



**Murei v Chumo (Environment & Land Case 137" A" of 2012)
[2024] KEELC 6376 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 137" A" OF 2012
JM ONYANGO, J
OCTOBER 3, 2024**

BETWEEN

PHILIP KIPSUM MUREI APPLICANT

AND

KIBOCH CHUMO RESPONDENT

RULING

1. What I am required to determine is the Defendant's application dated 17th January 2024 seeking orders that the default judgment entered on 8th November 2018 be set aside and that the registration status obtaining on Land reference No. Nandi/Chemuswa/464 when the suit was filed be restored.
2. The application is predicated on the grounds that the Defendant was not served with a hearing notice and the matter proceeded without the knowledge of the defendant or his advocate and the defendant was denied the right to be heard.
3. In the Applicant's Supporting Affidavit sworn on the 17th January 2024 he has elaborated the said grounds and explained that in 2018 when the case came up for hearing, his former advocate Mr. S.K Kitur was ailing and he eventually passed away in 2020 as indicated in the annexed death certificate.
4. The Applicant avers that he learnt of the judgment in December 2023 but he was unable to trace the court file as it was erroneously indicated as ELC Case No. 237 "A" of 2012 instead of 137 A of 2012. The file was subsequently traced in the archives.
5. It is the Applicant's assertion that the suit property was illegally transferred during the pendency of the suit in 2010 contrary to the doctrine of lis pendens and the court never authorized the cancellation of his title.
6. The application is opposed by the Plaintiff/ Respondent vide his Replying Affidavit sworn on 16.2.24 in which he deposes that the Deputy Registrar issued a hearing notice to both parties and the matter



proceeded on the 4th hearing date. He states that he is aware that the Applicant's former counsel died in 2020.

7. He further avers that in related suit Kapsabet SPM ELC Case No. 110 OF 2016, the Applicant filed suit against the Respondent seeking a declaratory order that the suit land was his. During the hearing of the said suit, the Applicant admitted that judgment had been delivered in this suit and it is therefore not true that he only learnt of the judgment in December 2023 thus he has come to court with unclean hands. He contends that the Applicant is guilty of laches.
8. In response to the Replying Affidavit, the Applicant filed a Supplementary Affidavit sworn on 30.4.24 in which he insists that he was not served with a hearing notice and purports to challenge the court and the Respondent to demonstrate that he was served. He reiterates that his title was unlawfully cancelled.
9. It is his contention that the Kapsabet case has no bearing on the instant suit as it does not cure the procedural defects in this matter. He denies that this suit has been overtaken by events and insists that he is entitled to the right to be heard before a decision is made against him.
10. The court directed that the application be canvassed through written submissions and both parties complied with the said directions by filing their submissions.
11. Having carefully considered the application, the response thereto and the rival submissions, I am of the view that the issues for determination are as follows:
 - i. Whether the Applicant was served with a hearing notice
 - ii. Whether the default judgment entered on 8th November 2018 ought to be set aside.

Whether the Applicant was served with a hearing notice

Order 12 Rule 2 of the [Civil Procedure Rules](#) Provides as follows:

If on the day fixed for hearing, after the suit has been called for hearing outside the court, only the plaintiff attends, the court if satisfied that the notice of hearing was served upon the defendant, if the court is satisfied;

- a. That notice of hearing was duly served, it may proceed with the hearing;
 - b. That notice of hearing was not duly served, it shall direct a second notice to be served or;
 - c. That notice was not served in sufficient time to enable the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.
12. In the instant case the Applicant maintains that his former advocate was not served with a hearing notice as he was ailing and he finally died in 2020. On the other hand, counsel for the Respondent contends that the hearing notice was served on both parties by the court.
 13. Order 12 Rule 2 (b) is clear that if the court is not satisfied that the hearing notice was served, it may direct that a fresh notice be served. The court in this instance did not direct that the hearing notice be served afresh implying that it was satisfied that service had been effected. The onus was on the Applicant to prove that his former advocate was not served. The death certificate which shows that he died 2 years after the hearing in 2020 does little to prove that he was not served. In the circumstances, I am inclined to believe that he was served.



