



Munguti v Mutisya & 11 others; Emmanuel & 2 others (Interested Parties) (Environment & Land Case 481 of 2015) [2024] KEELC 565 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 481 OF 2015
OA ANGOTE, J
FEBRUARY 8, 2024**

BETWEEN

ANTHONY VINCENT MBINDYO MUNGUTI PLAINTIFF

AND

MATHEW MBALUKA MUTISYA 1ST DEFENDANT

CHIEF REGISTRAR OF LANDS 2ND DEFENDANT

ABSA BANK KENYA PLC 3RD DEFENDANT

TYSONS LIMITED 4TH DEFENDANT

VINCENT MULELA KILONZO 5TH DEFENDANT

MARGARET NTHENYA KILONZO 6TH DEFENDANT

ERIC MULI KILONZO 7TH DEFENDANT

**CHRIS TABU MULE (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
THE LATE PHILIP MULE KILONZO) 8TH DEFENDANT**

CHARLES MUTAVI KILONZO 9TH DEFENDANT

M/S MAPACA LIMITED 10TH DEFENDANT

PAUL ASAMBA 11TH DEFENDANT

CAREN ASAMBA 12TH DEFENDANT

AND

SORONE OLE RIAMET EMMANUEL INTERESTED PARTY

LEMEILOI NAENKOP KANAI OLE NASARIKE INTERESTED PARTY

EMOWUO SELF HELP GROUP INTERESTED PARTY



RULING

Background

1. Before this Court for determination is the 1st Defendant's Notice of Motion application dated 13th June, 2023 brought pursuant to the provisions of Section 3 and 3A of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules, seeking the following orders;
 - a. That the Honourable Court be pleased to vacate, set aside and/or review the orders dated the 21st March, 2023 dismissing the 1st Defendants' Defence and Counter-claim.
 - b. That this Honourable Court be pleased to reinstate the 1st Defendants' statement of Defence and Counterclaim.
 - c. That this Honourable Court be pleased to recall the Plaintiff for purposes of cross-examination by the 1st Defendant.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Mathew Mbaluka Mutisya, the 1st Defendant, who deponed that he defended the suit by filing of a Defence and Counter claim; that he was at all material times represented by Opande Christiansen, whom he paid instruction and legal fees and that the aforesaid Advocate did not inform him that the matter was coming up for hearing on 21st March, 2023.
3. The 1st Defendant deposed that had he been informed, he would have been ready to proceed having filed all the relevant documents; that on 21st March, 2023, Otieno Advocate appeared before the Court purporting to represent him and that he is a stranger to the said Advocate Otieno who is a masquerader who disguised as his Advocate.
4. The 1st Defendant deponed that Advocate Otieno deceived the Court and other Counsel that he had not obtained instructions from him and had not filed pleadings and that had he instructed Mr Otieno as alleged, the proper procedure would have been for the Advocate to file a formal application to cease acting and serve the same upon him.
5. According to Mr Mutisya, the activities of 21st March, 2023 prompted him to seek assistance from the Law Society of Kenya who conducted a search which revealed that his then Advocate, Opande Christiansen had been struck off the record; that this supports his case that Advocate Otieno who appeared on his behalf on the said date was an imposter and that there was collusion to defeat his case.
6. In response, the Plaintiff filed a Replying Affidavit on 17th July, 2023 in which he deponed that the firm of Osoro Omwoyo & Company Advocates is not properly on record, no notice of change having been served upon himself or his Advocate on record; that in any event, even if the change of Advocates was proper, the mere fact of change of Advocates does not constitute sufficient grounds for granting the prayers sought and that there is no prayer seeking to re-open the case after its closure on 23rd March, 2023 and the application is a non-starter and should be dismissed.
7. According to the Plaintiff, the 1st Defendant is pleading falsehoods; that Advocate Opande Christiansen has never been the 1st Defendant's Counsel nor has he ever appeared in the matter; that the public search engine shows that Mr Opande Christiansen was permanently struck off the roll as at 2017 and it is irrational for the 1st Defendant to allege that he instructed him and that the 1st Defendant has at all times been represented by the firm of Abuodha and Co Advocates who consistently filed pleadings and attended Court.



8. Mr Munguti asserted that the 1st Defendant is undeserving of the orders sought in the application having come to Court with unclean hands; that he neglected Court sessions, abandoned his Advocates and ultimately failed to attend court on 23rd March, 2023 when the matter came up for hearing despite service and that the assertions that the Applicant's Defence and Counterclaim raises triable issues is unsupported. None of the parties filed submissions.

