



Mosbey & 6 others v Busienei & 2 others (Environment & Land Case E019 of 2022) [2024] KEELC 4076 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4076 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE E019 OF 2022

EO OBAGA, J

MAY 8, 2024

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22 LAWS OF KENYA

AND

**IN THE MATTER OF THE REGISTERED LAND KNOWN AS
MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1472,1473 AND 1474**

AND

IN THE MATTER OF AN APPLICATION FOR ORDERS BASED ON ADVERSE POSSESSION

BETWEEN

PIUS KIMAIYO MOSBEY 1ST APPLICANT
PHILIP KIPKORIR LAMAI 2ND APPLICANT
PHILIP KIPKEMBOI MUTAI 3RD APPLICANT
JOSEPH KINYOR MAHINDI 4TH APPLICANT
SELLY JEPTOO TANUI 5TH APPLICANT
ROSA JEPKEMBOI KEBENEI 6TH APPLICANT
WILSON KIPNGETICH SANG 7TH APPLICANT

AND

PAULO KIPLAGAT BUSIENEI 1ST RESPONDENT
BENJAMIN KIPKOSGEI LAGAT 2ND RESPONDENT
ELIAS CHERUIYOT LAGAT 3RD RESPONDENT



RULING

1. This is a ruling in respect of a Notice of motion dated 25/1/2024 in which the Applicants are seeking the following orders: -
 1. Spent
 2. The order given on 24.1.2024 closing the applicants'/respondents' case and fixing this suit matter for mention on 21.2.2024 for filing written submissions be and is hereby set aside forthwith.
 3. Subject to prayer 2 of this application, this suit/matter be and is hereby re-opened and fixed for hearing on merit on priority basis.
 4. The applicants'/respondents witnesses namely PW1, PW2, PW3 PW4 and PW5 be and are recalled for cross –examination by the respondents/applicants.
 5. The order given on 20.9.2023 for the parties including the respondents/applicants to comply with be and is hereby extended with leave to the respondents/applicants to comply with the orders granting the extension, if any given.
 6. Cost to the respondents/applicants.
2. The Applicants contend that one of them that is the 2nd Applicant was present in court on 24.1.2024 when the hearing proceeded *ex-parte* and the Applicants' case in which they were seeking orders of adverse possession was concluded. The 2nd Applicant states that he made frantic efforts to their advocate who could not pick his phone because it was busy throughout.
3. The Applicants' Advocate has also filed an affidavit which was neither signed nor dated in which he states that on 24.1.2024, he was having a hearing before Iten Environment and Land Court and that is why he did not attend court. In a further affidavit by the 2nd Applicant, the 2nd Applicant states that their advocate was not present and did not know that the case had been allocated time at 10. 00a.m for hearing.
4. The Applicants' application was opposed by the Respondents through a replying affidavit sworn by their counsel on 12.3.2024. The deponent states that the hearing date of 24.1.2024 was taken by consent of counsel for the parties. The case was called out virtually at around 9.05 a.m when both counsel indicated to court that they were ready to proceed. The court allocated the case for 10.00a.m. The Applicants' advocate did not inform the court that he had another matter at Iten.
5. When the court assistant came to chambers to call the judge, the judge informed the court assistant that he was going to give the Applicants' counsel a few minutes to avail himself. Counsel for the Respondents then made frantic efforts to counsel for Applicants. Counsel for the Applicants could not pick his calls.
6. The Respondents through their counsel state that the Applicants are out to delay this matter. The Applicants' counsel had enough time to prepare for the case and that this application has been made to frustrate this case.
7. I have carefully considered the Applicants' application as well as the opposition to the same by the Respondents. The only issue for determination is whether this court should exercise its discretion to set aside the orders of 24.1.2024.



8. To begin with, it is not in contention that the Applicants' counsel was present when the matter was called out virtually at around 9.05a.m on 24.1.2024. Both Advocates confirmed that they were ready to proceed and were allocated time at 10.00a.m. At 10.00a.m the court assistant went to open court to confirm whether all parties were present. The court assistant came back and told me that only the counsel for Respondents and his witnesses were present.
9. I then asked the court assistant that it was fair to give counsel for Applicant a time. At around 10.27a.m, the Applicants' counsel had not arrived. It was also not brought to my attention that the 2nd Applicant was present in court. At 10.30a.m, I entered the court whereby the Respondents' counsel informed me that he had tried to call the counsel for the Applicants in vain. As the Applicants' counsel was available virtually at 9.05a.m and he confirmed his willingness to proceed, I directed the case to proceed. We proceeded to conclusion and I gave directions on written submissions.
10. Upto the time of giving directions on filing of written submissions, the 2nd Applicant did not try to inform the court that he was present. I think this was deliberate considering the previous conduct of the Applicants. In considering whether to exercise discretion in favour of the Applicants. The court is under duty to consider past conduct of the parties.
11. The Respondents had purchased portions from the 1st Applicant's land. The 1st Applicant refused to give them title. The Respondents moved to court and filed an originating summons seeking orders of adverse possession. The 1st Applicant filed a replying affidavit in which he admitted the Respondents' claim and stated that he was willing to give them titles. He stated that he was being misled by the 2nd and 3rd Applicants who are his sons.
12. The 1st Applicant then filed another affidavit in which he denied ever selling land to any of the Respondents. He wanted an injunction granted against the Respondents claiming that they invaded his land. This application was dismissed on 6.7.2023 as it was an abuse of the court process and would have amounted to constructive eviction.
13. The Applicants' counsel does not explain why he chose not to come to court at 10.00a.m yet he had confirmed his readiness to do so at 9.00a.m when the file was called out virtually. The 2nd Applicant in his further affidavit lied on oath when he claimed that their advocate was not around even when the call over was conducted at around 9.05a.m.
14. The discretion to set aside *ex-parte* proceedings is meant to be exercised to help one who has a good reason why he did not attend court. It is not meant to assist a party who is out to obstruct the course of justice. In the instant case, the Applicants are out to obstruct the course of justice. The 2nd Applicant should have even raised his hand and informed the court that his Advocate was away and that he was present. He did not do this. He hoped that his advocate would later make an application for setting aside the *ex-parte* proceedings and that he application would be allowed. I find no merit in this application which is dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 8TH DAY OF MAY, 2024.

E. O. OBAGA

JUDGE

In the virtual absence of parties who were aware of the date of delivery of ruling.

Court Assistant –Laban