Whether the default judgment ought to be set aside

14. Having found that the applicant has failed to prove lack of service, I will proceed to consider whether there are other reasons that would compel the court to set aside the judgment. Essentially, setting aside an ex parte judgement is a matter of the discretion of the court. In the case of *Patel v E.A. Cargo Handling Services Ltd 1975*) E.A 75 the court observed as follows:

“The discretion is free and the main concern of the courts is to do justice to the parties before it, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise , to obstruct or delay the cause of justice(see *Shah v Mbogo 1967* EA 116.”
15. In exercising its discretion, the court will consider the nature of the of the action, the defence if any, the length of delay and reasons for the delay if any, as well as the prejudice that will be occasioned to the Respondent and whether it can be compensated by an award of costs.
16. In the case at hand, the Plaintiff and the defendant are brothers. The Plaintiff’s claim which was originally filed in February 2004 is that the Defendant unlawfully had himself registered as the owner of land parcel number Nandi/Chemuswa/464 which originally belonged to their father, Chumo Arap Bett, yet he had been given land parcel no. Nandi/Chemuswa/463. He sought a declaration that the Defendant holds the suit land in trust for the plaintiff. He also sought an order that the Defendant be ordered to execute documents of conveyance to transfer the whole of parcel number Nandi/Chemuswa/464 and in default the court to execute the said documents in place of the defendant.
17. In his Defence dated 14.2.2004, the Defendant denied the plaintiff’s claim and stated that the plaintiff’s claim over the suit property is false as the late Chumo Arap Bett never donated any land to anybody and that he (defendant) is the absolute proprietor of the suit land. He faulted the plaintiff for having failed to join the Land Registrar who issued the title in the name of the defendant and prayed that the Plaintiff’s suit be dismissed.
18. From the judgment it is clear that when the case came up for hearing the court observed that the Plaintiff had engaged the land Registrar, Nandi County who directed the defendant to surrender the title in respect of the suit property. The Land Registrar eventually cancelled the Defendant’s title and registered the Plaintiff as the proprietor of the suit property in 2016. The court was therefore of the view that the prayers sought in the Plaint were no longer necessary as the Plaintiff was the registered proprietor of land parcel No. Nandi/Chemuswa/464 and the court could not make a declaration that the Defendant was holding the land in trust for the Plaintiff. Additionally, the court could not order the Defendant to transfer the title to the Plaintiff as the suit had been overtaken by events. The court nevertheless held that the Plaintiff had proved his case and awarded him the costs of the suit.
19. Learned counsel for the Respondent has submitted that in a related suit filed by the Respondent against the Applicant in Kapsabet Court, the Applicant filed a Counterclaim seeking the cancellation of the Respondent’s title but the suit was determined in favour of the Respondent. The Applicant’s appeal against the said judgment was subsequently dismissed on 28. vide Kapsabet ELC Appeal No.4 of 2022. It was his contention that that by the time this suit came up for hearing the Respondent was no longer interested in pursuing the matter as it had been resolved in another forum.
20. In view of the decision in Kapsabet ELC Appeal No. 4 OF 2022 which affirmed the decision in Kapsabet SPM ELC No.110 OF 2016, the issue of the ownership of the suit property has been



determined by a court of concurrent jurisdiction and even if this court were to set aside the judgment, the matter would be res judicata.

21. Additionally, the Applicant was not honest when he averred that he learnt of the judgment herein in December 2023 as he admitted during the hearing of the Kapsabet suit in 2021 that the judgment herein had been delivered. It would appear that the Applicant was waiting to see if his appeal would succeed as he only filed the instant application after his appeal was dismissed on 28.3.24. It is therefore clear that the applicant is guilty of laches as he has not explained the delay in filing this application.
22. On the question of the right to be heard, I agree with learned counsel for the Applicant that a party should not be condemned unheard as this would amount to breaching the rules of natural justice. I am in agreement that that as far as possible cases should be heard on merit. I concur with the authorities cited by counsel for the Applicant. However, in the instant case, the Applicant has been economical with the truth by failing to disclose that he was heard in Kapsabet SPM ELC No.110 OF 2016 and Kapsabet ELC Appeal No. 4 of 2022 where the court determined the ownership of the suit property and by this application the Applicant hopes to have a second bite at the cherry. This is clearly an abuse of the court process.
23. Having taken into account all the foregoing factors, I am of the considered view that the application lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF OCTOBER 2024.

J.M.ONYANGO

JUDGE

In the presence of;

Mr. Momanyi for the Defendant/Applicant

Mr. Nyekwei for the Plaintiff/Respondent

Court Assistant: Brian

