



**Werunga v Wanyonyi & another (Being Sued as the Legal Representatives of the Estate of Mukholi Kiabai - Deceased) (Environment & Land Case E002 of 2022) [2024] KEELC 6856 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6856 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E002 OF 2022  
EC CHERONO, J  
OCTOBER 17, 2024**

**BETWEEN**

**CHARLES WABULA WERUNGA ..... PLAINTIFF**

**AND**

**PHANICE NEKESA WANYONYI ..... 1<sup>ST</sup> DEFENDANT**

**ELIUD WAFULA AINEAH ..... 2<sup>ND</sup> DEFENDANT**

**BEING SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF  
MUKHOLI KIABAI - DECEASED**

**RULING**

1. By a Notice of Motion Application dated 30<sup>th</sup> of May 2024, brought under Section 3, 3a and 63(e) of the [Civil Procedure Act](#) and Order 12 Rule 7 of the [Civil Procedure Rules](#) 2020, the Applicant seeks for orders as follows;
  - a. Spent
  - b. Spent
  - c. That the ex parte orders dated the 5<sup>th</sup> day of March, 2024 be set aside.
  - d. That Moses Kuloba Keyacourt process is ordered to attend court for cross examination of his affidavit of service dated 19<sup>th</sup> December, 2023.
  - e. That costs of this application be provided for and be borne by the Defendant/Respondents.
2. The Application is founded on the grounds set out on the face of the Application and on the Supporting Affidavit sworn by Charles Wabula Werunga on 30<sup>th</sup> May, 2024. In his affidavit, the Applicant contends that this suit was dismissed for want of prosecution on 5<sup>th</sup> May, 2024, a date which



was unknown to him and his counsel. He accused one Moses Kuloba Keya for perjury stating that the firm of Were & Company Advocates never received the hearing notice and the copy allegedly signed and stamped. It was deposed that the Applicant became aware of the said dismissal during another hearing between the parties herein i.e. BGM CMCC no 337 of 2022. That it took a while to have the file traced because the same was proceeding before the Deputy Registrar for consideration of a bill of costs. It was argued that the parties were negotiating and had reached an agreement therefore the orders sought will not unduly prejudice the Respondents.

3. In opposition thereto, the Respondents filed a replying affidavit sworn by the 2<sup>nd</sup> Respondent on 27/6/2024 where they contend that the Applicant testified as PW1 on 31/10/2022 and later sought to amend his Originating Summons vide an application dated 22/11/2022. They stated that the said application was allowed vide a ruling delivered on 7/3/2024 on condition that thrown away costs of ksh 10,000/= be paid to the Respondents herein within 14 days. It was deposed that the Applicant has never paid the said thrown away costs and has never amended his originating summons and paid the requisite fee. That on 16/5/2023 when the matter coming up for hearing, the Applicant's counsel sought for an adjournment which was allowed on condition that ksh 10,000/= be paid as costs and ksh 2,000/= be paid as court adjournment fees. That the Applicants counsel was served with the hearing notice for 5/3/2024 and the same was duly stamped and signed by the receiving officer. They therefore sought to have the application dismissed.
4. The parties took directions to have the application canvassed by way of written submissions. The Applicant filed his submissions dated 10<sup>th</sup> June 2024 where he relied on the case of; *Patrick Omondi Opiyo t/a Dallas Pub v Shaban Keah & Another* (2018) eKLR.
5. The Respondents on their part filed submissions dated 27<sup>th</sup> June, 2024 through the firm of Robert Wamalwa & Co. Advocates. It was their contention that the Applicant is guilty of laches and that he lost interest in prosecuting his case. Reliance was placed in the case of *Tana and Athi River Development Authority v Jeremiah Kimigbo wakio & 3 Others* (2015)eKLR, *Habo Agencies Limited v Wilfred Odhiambo Musingo* (2015)eKLR. The Respondent argued that the Applicant is in contempt for having not paid throw away costs, adjournment costs and fees. He cited the case of; *Euphemia N. Makoba v Ghairman Bumula Land Disputes Tribunal & Another* (2015) eKLR. Lastly, it was submitted that the Applicant was properly served with the hearing notice dated 5/12/2023.
6. The nature of this application calls for a review of the court record. This matter was commenced by way of Originating summons dated 26/3/2022. The 2<sup>nd</sup> Respondent herein swore an affidavit in response to the Originating summons dated 21/4/2022. The matter was fixed for pre-trial directions where agreed to comply with Order 11 and thereafter the case was set down for hearing on 31/10/2022 when the Applicant testified as PW1. On 23/11/2022, the Court was informed that the Applicant herein had filed a notice of motion dated 22/11/2022 seeking leave to amend the Originating Summons, and directions were taken to canvass the application by affidavit evidence. On 7/3/2023, the court rendered its ruling on the application and allowed the same on condition that the amended Originating summons be filed and served within 7 days, the Respondent to file his amended response within 14 days upon service and thrown away costs of ksh 10,000/= to be paid to the Respondent. Parties thereafter took a date for pre-trial directions.
7. On 2/10/2023, the matter was fixed for hearing when parties informed the court that the out of court negotiations for settlement had failed and a fresh hearing date was fixed for 1/11/2023. On the said date, the Applicants made an application for adjournment on grounds of lack of witnesses and for want of instructions which was opposed and after considering the arguments of both sides, the application was allowed on condition that the Applicant pays the Respondent and their witnesses thrown away costs of ksh 10,000/= plus Court adjournment fees of ksh 2,000/=. The matter was fixed for mention



