



**Mugo (Chairman) & 2 others (Suing for an on Behalf of Gwikuria Self Help Group) v Njau
(Environment & Land Case E120 of 2022) [2024] KEELC 6634 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E120 OF 2022**

JG KEMEI, J

OCTOBER 9, 2024

BETWEEN

**ANDREW NGUGI MUGO (CHAIRMAN) 1ST PLAINTIFF
JAMES MWANGI (TREASURER) 2ND PLAINTIFF
ESTHER WANGUI SUSAN (SECRETARY) 3RD PLAINTIFF
SUING FOR AN ON BEHALF OF GWIKURIA SELF HELP GROUP**

AND

ROSEMARY W NGENDO NJAU DEFENDANT

RULING

1. Coming up for determination is the Defendant/Applicant's Notice of Motion Application dated 22/12/2023 expressed under Article 159 (2) (d) Constitution of Kenya, Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and Order 18 Rule 10 & Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking Orders that; -
 - a. Spent.
 - b. Spent.
 - c. The Honorable Court be pleased to set aside the ex parte proceedings of 24th October 2023 and the matter be heard afresh and the Applicant be allowed to defend the suit unconditionally.
 - d. In the alternative, this Honorable Court be pleased to recall the Plaintiff's witnesses who testified on 24th October 2023 for cross-examination and re-examination.
 - e. The costs of this Application abide the outcome of the suit.



2. The motion is supported by an Affidavit of even date sworn by Ruth Kuria, the Applicant's Counsel. She conceded that the Plaintiff's case proceeded for ex parte hearing on 24/10/2023 due to the Applicant's communication breakdown on how the hearing was to proceed. That as a result, the Applicant withdrew instructions from the Advocate's firm prompting the Counsel to file an application dated 24/10/2023 to cease acting. See RK1 a and b. That when the matter was called out for hearing, the Court declined to indulge the Counsel holding brief for the Applicant seeking the hearing of the Application to cease acting. That the Counsel and Applicant have had a meeting and the Applicant has re-appointed the deponent to act for her in the matter hence the application.
3. Opposing the Plaintiff/Respondent, Andrew Ngugi Mugo swore his Replying Affidavit on 17/1/2024. He deponed that the application is an abuse of Court process noting that the Applicant's Counsel's application to cease acting is still pending for determination. That the conduct of the Applicant and her Counsel in respect of this matter bespeak of abuse and disrespect of Court process. That on the 24/10/2023 the Applicant's Counsel appeared in Court and hearing was slated for 12.00 noon when she failed to appear and instead another Counsel, Mr. Kinyua holding brief for the deponent informed the Court that the Applicant was not present in Court and that she had disagreed with her Counsel on how to proceed with the matter. That notable the Applicant was not in Court and the issues raised herein were already addressed by the Court on 24/10/2023 when the matter proceeded for hearing. He urged the Court to dismiss the application with costs.
4. On 29/1/2024 directions were taken and parties undertook to canvas the application by way of written submissions. It must be noted that none of the parties filed their submissions.
5. The germane issue for determination is whether the application is merited.
6. The Court record bears witness that the hearing date of 24/10/2023 was taken by consent of both parties on 27/4/23 before the Hon Deputy Registrar of this Court. It therefore follows that the parties were well aware of the hearing date. Rightly so because the Applicant through Mr. Kinyua Advocate who was holding brief informed the Court of an application seeking the Applicant's Counsel from acting in the matter that was filed on the very morning of the hearing date. To this end, the Court noted that the application to cease acting was not before it in the physical file and proceeded to allocate hearing time. The hearing proceeded in earnest at noon ex parte. Neither the Defendant nor her Counsel was present in Court hence the Application.
7. Going by the Applicant's Counsel averments in the Supporting Affidavit, having fell out with her client, the Defendant, it was incumbent upon the Defendant at the very least to appear in Court to safeguard her interests in the case. It is appreciated that virtual Courts in this era are just a button away and therefore the Defendant could access the Court from the comfort of her being. She did not. A case belongs to the client and such client must take appropriate steps to assist the Court achieve the overriding objective stated in oxygen principles under the *Civil Procedure Act*.
8. The Applicant inter alia relies on Sections 1A, 1B and 3A of the *Civil Procedure Act* in her motion. Under section 1B (a) of the *Civil Procedure Act* the Court is tasked to ensure the just determination of proceedings. Additionally, she relies on Article 159(2) of *the Constitution* of Kenya which requires this Court in exercise of its judicial authority, to ensure justice is administered without undue regard to procedural technicalities and that it is so administered to all, irrespective of status. Moreover Article 48 of *the Constitution* of Kenya enshrines the right to access justice for all.
9. This suit is part heard. The Plaintiff and his two witnesses testified ex parte on 24/10/2023. It is therefore not correct as averred under Para. 2 (viii) of the Plaintiff's Replying Affidavit that only one witness testified and the Defendant will have an opportunity to cross-examine the remaining witnesses.



In fact, the Court record shows that the Plaintiff's Counsel sought an adjournment to call the last witness. The Plaintiff did not demonstrate the prejudice if any he and the other two witnesses stand to suffer if they are recalled for cross examination. The Court of Appeal in *African Safari Club Vs. Safe Rentals Limited* [2010]eKLR observed that the balancing act as described in the analysis of the positions of the parties before a Court, is in keeping with one of the principal aims of the oxygen principle of treating both parties with equality or in other words placing them on equal footing as far as it is practicable.

10. The upshot of the forgoing is that the Court finds that the Applicant has not satisfied the threshold of setting aside the ex parte proceedings of 24/10/2023.
11. However, in the interests of justice, the Court allows Prayer No. d of the Application subject to the Defendant's payment of throw away costs of Kshs. 5,000/- (Five Thousand Shillings Only) to the Plaintiff within the next 15 days.
12. The parties are directed to fix the matter for hearing expeditiously.
13. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Macharia HB Kariuki for 1st, 2nd and 3rd Plaintiffs

Ms. Wanjiru HB for Ms. Wangui Kuria for Defendant

Court Assistants – Phyllis/Oliver

