Plaintiff (1st Respondent) vide a Replying Affidavit sworn by himself on 27th September 2024 in which he deposes that the Respondents have been pursuing their titles from the Applicants without success for many years and that this application is another attempt to delay justice.
 9. The 1st Respondent depones that Mr. Wanjama was present in court on 8th November 2023 when the court gave directions on the hearing of the application dated 20th September 2023. However, the Applicants' former advocate was absent during the hearing on 18th January 2023. As a result, the



application was allowed and the matter was fixed for hearing for the main suit on 15th June 2023. He further depones that the Applicants' former advocate was served with the hearing notice, penal notice and the orders issued on 18th January 2023. On 15th June 2023, the matter proceeded for hearing in the absence of the Applicants or their advocate and a Judgment was subsequently issued.

10. He avers that the Respondents later filed a Party and Party Bill of Costs which they served upon the Applicants' former advocate together with a taxation notice. He further avers that the Applicants' former advocate was present in court when the bill came up for taxation on 23/1/2024. The said advocate sought time to file written submissions on the bill of costs.
11. The 1st Respondent contends that their advocate forwarded the decree and the ruling on the taxation to the Applicants' former advocate for compliance. However, they did not receive any response and they were compelled to pursue execution proceedings.
12. The 1st Respondent avers that he met Francis Mwaura Chege before and during the pendency of the suit and implored him to do the right thing, however, his response was that the 1st Respondent should communicate with their advocates on the issue. The 1st Respondent further avers that he also met with Naima Suleiman on several occasions and despite imploring her to give the Respondents the titles to their properties, the Respondents got no response.
13. The 1st Respondent argues that the impugned judgment is a regular judgment given that the Applicants confirmed that they were served with summons to enter appearance. The 1st Respondent further argues that the Applicants had legal representation throughout the pendency of the suit. The 1st Respondent adds that the Applicants' former advocates were served with both the hearing notice for the hearing scheduled on 15th June 2023 and the decree, which they ignored. The 1st Respondent denied approaching Applicants' former advocates to withdraw the suit.
14. The 1st Respondent contends that there are no triable issues in the draft defence given that some of the Applicants are still without titles to their properties. The 1st Respondent denies the allegation that the proclamation notice was not served. He argues that the Applicants have come to court with unclean hands given that their supporting affidavit contains misrepresentations, hence, they do not deserve favourable exercise of the court's discretion.
15. In response to the Replying Affidavit, the Applicants filed a Further Affidavit sworn by Francis Mwaura Chege on 28th November 2024 in which he avers that despite delays which were occasioned by factors beyond their control, titles to the Respondents properties were processed and issued. He adds that there has been constant communication to the purchasers who have not obtained their titles, inviting them to go and sign the transfer, however, they are yet do so.
16. He insists that the Applicants were not notified of the hearing dates by their former advocates on record, hence the mistakes of their advocates on record ought not to be visited on them.
17. The court directed that the application be canvassed through written submissions and both parties complied with the said directions by filing their submissions.
18. Having carefully considered the application, the response thereto and the rival submissions, I am of the of the view that the issues for determination are as follows:
 - i. Whether the Applicants were served with a hearing notice
 - ii. Whether the judgment entered on 19th September 2023 ought to be set aside.



(i) Whether the Applicants were served with a hearing notice

19. Order 12 Rule 2 of the Civil Procedure Rules Provides as follows:

If on the day fixed for hearing, after the suit has been called for hearing outside the court, only the plaintiff attends, the court if satisfied that the notice of hearing was served upon the defendant, if the court is satisfied;

- a. That notice of hearing was duly served, it may proceed with the hearing;
- b. That notice of hearing was not duly served, it shall direct a second notice to be served or;
- c. That notice was not served in sufficient time to enable the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.

20. In the instant case, the Applicants aver that a perusal of the court record shows that on 8th November 2022 the court gave directions on the filing of submissions on the Respondents' application dated 20th September 2022. They maintain that the hearing proceeded without a hearing notice being served upon the Applicants or their former advocates. On the other hand, the Respondents contend that the hearing notice was served on the Applicants' former advocate but he simply chose to ignore it.

21. A perusal of the court record shows that Mr. Wanjama was present in court on 8th November 2022 when directions were given for hearing of the Notice of Motion application dated 20th September 2022 and a date set for highlighting of the submissions on 18th January 2023. The Applicants former advocates neither filed a response to the said application nor appeared for the hearing on 18th January 2023. As a result, a ruling allowing the application was delivered and the matter was subsequently scheduled for hearing of the main suit on 15th June 2023.