on 30/11/2023 to confirm whether counsel for the Applicant had filed an application to cease acting. On the said date, neither the Applicant nor his counsel was present in court and the matter was fixed for hearing. When the matter came up for hearing on 5/2/2024, neither the Applicant nor his counsel was present in court despite there being proof of service for hearing on that date. Upon considering an application by Counsel for the Respondent, the court dismissed the suit for want of prosecution with costs.

8. The Applicant has now approached the court for setting aside of the said orders dismissing his suit and for the process server who served the hearing notice dated 5/12/2023 be called for cross-examination.

9. I have considered the application before me. I have also considered both the law and the submissions by learned counsels. The Applicant disputes the service. He alleges that the same was never served upon his advocate on record. Again, learned counsel, by asking for summoning of the process server wishes to demonstrate to the court his assertions as above. He intends to do so by way of cross-examination of the process server. The Respondents on the other hand have presented a document they allege is the back of the served copy of the hearing notice insisting that the same was served upon Mr. Were, Advocate who appended his signature thereon.

10. The jurisdiction of the court to set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that;

This discretion (to set aside ex parte proceedings or decision) is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

11. An applicant must demonstrate sufficient cause to warrant stay of execution and the setting aside of proceedings. That there was no negligence and one is acting in good faith in view of the given facts and circumstances of each case. In *Wachira Karani v Bildad Wachira* [2016] eKLR the court held that;

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.

12. Where a party asserts that they were not duly served despite a process server swearing that they effected service, the Court of Appeal in *Shadrack Arap Baiywo v Bodi Bach* [1987] eKLR stated that there is a presumption of service in favour of a process server. The Appellate Court cited with approval the author of *Chitale and Annaji Rao's The Code of Civil Procedure* Volume II page 1670, where the learned commentators stated as follows:

3. "Presumption as to service – There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."

13. Thus, the Applicant must demonstrate that he was prevented from attending court by a sufficient cause. In this case the Applicant claims there was no service of the hearing notice for 5/3/2024. I find the document submitted by the Respondents as proof of service to be unconvincing. This is because it only contains a stamp, making it unclear what exactly is being acknowledged by the stamp. In short,



it does not serve as proof of anything. However, this Court takes note of the Applicant's conduct throughout the proceedings, including the failure to pay the thrown away costs, court adjournment fees, as well as advocate and witness costs. I must express my displeasure with this behavior.

14. Having said that, I take cognizance of the fact that this court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as held in the case of *Wachira Karani v Bildad Wachira* Civil Suit no 101 of 2011 [2016] eKLR. This court is therefore inclined to allow the Applicant a chance to prosecute his case upon terms and conditions to be complied with.
15. In view of the foregoing, I hereby allow the application dated May 30, 2024 on the following term;
  - a. The orders dated the March 5, 2024 are hereby set aside.
  - b. The Applicant to settle the costs ordered on March 7, 2023 and November 11, 2023 within 7 days from today.
  - c. The Applicant shall ensure that this suit is heard and determined within six (6) months.
  - d. The costs of this application shall be costs in the cause.

16. It is so ordered.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Were for plaintiff/applicant.
2. Mr. Sabwami H/B for Wamalwa R. for Defendant/Respondent.
3. Bett C/A.

