



REPUBLIC OF KENYA



KENYA LAW
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**Mbugua & another v Gitau & 2 others (Environment & Land Case
285 of 2016) [2025] KEELC 3726 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 285 OF 2016**

YM ANGIMA, J

MAY 8, 2025

BETWEEN

PETER MAINA MBUGU 1ST PLAINTIFF

JAVAN MTOTO MZUGHA 2ND PLAINTIFF

AND

JOHN RUGE GITAU 1ST DEFENDANT

MOSES WAWERU NDUNGU 2ND DEFENDANT

LILLY SULEIMA SHARBAID 3RD DEFENDANT

RULING

A. 3rd defendant's application

1. By a notice of motion dated 05.06.2024 filed pursuant to Sections 1A and 1B of the *Civil Procedure Act* (Cap 21) Order 22 Rule 22 of the Civil Procedure Rules and all other enabling provisions of the law the 3rd defendant sought, inter alia, the setting aside of the judgment and decree of the court dated 27.09.2023 together with all consequential orders. She also sought the setting aside of the proceedings of 30.05.2023 when her case was closed by her previous advocates.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 3rd defendant on 04.06.2024 and the annexures thereto. It was the 3rd defendant's case that she was not accorded a fair trial because her previous advocates closed her case on 30.05.2023 without calling her as a witness. She stated that she was unwell at all material times hence the reason she was unable to attend court on the date slated for defence hearing.
3. It was the 3rd defendant's case that she was unable to move the court earlier for setting aside because she was out of the country on medical treatment. In a bid to demonstrate her indisposition she exhibited



copies of various medical sheets, discharge summary and medical reports prepared both locally and abroad.

B. 2nd plaintiff's response

4. The 2nd plaintiff filed grounds of opposition dated 01.07.2024 and a replying affidavit sworn by Javan Mtoto Mzughu on even date in opposition to the application. It was disputed that the 3rd defendant was denied a fair hearing or a chance of being heard on account of ill-health or at all. It was pointed out that when the suit came up for further defence hearing on 30.05.2023 the 3rd defendant's advocates on record voluntarily closed her case and the court was not informed of the alleged illness on the part of the 3rd defendant.
5. The 2nd plaintiff contended that there was undue delay in filing the instant application since the 3rd defendant had filed a notice of appeal dated 05.10.2023 meaning that she was aware of the judgment delivered on 27.09.2023. The 2nd plaintiff was of the view that the application was merely a delaying tactic intended to deny him the fruits of his judgment.

C. 3rd defendant's further affidavit

6. The material on record shows that the 3rd defendant filed a further affidavit sworn on 26.07.2024 in support of her application. It is evident that the purpose of the affidavit was merely to exhibit an English translation of a medical report and a notice of withdrawal of the notice of appeal dated 05.10.2023. Although the 2nd plaintiff applied for the said affidavit to be struck out because it was filed without leave of court, the court declined to do so because there was no evidence that the 2nd plaintiff had thereby suffered any prejudice.

D. Directions on submissions

7. When the application was listed for directions it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 3rd defendant's submission on dated 29.07.2024 but the 2nd plaintiff's submissions were not on record by the time of preparation of the ruling.

E. Issues for determination

8. The court has perused the notice of motion dated 05.06.2024, the grounds of opposition and replying affidavit, the further affidavit as well as the material on record. The court is of the view that the following are the key issues which arise for determination;
 - a. Whether the 3rd defendant has made out a case for setting aside the judgment dated 27.09.2023 and prior proceedings.
 - b. Whether the 3rd defendant is entitled to the consequential orders sought.
 - c. Who shall hear costs of the application.