22. A further perusal of the court record shows that an affidavit of service sworn by one Arphaxad Mbula Kiema was filed by the Respondents' Advocates on 15th February 2023. Arphaxad Mbula Kiema stated that on 23rd January 2023, he received a hearing notice dated 20th January 2023, a penal notice dated 30th January 2023 and an order issued on 18th January 2023 from the Respondents' advocates which he was directed to serve upon Wanjama & Company Advocates whose offices were located on 2nd Floor (Entrance A) of Agip House- Haile Selassie Avenue.

23. He further stated that he served the said documents on the same day at 11.30 am and that the receptionist at Wanjama & Company Advocates office acknowledged receipt of the documents by stamping and signing on the front page of each of the documents.

24. Indeed, the hearing notice and the penal notice both contain stamps and signatures. The hearing notice indicates that the hearing was scheduled for 15th June 2023. The Applicants have never challenged the said Affidavit of Service. In the circumstances, I am inclined to believe that the Applicants' former advocates were served with the hearing notice.



(ii) Whether the judgment rendered on 19th September 2023 ought to be set aside

25. Setting aside an ex parte judgement is a matter of the discretion of the court. In the case of *Patel vs E.A. Cargo Handling Services Ltd 1975) E.A 75* the court observed as follows:

“The discretion is free and the main concern of the courts is to do justice to the parties before it, the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see *Shah vs. Mbogo 1967 EA 116.*”

26. In exercising its discretion, the court will consider the nature of the of the action, the defence if any and whether or not it raises triable issues, the length of delay and reasons for the delay if any, as well as the prejudice that will be occasioned to the Respondents and whether it can be compensated by an award of costs.

27. The Respondents’ case was that they bought various plots from the 2nd Applicant which were part of the 50 plots subdivided from the 5 acres comprised in L.R No. 4148/1442. The 2nd Applicant had purchased L.R No. 4148/1442 which was a subdivision of L.R No. 4148/18, from the 1st Applicant. The Respondents stated that despite being in possession of the plots and some of them having fully developed the same, the Applicants had failed to process for them the titles to their plots.

28. In their draft Defence, the Applicants admit paragraphs 1,2,3,4, 5,6,7,8,9,10,11,12,13,14,15,16,17,18 of the plaint. However, they add that some of the Respondents failed to avail themselves to sign transfer documents to facilitate the issuance of their certificate of titles. Furthermore, in their Further Affidavit dated 28th November 2024, the Applicants admitted that there were delays in the issuance of the titles to the Respondents.

29. Judgment in this matter was delivered on 19th September 2023. Thereafter, the Respondents filed taxation proceedings and a ruling was delivered on 14th June 2024. This application was filed on 2nd September 2024, a year after Judgment was rendered. It is the duty of a litigant to constantly follow up with their advocate to get updates on their case.

30. In the case of *Langer vs Mutambu & Another [2023]eKLR*, relied on by the Respondents in their submissions, the court observed as follows:

“I have gone through the record which shows that although judgment was entered on 25th July 2019, this application was only filed in May 2021, almost two years after the suit had been heard. The defendants, apart from stating that they were not informed of the hearing date, did not attempt to explain why they made no effort to find out from their advocates the status of their case. In other words the defendants did not explain the delay in filing the application to set aside the judgment.”

31. Similarly, in *Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002*, Justice Kimaru, expressed himself as follows:

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a



suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her former application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour is an indictment on the defendant. She had been indolent and taking into account her last conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

32. It is not enough for the Applicants to lay the blame on their former advocates. The court also notes that the said advocates are not present to give their side or defend themselves. There is also no evidence that the Applicants have lodged a claim against their former advocates at the Advocates Complaints Commission with regard to how they conducted the matter.
33. Moreover, the Respondents have already commenced the process of executing their decree and their award of costs hence, it would be prejudicial to them to return the matter to a never-ending cycle of litigation.
34. Having taken into account all the foregoing factors, I am of the considered view that the application lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5TH DAY OF MARCH 2025.

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J. M ONYANGO

JUDGE

In the presence of:

1. Mr Nyakiangana for the Defendants/Applicants
2. Mr Thuku for the Plaintiffs/Respondents

Court Assistant: Hinga