Analysis and Determination

9. Having considered the Motion and response, the issues that arise for determination are;
- i. Whether the firm of Osoro Omwoyo & Co Advocates is properly on record?
 - ii. Whether the Court should set aside its orders of 21st March, 2023 dismissing the 1st Defendant's Counterclaim and reinstate the same?
 - iii. Whether the Plaintiff should be recalled for purposes of cross-examination by the 1st Defendant?
10. The law with respect to change of representation is to be found under Orders 9 and 10 of the Civil Procedure Rules, 2010. Order 9 Rule 5 thereof provides thus;
- “A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
11. In the present case, Counsel for the Applicant filed a Notice of Change on 13th April, 2023. He has however not disputed the assertions of non-service of the same on the Respondent by way of evidence or otherwise and what the Court is left to consider is whether non-service renders the notice incompetent.
12. The Court in *Romane Agencies Ltd vs Tanathi Water Services Board Civil Appeal No. 159 of 2013* had the opportunity to consider this question and held thus:
- “The requirement for service of a Notice of Change must when understood in the context of its purpose and object be taken to require notification rather than validation of the change of advocate. The parties in the suit and previous counsel are notified of the change of advocates by service upon them as required by the rule. Service of the notice of change does not validate the change of advocate. The object of change of advocates is to promote the right of counsel, with the freedom of a litigant to appoint an advocate of his own choice. To hold otherwise would be to subjugate a party's right of counsel to a notification requirement.”
13. The Court is persuaded by this position. Failure to serve the notice of change should not have the effect of invalidating the same. This is especially as this non-service has not been alleged to have caused any prejudice. The Court further relies on the exposition by the Court of Appeal in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & Others [2013] eKLR* thus;
- “... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice



must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

14. In the end, the Court finds that the firm of Osoro Omwoyo and Co Advocates is properly on record.
15. The next issue to deal with is whether the Court should set aside its orders of 21st March, 2023 dismissing the 1st Defendant’s Counterclaim and reinstate the same.
16. Order 12 Rule 7 of the Civil Procedure Rules, 2010 gives this court discretion to reinstate a suit that has been dismissed and stipulates as follows;

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
17. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. This position was stated in the case of *Shah vs Mbogo & Another* (1967) EA 116, where the Court of Appeal of East Africa held as follows:

“The discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”
18. More recently, the Court of Appeal in *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated as follows:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit...”
19. In the present case, the Applicant seeks an order setting aside the orders made in this Court on 21st March, 2023 dismissing his Counterclaim. When the matter came up for hearing on the said date, the 1st Defendant was not present. The record however indicates that Counsel Otieno was present on his behalf.
20. Counsel Otieno informed the Court that he had not received instructions from the 1st Defendant whom he termed difficult. Noting that the 1st Defendant was not ready to proceed with his case, Counsel for the 10th-12th Defendants, receiving support from Counsel for the 5th-9th Defendants, asked that the 1st Defendant’s Counterclaim be dismissed. Counsel Otieno’s response to this was: “I will not gag the Court, I leave it to the Court. The Counterclaim can be dismissed.
21. The 1st Defendant’s Counterclaim was dismissed and the matter proceeded for hearing. The Plaintiff testified and closed his case. None of the other Defendants called any witnesses and all the Defendants’ respective cases were closed.
22. The Applicant asserts that he was never informed of the hearing date by his Counsel Opande Christiansen, hence his absence on the aforesaid day; that had he been informed, he would have attended as he had duly filed all the relevant documents and that Counsel Otieno who appeared on his



- behalf is a stranger to him as the Counsel whom he instructed was one Christiansen Opande whom he later on realized had been struck off the roll of advocates. It is the 1st Defendant's case that it is apparent that there was collusion to defeat his case by the said Advocate Otieno.
23. The 1st Defendant has made very serious allegations, especially as regards Counsel being an imposter. Having considered the pleadings and the proceedings before this Court, it is noted that as early as 2016, Mr Otieno Advocate has consistently been appearing for the 1st Defendant ostensibly from the firm of Abuodha and Co. Advocates which came on record for the 1st Defendant on 12th January, 2016, having taken over from the firm of Mogire & Company Advocates.
 24. Indeed, the 1st Defendant's pleadings, including the Defence and Counterclaim, annexed to the application, were filed by the firm of Abuodha and Co Advocates. The Court has not found any indication of the alleged Mr Opande Christiansen.
 25. Taking into account the foregoing narration, it is apparent that the 1st Defendant is not being candid. No tangible reason has been given for the 1st Defendant's failure to attend Court. Merely blaming Counsel, without more is not sufficient. Further, it is noted that before the aforesaid date, the last appearance of the 1st Defendant was on 17th June, 2021 and was absent on 28th June, 2021, 21st October, 2021, 14th December, 2021, 23rd February, 2022 and 3rd October, 2022.
 26. It is trite that a case belongs not to an advocate but to a client and a client should proactively undertake to be aware of the progress of his matter.
 27. The aforestated chronology of events points to a lax attitude by the 1st Defendant. This is a fairly old matter. The Court is not persuaded that the overriding objective of the Court would come to the aid of the 1st Defendant in this case. In the end, the Court declines to reinstate the Defence and Counterclaim. In the same vein, the court declines to recall the Plaintiff for cross examination by the 1st Defendant.
 28. The upshot of the foregoing is that the application dated 13th June, 2023 is found to be unmerited. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.

O. A. Angote

Judge

In the presence of;

Mr. Evans Ochieng for Plaintiff

Mr. Osoro for Applicant

Court Assistant - Tracy

