



**Kangethe (Substituted as the Legal Representative of Lucy Njeri Ng'ang'a – Deceased) v Mwangi  
(Environment & Land Case 29 of 2019) [2023] KEELC 15840 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 29 OF 2019**

**YM ANGIMA, J**

**MARCH 2, 2023**

**BETWEEN**

**JOSEPH MWANGI KANGETHE (SUBSTITUTED AS THE LEGAL  
REPRESENTATIVE OF LUCY NJERI NG'ANG'A – DECEASED) ..... PLAINTIFF**

**AND**

**ESTHER WANJIRU MWANGI ..... DEFENDANT**

**RULING**

**A. Introduction**

1. By an originating summons dated 29.07.2003 the original Plaintiff, Lucy Njeri Ng'ang'a sought a declaration that she was entitled to Title No Nyandarua/Kiriita Mairo Inya Block 2 (Ngaindeithia) 653 (the suit property) as a beneficiary and dependent of the estate of Mwangi Waithera (deceased) and that the Defendant's registration as proprietor thereof was fraudulent. In the alternative, she prayed for an order that she be registered as proprietor of the suit property on account of adverse possession.
2. The record shows that the Defendant entered an appearance to the originating summons and filed a replying affidavit sworn on 18.08.2003 in opposition to the originating summons through a firm of advocates. However, when the suit came up for hearing in 2020 neither the Defendant nor her advocates attended court with the consequence that the suit proceeded ex-parte. By a judgment dated and delivered on 25.06.2020 the court entered judgment in favour of the Plaintiff upon finding that the Defendant was holding the suit property in trust for the Plaintiff and other members of the Plaintiff's family. The court further directed the cancellation of the Defendant's registration and registration of the Plaintiff as proprietor in trust for all members of his immediate family.

**B. The Defendants' Application**

3. By a notice of motion dated 15.07.2022 grounded upon Article 159 of the *Constitution* of Kenya, Sections 1A, 1B & 63(e) of the *Civil Procedure Act* (Cap.21), Order 10 rules 11, Order 22 rule 22, Order



40 rule 1 and order 51 rule 1 of the Civil Procedure Rules the Defendant sought the setting aside of the *ex parte* judgment dated 25.06.2020 together with all consequential orders and leave to defend the suit.

4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant on 23.07.2022 and the exhibits thereto. The main grounds advanced by the Defendants were that her previous advocates on record Ms. Mirugi Kariuki & Co. Advocates had failed to notify her of the hearing date and that she was unable to follow up on the matter due to the Covid-19 pandemic. She further contended that the mistakes of her previous advocates should not be visited upon her since she was an innocent litigant.

### **C. The Plaintiffs' Response**

5. The substituted Plaintiff, Joseph Mwangi Kangethe, filed a replying affidavit sworn on 30.08.2022 in opposition to the application on several grounds. Firstly, it was contended that the Defendant was guilty of inordinate and inexplicable delay in filing the instant application since the *ex parte* judgment was delivered over 2 years ago. Secondly, that the Defendant had failed to follow up on the matter with her previous advocates. Thirdly, that the hearing date was taken by consent of the advocates for the parties hence the *ex parte* judgment was a regular one. Fourth, that the Defendant's former advocates had not sworn any affidavit in support of the application. Fifthly, that the Defendant had recently invaded the suit property and forcibly evicted the Plaintiff upon learning of the judgment. Sixthly, that the Defendant had failed to satisfy the conditions for setting aside the *ex parte* judgment as required by law.

### **D. Directions on submissions**

6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Defendant's submissions were filed on 18.10.2022 whereas the Plaintiff's submissions were filed on the same date.

### **E. The issues for determination**

7. The court has considered the Defendant's notice of motion dated 15.07.2022, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
  - a. Whether the Defendant is entitled to change advocates after judgment.
  - b. Whether the Defendant has satisfied the conditions for setting aside the *ex parte* judgment dated 25.06.2020.
  - c. Whether the Defendant has satisfied the conditions for the grant of the temporary injunction sought.
  - d. Who shall bear costs of the application.

