



Kimani v Wanjiru & 2 others (Environment and Land Case Civil Suit 559 of 2017) [2024] KEELC 3788 (KLR) (2 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3788 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 559 OF 2017**

JE OMANGE, J

MAY 2, 2024

BETWEEN

MARY WANJIKU KIMANI PLAINTIFF

AND

MARY WANJIRU 1ST RESPONDENT

MARTIN PAUL 2ND RESPONDENT

MARY WANJIRU KIMANI 3RD RESPONDENT

RULING

1. This application arises out of the lease hold interest in house number 84-3 D situated at Umoja II Estate Nairobi herein referred to as the suit property. In the application dated the 2nd February 2021 the 1st defendant /Applicant is seeking the following orders:
 - a. That the honourable court be pleased to set aside the judgement entered on 19th November 2020 by Hon Justice L. Komingoi against the 1st defendant.
 - b. Costs of the application.
2. The application, is supported by an affidavit sworn by the Applicant in which she depones that she is the legally registered owner of the suit property herein, in respect of which a Judgement was entered without her participation. She avers that the Plaintiff did not serve her with the pleadings or inform her of the hearing dates. As such, it is her contention that the Judgement which was obtained irregularly should be set aside so that she can be heard.
3. The Plaintiff/1st Respondent opposed the said application vide a Replying Affidavit dated 23rd November 2023 in which she indicated that the 1st Defendant was duly served with all the pleadings but deliberately failed to enter appearance or file a statement of defence. She stated that the application



was made in bad faith as she had demonstrated how she had acquired the suit property from the 3rd defendant herein, whereas the Applicant/1st Defendant had not substantiated her claim to ownership.

4. The parties who were unrepresented did not file submissions. The issue that is before the court for determination is Whether the application to set aside is warranted?
5. The Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, observed that any court in exercising its discretion to set aside any judgment or order, it must judiciously do so, and it is not necessarily a walk in the park for a party moving the Court for an order to that effect.

That the decision whether or not to set aside ex parte judgement is discretionary is not in doubt and that the discretion is intended to be exercised to avoid injustice and hardship resulting from accident or an excusable mistake or error, but is not meant to assist a person who has deliberately sought to obstruct or delay the course of justice as in the case Shah vs. Mbogo & Another [1967] EA 116.

6. In the instant case, the Applicant alleges that she was not served with the pleadings hence her failure to appear in court. The Court record indicates that she was served by one Peter Keli who indicates that he served the 1st Defendant while she was at Muthurwa market and served her with summons and other documents, whereupon the Applicant notified him that she was following up the issue with the Governor's Office. The Applicant did not challenge this testimony so it is probably true that she was served but thought that she could resolve the issue at the Governor's Office.
7. I must say that the application by the applicant has material gaps such as the draft Defence which would have helped strengthen her case. However, the court notes that the Applicant is unrepresented. There is no doubt that a litigant who is unrepresented is often in a disadvantaged position compared to a represented litigant. Article 10 of *the Constitution* requires this court to interpret the law in a manner that promotes the values and principles of governance.

In the present case the court finds that it is just to give both Plaintiff and the 1st Defendant an opportunity to present their case.

8. As I do so, I am aware that the Plaintiff is also entitled to a final determination of the case. As such, the Judgement is set aside subject to the condition that the Defendants will comply with the case time table which the court will set.
9. Consequently, the application dated 23rd February, 2021 is allowed in the following terms;
 - a. The Judgement dated 19th November, 2020 is hereby set aside
 - b. The 1st Defendant is to pay thrown away costs of Kshs 10,000 to the Plaintiff within 30 days
 - c. The Defendants are to comply with the case time table for hearing of the case which the court will set.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS ON 2ND MAY 2024.

JUDY OMANGE

JUDGE

In the Presence of: -

Mary Wanjiku Kimani-Present

Court Assistant: Steve Musyoki

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