



REPUBLIC OF KENYA



**Kamunge v Koech (Environmental and Land Originating Summons  
10 of 2022) [2024] KEELC 4006 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2022**

**LA OMOLLO, J**

**MAY 2, 2024**

**BETWEEN**

**SIMON GITHUA KAMUNGE ..... PLAINTIFF**

**AND**

**STEPHEN KIPKEMOI ARAP KOECH ..... DEFENDANT**

**RULING**

**Introduction.**

1. This ruling is in respect to the Applicant's Notice of Motion application dated 1<sup>st</sup> November, 2023. The Applicant seeks the following orders:
  - a. The Honourable court be pleased to set aside its directions and order issued on 25<sup>th</sup> September, 2023 closing the Plaintiff's and Defendant/Applicant's case.
  - b. This Honourable court be pleased to order opening and hearing of the Plaintiff's and Defendant/Applicant's case herein on such terms that may be imposed by this Honourable court.
  - c. Spent.
  - d. This Honourable court issues such orders or directions as it deems fit to grant for the ends of justice to be met in this application.
  - e. That costs of this application be in the cause.
2. The application is based on the grounds on its face and supported by the affidavit sworn on 1<sup>st</sup> November, 2023 by one Hillary Muthomi Kariuki; the Applicant's Counsel.



### **Factual Background.**

3. The Plaintiff commenced this suit vide Originating Summons dated 16<sup>th</sup> May, 2022. In the summons, he prays for judgment against the Defendant for:
  1. That the plaintiff be declared to have become the legal owner through adverse possession having occupied, cultivated and developed the said parcel of land continuously and uninterrupted for over Fifteen (15) years since the year 2007 and as the sole proprietor of all that parcel of land named Nakuru Municipality Block 21/188.
  2. That the Honorable court do direct that Nakuru County Land Registrar rectify the land register accordingly and the plaintiff be registered as the sole proprietor of the said parcel of land namely Nakuru Municipality Block 21/188.
  3. That the last original title deed in respect of Nakuru Municipality Block 21/188 which is with the defendant be dispensed with.
  4. That the Defendant be prohibited from evicting or in any other way of the suit land pending the hearing and determination of this suit.
  5. That the Defendants pay the costs of this suit. Any other or further relief which this Honourable court may deem fit to grant.
4. In response, the Defendant filed a Replying Affidavit dated 6<sup>th</sup> February, 2023 where he avers that the Plaintiff entered his suit property through his consent.
5. He urges the court to dismiss the Plaintiff's case with costs.

### **Applicant's Contention.**

6. The Applicant contends that the Defendant/Applicant was present in court on 25<sup>th</sup> September, 2023 when the matter came up for hearing.
7. He further contends that he was also present on that day but appearing virtually for the Defendant/Applicant. He contends that he was ready to proceed with the said hearing but when the matter was called out, he was on his feet in another high court matter at Chuka.
8. It is the Applicant's contention that both the Plaintiff's advocate and the Defendant were physically present in court.
9. He contends that he finished addressing the court in Chuka but encountered a technical hitch on his computer and was thus unable to login virtually.
10. The Applicant contends that efforts to reach the Plaintiff's advocate and the Defendant were futile and at the point of reaching them on phone, the Plaintiff's case was ongoing.
11. He further contends that due to his inability to address the court, the Plaintiff's case was heard in his absence and both the Plaintiff's and Defendant's case were closed.
12. The Applicant contends that the inability to address the court was beyond him. He adds that closing of the Applicant's case before being heard is prejudicial thus denied of the right to a fair trial.
13. He contends that the Applicant has always attended court and is keen to have the case heard and determined expeditiously.



14. In conclusion, the Applicant contends that it is in the interest of justice that that the instant application be allowed.

### **Respondent's Response.**

15. In response to the application, the Plaintiff/Respondent filed a replying affidavit sworn on 3<sup>rd</sup> November, 2023 by one Peter Chege the Respondent's Counsel.
16. He deposes that the hearing date of 25<sup>th</sup> September, 2023 was taken by consent by counsels for both parties and that on the said date he called the Applicant's advocate twice to inform him of the hearing but he did not respond.
17. He also deposes that the court assistant called the Applicant's advocate but he never responded. He adds that Counsel never made any effort to follow up on the call or what transpired in court.
18. He further deposes that the Applicant's counsel has not demonstrated to this court that he was on his feet in another case in Chuka.
19. It is his deposition that the Respondent already filed his submissions.
20. In conclusion, he urges the court to dismiss the instant application as it is an abuse of the court process.

