



REPUBLIC OF KENYA



Muhika v Muriuki (Sued Through his Appointed Attorney Margaret Wangari Karonjo) (Environmental and Land Originating Summons 33 of 2023) [2023] KEELC 21513 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 33 OF 2023
YM ANGIMA, J
NOVEMBER 9, 2023**

BETWEEN

FRANCIS MUTHOGA MUHIKA PLAINTIFF

AND

**SAMUEL KARONJO MURIUKI DEFENDANT
SUED THROUGH HIS APPOINTED ATTORNEY MARGARET WANGARI
KARONJO**

RULING

A. Defendant's Application

1. By a Notice of Motion dated June 8, 2023 expressed to be based upon order 10 rule 10 of the *Civil Procedure Rules, 2010* (the Rules) and sections 1A, 1B, 3A of the *Civil Procedure Act* (cap 21), the Defendant sought the following orders:
 - a) ...spent;
 - b) ...spent;
 - c) That the honourable court be pleased to grant leave to the firm of Murimi, Mbago & Muchela Advocates to come on record for the Defendant in place of Naomi Muriithi & Co Advocates.
 - d) That this honourable court be pleased to set aside the *ex-parte* judgment dated May 4, 2023 herein and all consequential orders and do grant leave to the Defendant to respond and defend this cause.
 - e) That the draft Replying Affidavit in response to the original summons herein, annexed hereto be admitted out of time and be deemed as duly filed upon payment of the requisite fees.



- f) That costs hereof be in the cause.
2. The application was based upon the grounds set out on the face of the motion and the contents of the Supporting Affidavit sworn by Margaret Wangari Karonjo on June 8, 2023 and the annexures thereto. The Defendant contended that when the Plaintiff served her with the Originating Summons for adverse possession she appointed the firm of M/S Naomi Muriithi & Co Advocates who filed a notice of appointment dated July 22, 2020 but failed to defend the suit effectively. It was contended that the said firm did not notify the Defendant of the hearing date and did not even file an answer to the originating summons. As a result, the suit proceeded for hearing *ex-parte* and an *ex-parte* judgment was delivered in favour of the Plaintiff on May 4, 2023.
 3. The Defendant contended that the *ex-parte* judgment was as a result of a default on the part of her previous advocates and that she had a good defence on the merits to the Plaintiff's claim for adverse possession. She annexed a draft replying affidavit in which she disputed the Plaintiff's claim for adverse possession. She denied that the Plaintiff took possession of any portion of the suit property in 1999. She denied that the Plaintiff had been in occupation of 2 acres out of the suit property for 26 years and contended that the Plaintiff only made an attempt to enter the suit property in 2018 which attempt was thwarted by a court order granted in Nyahururu C.M. ELC No. 340 of 2018.

B. Plaintiff's Response

4. The Plaintiff filed a replying affidavit sworn on 18.09.2023 in opposition to the application. It was stated that the Notice of Motion dated June 8, 2023 was premised on the wrong provisions of the law since the Defendant's advocate had filed a notice of appointment in the suit. It was pointed out that the correct legal provisions were Order 12 rule 7 of the Rules hence the court had not been properly moved.
5. The Plaintiff asserted that the Defendant had not given a reasonable or satisfactory explanation for her failure to defend the suit and failure to attend court for hearing since her advocate on record at the material time was duly served with a hearing notice. It was contended that a suit belongs to the concerned parties hence it was upon the Defendant to follow up with her advocate on the progress of the suit.
6. The Plaintiff contended that he had been in open, notorious and continuous possession of 2 acres out of the suit property and developed it extensively over the years by building thereon with full knowledge of the Defendant who did not evict him. It was further contended that the Defendant had no plausible or reasonable defence to the suit and that the proposed defence was a sham which did not raise any genuine triable issues. Consequently, the court was urged to dismiss the application.

C. Directions on Submissions

7. When the application was listed for inter-partes hearing it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Defendant's submissions were filed on October 31, 2023 whereas the Plaintiff's submissions were not on record by the time of preparation of the ruling.

D. Issues For Determination

8. The court has perused the Defendant's notice of motion dated June 8, 2023, the Plaintiff's Replying Affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein:



- a) Whether the Defendant is entitled to leave to change advocates.
- b) Whether the Defendant has made out a case for setting aside the *ex – parte* judgment dated May 4, 2023.
- c) Whether the Defendant is entitled to the consequential orders sought.
- d) Who shall bear costs of the application.