### **Analysis and Determination**

#### **(a) Whether the Defendant is entitled to change advocates after judgment**

8. The Defendant sought leave of court for the firm of Wambugu Law Advocates to come on record on her behalf in place of the firm of M/S Mirugi Kariuki & Co. Advocates after entry of the *ex parte*



judgment. That prayer was premised upon Order 9 rule 9 of the Civil Procedure Rules which stipulates as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court: -

- a. Upon an application with notice to all the parties; or
- b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

9. It is obvious from the record that the Defendant sought leave because there was no consent from the outgoing advocates. The Defendant was, however, required to serve the outgoing firm with the application for them to be accorded an opportunity of being heard on the issue of change of advocates. There is no affidavit of service on record in that regard and the application does not even indicate that it was to be served upon the firm of Mirugi Kariuki & Co. Advocates. This omission on the part of the Defendant was highly irregular. However, it is doubtful whether the said firm could have successfully opposed the Defendant’s quest to change advocates. A party has a legal right to be represented by an advocate of his choice. The court shall therefore ignore the procedural irregularity under the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010 and Section 19(1) of the Environment and Land Court Act. In the event, the court shall grant the leave sought by the Defendant to change legal representation from the firm of M/S Mirugi Kariuki & Co. Advocates to Wambugu Law Advocates. The Defendant shall, however, file and serve a notice of change of advocates upon the said firm to notify them of the change.

**(b) Whether the Defendant has satisfied the requirements for setting aside the *ex parte* judgment dated 25.06.2020**

10. The Defendant submitted that she had satisfied the requirements for setting aside the *ex parte* judgment under the law. It was submitted that the suit proceeded *ex parte* due to the failure by the Defendant’s former advocates to attend court and failure to notify her of the hearing date. It was further submitted that the mistakes of those advocates should not be visited upon the Defendant. The Defendant relied upon the cases of *Patel –vs- E.A. Cargo Handling Services Ltd* [1974] EA 75; *Shah –vs- Mbogo* [1967] EA 116; *Gideon Mose Ochwati –vs- Kenya Oil Co. Ltd & Another* [2017] eKLR and *Peter Mwangi Mcharia –vs- Alphaxard Warotho Komu & 2 Others* [2019] eKLR among others.
11. The Plaintiff, on the other hand, submitted that the Defendant had not satisfied the requirements for setting aside the *ex-parte* judgment. It was submitted that the Defendant had not shown sufficient cause for non-appearance at the trial and that the undue delay in filing the instant application had not been adequately explained. It was further submitted that the Defendant by her conduct and actions was out to deliberately obstruct the course of justice. The Plaintiff relied upon the case of *Shah –vs Mbogo* and *Another (supra)* and *Charles Wanjohi Wathuku –vs- Gitthinji Ngure & Another* [2016] eKLR in opposition to the application.
12. In the case of *Patel –vs- E.A. Cargo Handling Services Ltd (supra)* it was held that the discretion of the court to set aside an *ex parte* judgment was not limited as long as the court sets aside the judgment on such terms as may be just.



13. In the case of *Shah –vs- Mbogo & Another (supra)* it was held, *inter alia*, that:

“I have carefully considered, in relation to the present application, the principles governing the exercise of the court’s discretion to set aside a judgment obtained *ex parte*. The discretion 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...”

14. The court has considered the reasons for the Defendant’s non-appearance at the trial, the period of delay in filing the instant application and the reasons for the delay. It is evident from the material on record that the Defendant has had legal representation since the inception of the proceedings. She is now on her third law firm. At the time of trial, she was being represented by the firm of M/S. Mirugi Kariuki & Co. Advocates. The Defendant contended that the said firm had failed to attend court and failed to notify her of the hearing date.