### **Issues for Determination.**

21. The Defendant/Applicant filed his submissions on 15<sup>th</sup> December, 2023 the following day.
22. He submits that when the matter came up for hearing on 25<sup>th</sup> September, 2023, the advocate was appearing virtually while the Applicant was present in court.
23. He submits that though the Applicant's advocate was ready to proceed with the hearing, the matter was called out while he was addressing the High Court in Chuka in HCCA No. E004 of 2023 George Ndegwa Muiruri v Khilji Enterprises Limited, Dennis Mugambi Muthuri And Joseph Ngigi Kangethe.
24. He further submits that the advocate was acting for the 3<sup>rd</sup> Respondent in the said case. He also submits that after addressing the court in Chuka, the advocate encountered a technical hitch and was unable to login virtually.
25. He submits that the matter proceeded in the counsel's absence where the Plaintiff/Respondent testified and both parties' cases closed and were directed to file their submissions.
26. He also submits that the Applicant's counsel's absence in court on the date of the hearing was not deliberate but due to a technological challenge. He adds that the same cannot be visited upon the Applicant who is innocent and was present in court. The Defendant/Applicant relied on the judicial decisions in Shah V Mbogo and Pithon Waweru Maina V Thuu Mugiria (1983) eKLR.
27. He submits that the Applicant is keen to have the matter heard and determined. He adds that when the matter came up for hearing on 5<sup>th</sup> June, 2023, the Respondent's counsel sought for an adjournment and even though the Applicant's counsel was ready to proceed, they didn't object to the said request.
28. The Applicant submits that the application has been brought in good faith and without undue delay thus showing the desire to have the case heard on merit. He submits that he has cogent and reasonable defence and ought to be granted an opportunity to ventilate his case.



29. He also submits that no prejudice will be occasioned to the Respondent if the application is granted. He relied on Article 50 (1) and 25 (c) of *the Constitution* and the judicial decision in Fredrick Maritim & 3 Others V Ekegoro Property Management Limited & Another [2021] eKLR.
30. He also relied on the judicial decision in Timwood Products Limited V Karachiwalla (Nairobi) Limited [2016] eKLR and Court of Appeal decision in Japheth Pasi Kilonga & 8 Others V Mombasa Autocare Ltd [2015] eKLR.
31. In conclusion he urges the court that it would be in the best interest of justice and fairness that the application is allowed.
32. The Plaintiff/Respondent also filed his submissions on 15<sup>th</sup> December, 2023.
33. He submits that no evidence has been tendered by the Applicant's advocate to demonstrate that he was virtually present in court and that he encountered a technical hitch.
34. He submits that if the Defendant/Applicant was present in open court, counsel should have informed him to address the court.
35. He further submits that re-opening of the suit will be prejudicial, delay the expeditious disposal of the suit and waste the court's time.
36. The Respondent relied on the judicial decision in Mohamed Shally Sese (Shah Sese) V Fulson Company Ltd & Another [2006] eKLR. He submits that the Applicant has not approached the court with clean hands as he ought to have directed the Defendant to address the court at the hearing.

#### **Analysis and Determination.**

37. It is my considered view that only one issue arises for determination:

Whether the Applicant is entitled to orders for setting aside the proceedings of 25/9/2023 and consequently reopen the Plaintiff's and Defendant's case for hearing.
38. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

“Where under this order judgment has been entered or the suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
39. In *Patel v E.A Cargo Handling Services Ltd* [1974] E.A 75, the court held as follows:

“There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just...”
40. Further, in the judicial case in *Shah v Mbogo & Another* [1967] EA 116 it was held, inter alia, as follows:

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. The discretion 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 course of justice...”



41. In the instant case, the Applicant's advocate contends that when the matter came up for hearing on 25<sup>th</sup> September, 2023, he was addressing the court in another matter in Chuka.
42. The Applicant's case is that he experienced a technical hitch and was not able to join the virtual platform as a result of which the Respondent's case was heard and closed and his case also heard and closed.
43. The Respondent on the other hand argues that the hearing date had been taken by consent by counsel for both parties. He also argues that the Applicant's counsel never demonstrated that he was on his feet in another case in Chuka. He added that counsel never followed up on the case afterwards.
44. One of the cardinal principles of natural justice is that a person shall not be condemned unheard. While I am well aware of this principle, I must point out that counsel for the Applicant is not being entirely candid on the circumstances surrounding fixing the suit for hearing and the events on the day of the hearing.
45. The record shows that Counsel for the Applicant was absent during the call over. The matter was nevertheless confirmed for hearing at 10.30 am.
46. At 11.00 am the court convened and counsel for the Respondent informed the court that she had tried to call Counsel for the Applicant at 10.43 am and 10.44 am but his calls went unanswered.
47. This court ruled that the date had been taken by consent and ordered the matter to proceed to hearing. There is no record of the Defendant being in court or informing the court that his counsel was absent. This is what a reasonable man would do, if indeed he was in court as alleged.
48. Taking into consideration the circumstances of this case and acknowledging that mistake of counsel should not be visited against the client, it is in the interest of justice that I exercise my discretion to reopen this case so that it is heard on its merits.
49. I also acknowledge that the acts and omissions of the Applicant have caused great inconvenience to the Respondent who as at the time of this application had testified, closed his case, filed submissions and was waiting for judgment. Justice delayed is justice denied. This holds true for both parties.

**Disposition.**

50. The upshot of the foregoing is that the Applicant's application dated 1/11/2023 is allowed in the following terms:
  - a. The proceedings, directions and orders issued on 25<sup>th</sup> September, 2023 and all subsequent directions and orders are hereby set aside.
  - b. The Plaintiff's case is hereby reopened for purposes of cross-examination by the Defendant.
  - c. The Defendants case is hereby reopened.
  - d. The Defendant/Applicant shall pay to the Plaintiff/Respondent thrown away costs of Kshs. 50,000 before the date set for hearing.
  - e. The costs of this application shall be in the cause.
51. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 2<sup>ND</sup> DAY OF MAY 2024.**

**L. A. OMOLLO**



## **JUDGE**

### **In the presence of: -**

No appearance for the Defendant/Applicant.

No appearance for the Plaintiff/Respondent

Court Assistant; Mr. Joseph Makori.