F. Analysis and determination

Whether the 3rd defendant has made out a case for setting aside the judgment dated 27.09.2023 and prior proceedings

9. The court has considered the material and submissions on record on this issue. The 3rd defendant submitted that she had demonstrated sufficient cause for failing to attend court on 30.05.2023 for the



- hearing of her defence. She contended that she was indisposed at the material time hence it was not her fault that the case proceeded in her absence. She cited the cases of *Shah & Another vs Mbogo* [1967]EA 116 and *Wachira Karani vs Bildad Wachira*[2016] eKLR in support of her submissions.
10. In her supporting affidavit sworn on 04.06.2024 she stated that she travelled to Germany in May 2023 for further medical attention. She, however, avoided exhibiting copies of her travel passport or boarding pass to show when she travelled out of the country. She only exhibited a faint copy of what appeared to be a reservation or ticket which was stamped “not valid for travel”. She also omitted to specify the date of travel in her affidavit. The court takes the view that the most credible evidence of travel is either a boarding pass or travel passport duly stamped.
 11. The court has noted from the medical documents from Pandya Memorial Hospital Mombasa that the 3rd defendant was admitted as an inpatient on 11.04.2023 and discharged on 13.04.2023. She was thereupon granted a sick off of 3 days with effect from 14.04.2023. The medical report from a German physician shows that the 3rd defendant was seen at the clinic in September 2023 and was declared unfit to work until 30.12.2023.
 12. There is no indication on record to show when the 3rd defendant returned to the country save that she was attended at Moi Airport dispensary on 15.01.2024. There is no indication of any sick off days granted to the 3rd defendant even though she appears to have attended Premier Hospital on 16.04.2024 as an outpatient.
 13. The material on record shows that the 3rd plaintiff was at material times represented by an advocate during the hearing, that is, from the time the plaintiff’s case was heard until the close of the defence case. The material on record shows that on 13.3.2023 her advocate sought an adjournment on the basis that she was indisposed. The adjournment was granted as the other parties did not raise any objection thereto. The suit was consequently stood over to 30.05.2023 for further defence hearing.
 14. The record shows that on 30.05.2023 the 3rd defendant’s advocate informed the court that he wished to close the 3rd defendant’s case to which the court obliged. The matter was consequently set down for submissions on 24.07.2023 and for judgment on 27.09.2023. The judgment was delivered on the due date in the presence of the 3rd defendant’s advocates on record who promptly filed a notice of appeal dated 05.10.2023.
 15. The court is unable to find any material on record to demonstrate that the 3rd defendant was not aware of the hearing date of 30.05.2023. The court is also unable to find that the 3rd defendant was not medically fit to attend court on 30.05.2023. If that were so, then it would be expected that her advocate on record should have been aware of her condition and should have informed the court of her illness just like he did on 13.03.2023.
 16. There is no indication on record of any communication breakdown between the 3rd defendant and her previous advocate. There is no indication of malice on the part of the advocate and there is no indication of a falling out between them. The 3rd defendant’s claim of having been out of the country on 30.05.2023 is not supported by any credible evidence. As indicated before, the 3rd defendant deliberately withheld important travel documents from the court such as the stamped passport and boarding passes. The 3rd defendant has not been frank and faithful in disclosure of all material information. There is no telling when she left the country and whether or not she was medically fit to testify on 30.05.2023. If she was in Germany by 30.05.2023 why did she wait until September 2023 to see a doctor?
 17. Finally, the court takes the view that where a party is represented by an advocate in the course of the trial, the advocate has ostensible authority to adopt the best defence strategy according to his



professional judgment. Such strategy may well involve closing a party's case without calling witnesses. Where an advocate exercises such authority and sense of judgment it would be binding upon the client. The appropriate remedy to a litigant who is aggrieved by his advocate's judgment would not necessarily lie in setting aside the proceedings in question.

Whether the 3rd defendant is entitled to the consequential orders sought

18. The court has already found that the 3rd defendant has failed to demonstrate sufficient cause to warrant the setting aside of the judgment of 27.09.2023 and all prior proceedings. It would, therefore, follow that the 3rd defendant is not entitled to the consequential reliefs sought for re-opening of the case.

Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the 2nd plaintiff shall be awarded costs of the application.

G. Conclusions and disposal order

20. The upshot of the foregoing is that the court finds no merit in the 3rd defendant's application. As a consequence, the notice of motion dated 05.06.2024 is hereby dismissed in its entirety with costs to the 2nd plaintiff.

Orders according.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 8TH DAY OF MAY, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

No appearance for 1st plaintiff

Ms. Machogu for 2nd plaintiff

No appearance for 1st defendant

No appearance for 2nd defendant

Mr. Ireri for 3rd defendant

Gillian Court assistant