15. It is evident from the material on record that the said law firm has not sworn any affidavit or provided any letter to demonstrate that indeed they had failed to notify the Defendant of the hearing date hence the default judgment was occasioned by their mistake. On the contrary, there is an affidavit on record in support of the said law firm’s application dated 10.06.2022 for leave to cease acting for the Defendant for lack of instructions. It was contended by the said firm that the Defendant had refused, failed or neglected to give them instructions despite numerous requests. It was further contended that the firms’ relationship with the Defendant was strained because the Defendant had on several occasions failed to respect the advice of the firm. The law firm also indicated that the Defendant had failed to respond to numerous letters sent to her.

16. The court is of the opinion that the Defendant’s former advocates are not to blame for the entry of *ex parte* judgment against the Defendant. The material on record shows that they made every effort to reach the Defendant for instructions but without success until they ultimately filed an application for leave to cease acting. The court is further of the opinion that the Defendant was also obligated to get in touch with her advocates and to follow up on the progress of her case. She had also an obligation to pay her advocate’s legal fees (what advocates commonly call “instructions”) to enable them to continue representing her. It has been held that a litigant should not bear the consequences of his advocate’s mistake unless he was privy to the default or failed to give proper instructions to his advocates. The material on record in this matter clearly points to the Defendant’s failure to give instructions to her advocates, failure to follow up on the matter, and failure to respond to her advocates’ correspondence.

17. The court has considered the period of delay in filing the instant application and the reasons for such delay. It is evident from the record that the instant application was filed about 2 years after delivery of the *ex parte* judgment. The Defendant contended in her supporting affidavit that she came to learn of the judgment in December, 2021. She did not, however, file the instant application until 24.08.2022. This additional period of delay was not explained in a satisfactory manner. The court does not accept that the Covid-19 pandemic could be a valid explanation since the courts were fully operational at least since December, 2021.

18. The court has further considered the conduct of the Defendant in relation to the instant suit. There is uncontroverted evidence on record to show that after delivery of the *ex parte* judgment the Defendant invaded the suit property and forcibly evicted the Plaintiff and his family members therefrom. This she did without the sanction of a court order and knowing of the existence of the court case. If, indeed, the Defendant was not aware of the conclusion of the court case at the time of carrying out the forcible



eviction, why did she not seek legal advice from her advocates on whether or not to undertake the eviction? If she thought the court case was taking too long to be concluded, why didn't she peruse the court file to know its status or even taken steps to have it dismissed or set down for hearing?

19. It would appear that the Defendant was merely out to undermine the judgment of 25.06.2020 and thereby obstruct the course of justice by evicting the Plaintiff and commencing construction of new houses and structures on the suit property. The photographs annexed to the Plaintiff's replying affidavit indicate that the iron sheets used in the Defendant's construction were still brand new. The court is thus of the opinion that the Defendant's said conduct does not deserve the exercise of judicial discretion in her favour.

**(c) Whether the Defendant has satisfied the conditions for the grant of a temporary injunction**

20. The court is of the opinion that the Defendant's prayer for a temporary injunction was dependent upon her prayer for setting aside the *ex parte* judgment being successful. It is obvious from the foregoing paragraphs that the court is not inclined to allow the prayer for setting aside. In the premises, the Defendant's prayer for a temporary injunction is untenable. The court cannot grant an injunction against a decree holder in contravention of the terms of the decree. Consequently, the Defendant is not entitled to any order of injunction.

**(d) Who shall bear costs of the application**

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful party should be deprived of costs of the application. Consequently, the Plaintiff shall be awarded costs of the application.

**G. Conclusion and Disposal Order**

22. The upshot of the foregoing is that the court finds no merit in the Defendant's instant application save for the prayer for leave to change advocates. Accordingly, the court makes the following orders for disposal of the said application:
- a. The Defendant is hereby granted leave to change her advocates from M/s. Mirugi Kariuki & Co. Advocates to M/s. Wambugu Law Advocates.
  - b. Save as aforesaid, the rest of the prayers sought in the notice of motion dated 15.07.2022 are hereby dismissed in their entirety with costs to the Plaintiff.

It is so ordered.

**RULING DATED AND SIGNED AT NYAHURURU THIS 2ND DAY OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

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**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Ms. Ndegwa for the Plaintiff



Mr. Wambugu for the Defendant

C/A - Carol

