



**Kigano v County Government of Mombasa & 2 others (Environment & Land Case 302 of 2018) [2024] KEELC 5225 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5225 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 302 OF 2018**

**SM KIBUNJA, J  
JULY 10, 2024**

**BETWEEN**

**CLEMENT MUTURI KIGANO ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> DEFENDANT**

**GRACE WANGUI MAHUTHU ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The “1<sup>st</sup> defendant” filed the application dated the 5<sup>th</sup> February 2024 seeking for *inter alia* discharge, setting aside and or varying the orders of 30<sup>th</sup> January 2024, thus reopening the case for defence hearing. The application is based on the eighteen (18) grounds on its face and supported by the affidavit of Grace Wangui Mahuthu, the 2<sup>nd</sup> defendant, sworn on the 5<sup>th</sup> February 2024, deposing inter alia that though the defence hearing was confirmed for hearing on 30<sup>th</sup> January 2024 at 11.00 am, her advocate arrived at the courtroom at 11.09 am when the court had just ended the session; that she had been waiting for her advocate at the court lobby from 9.00am; that upon perusing the court record, they learnt the defence case had been closed and directions on filing of submissions given; that she has been in occupation of the suit property since 1995 and her late husband had done massive development on it and should be given the opportunity to tender her defence.
2. The plaintiff opposed the application through the replying affidavit of Clement Muturi Kigano, sworn on the 21<sup>st</sup> March 2024, among others deposing that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have been delaying in complying with Order 11 of the Civil Procedure Rules, and have never been keen to have this suit heard and concluded; that on the 30<sup>th</sup> January 2024, the suit was called at 9.00am and confirmed for hearing at 11,00am but the defendants had not arrived by 11.10am when their cases were closed; that the



defendants failure to punctually attend court on that date has not been explained and the application should be dismissed with costs.

3. The court gave directions on filing and exchanging submissions on the 9<sup>th</sup> April 2024 and 9<sup>th</sup> May 2024. The learned counsel for the 2<sup>nd</sup> defendant and plaintiff filed their submissions dated the 6<sup>th</sup> May 2024 and 20<sup>th</sup> May 2024 respectively, which the court has considered. The learned counsel for 1<sup>st</sup> Defendant indicated they were not opposing the application.
4. The following are the issues for the court's determinations:
  - a. Whether the applicant has made a reasonable case for the court to exercise its discretion to set aside the orders of 30<sup>th</sup> January 2024 closing the defence cases.
  - b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel for the 2<sup>nd</sup> defendant and plaintiff, superior courts decisions cited thereon and come to the following conclusions:
  - a. There is no dispute that all the parties were aware the suit was coming up for defence hearing on the 30<sup>th</sup> January 2024. The record confirms that the hearing date of 30<sup>th</sup> January 2024 had been fixed by consent of counsel for the plaintiff and 2<sup>nd</sup> defendant after the close of the plaintiff's case on the 4<sup>th</sup> October 2023.
  - b. The record also confirms that on 30<sup>th</sup> January 2024, the suit was called during the virtual session that commenced at about 9.00am in the presence of counsel for the plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants and confirmed for defence hearing at 11,00am. The record further show that when the suit was called in open court at 11.04 am, only the plaintiff and his counsel were in court. The court closed the defendants' case, on oral application by counsel for the plaintiff. The court then gave directions on filing and exchanging submissions. Then the instant application was filed on 5<sup>th</sup> February 2024.
  - c. The application dated 5<sup>th</sup> February 2024 is indicated to have been drawn and filed through MS. "J. S. Kaburu & Company Advocates for 1<sup>st</sup> defendant" but the supporting affidavit is by the 2<sup>nd</sup> defendant. The notice of appointment dated 14<sup>th</sup> February 2019 that is on record shows that Ms. J. S. Kaburu & Company Advocates are on record for the 2<sup>nd</sup> defendant, and I will therefore take their signing off the application as counsel for the 1<sup>st</sup> defendant was in error, and the court will proceed to determine the application on its merit.
  - d. The 2<sup>nd</sup> defendant has in the supporting affidavit deposed that her advocate got late because he was held up in a traffic jam and that she had been waiting for him at the lobby from 9.00am. That has been disputed by the plaintiff through his replying affidavit who deposes that there is no explanation tendered why the 2<sup>nd</sup> defendant was not in the courtroom when the suit was called out. Further, that the 2<sup>nd</sup> defendant's chambers is a walking distance from the court premises, and the issue of traffic jam should not arise. Though the 2<sup>nd</sup> defendant and or her counsel have not responded to the foregoing deposition by the plaintiff, and considering the application was filed within a week from the date of the order sought to be set aside was made, it is only fair and just that the defendants be granted an opportunity to present their defence. There is no evidence that the plaintiff's case will be prejudiced in any way if the application is allowed, and any inconvenience that is likely to be suffered by him, may be addressed by an award of costs.



- e. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event, unless otherwise directed, and in this instance, the 2<sup>nd</sup> defendant/applicant though successful will meet the plaintiff's costs.
6. That in view of the above determinations, the court finds and orders as follows:
- a. That the 2<sup>nd</sup> defendants application dated the 5<sup>th</sup> February 2024 is allowed and the order of 30<sup>th</sup> January 2024 closing the defence cases set aside.
- b. Nevertheless, the 2<sup>nd</sup> defendant/applicant to meet the plaintiff's costs in the application.
- Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10<sup>TH</sup> DAY OF JULY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Plaintiff : Mr. Amuga

Defendants : M/s Avianda for 2<sup>nd</sup> Defendant

M/s Ombogo for 1<sup>st</sup> Defendant

LEAKEY – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