E. Analysis and Determination

Whether The Defendant Is Entitled To Leave To Change Advocates

9. The court has considered the material on record on this issue. Although the Defendant did not cite the provisions of the law relied upon on the face of her application it is obvious that the prayer could only be sought pursuant to Order 9 rule 9 of the Rules. The said rule stipulates that leave of court is required for a party to change advocates after judgments. The alternative to this is for the concerned party to obtain a consent from the outgoing advocate.
10. It is evident from a perusal of the said rule that where a party opts to seek leave of the court such application ought to be with notice to the outgoing advocate. There is no evidence on record to show that the firm of M/s Naomi Muriithi & Co Advocates was served with the application. There is even no indication on the face of the motion that it was intended to be served upon the said firm. The Defendant was probably reluctant to serve the said firm with the application where she has accused the firm of professional misconduct for fear that the advocate may file a response detrimental to her case such as failure to give proper instructions and failure to pay professional fees.
11. Be that as it may, the court has noted that the Plaintiff did not oppose the Defendant's desire to change her advocates after judgment. The court takes the Defendant's failure to serve the application upon the outgoing advocate as a procedural irregularity which does not affect the substance of the proceedings. Consequently, the court is inclined to grant the Defendant the leave sought to change advocates after judgment.

Whether The Defendant Has Made Out A Case For Setting Aside The Ex – Parte Judgment Dated May 4, 2023

12. The court has considered the material and submissions on record on this issue. The court has noted that the Plaintiff's contention that the application was brought under the wrong provisions of the law. The court agrees with the Plaintiff that the court ought to have been moved under the provisions of order 12 rule 7 of the Rules as opposed to order 10 rule 10 of the Rules since the Defendant's advocate got on record and even filed grounds of opposition. However, the court is of the opinion that the defect in the Defendant's application is merely procedural and that the same is curable under both sections 19(1) of the Environment and Land Court Act, 2011 and article 159(2)(d) of the Constitution of Kenya. In any event, there is no evidence to demonstrate that the Plaintiff suffered any prejudice as a result of the said flaw. The court shall therefore proceed to consider the Defendant's application on merit.
13. The court agrees with the Defendant's contention that the court has a wide and unfettered discretion to set aside an ex-parte judgment. However, such discretion must be exercised judiciously and upon some reason. The Defendant has an obligation to lay a basis upon which the court may exercise judicial discretion in his favour. It has been held that where a party seeks the setting aside of a regular ex-parte judgment he ought at least to render an explanation for his default in defending the suit or demonstrate



that he has a reasonable defence to the action which raises bonafide triable issues. See *Shah –vs- Mbogo & another* [1967] EA 116; *Patel –vs- E.A. Cargo Handling Services Ltd* [1974] EA 75.

14. The material on record shows that although the Defendant's advocate filed a notice of appointment dated July 22, 2020 and grounds of opposition dated July 17, 2020 no action was taken to file an answer or Replying Affidavit to the Originating Summons for adverse possession. The material on record shows that neither the Defendant nor her advocate attended court for hearing of the suit despite service of a hearing notice upon the advocate. The Defendant's explanation that she had relied upon her previous advocates to do everything for her is not plausible at all.
15. The record shows that a period of 3 years had lapsed between the filing of the notice of appointment dated July 22, 2020 and the time the instant application for setting aside the judgment was filed. There is no indication on record to show that the Defendant took any steps to follow up with her advocates to get to know the next step in the litigation process and to prepare for the hearing of the suit. An advocate is not expected to swear and file a replying affidavit in opposition to an Originating Summons for adverse possession or to testify on behalf of his client at the trial.
16. The court has considered the nature of the proposed defence or answer to the originating summons. The Defendant has disputed that the Plaintiff ever took possession of the 2 acres claimed in the summons in 1999 or at all. The Defendant's contention is that the Plaintiff only made an abortive attempt to enter the suit property in 218 which was stopped by a court order issued in CM ELC No 340 of 2018. The Defendant's contention, therefore, was that the Plaintiff had no viable claim for adverse possession at all.
17. The court is satisfied that the Defendant's proposed defence to the action is not hopeless or frivolous. The court is of the view that it raises some triable issues worth of investigation at the hearing. A defence which raises a triable issue is not necessarily one which must succeed at the trial. It may well fail at the trial but it is sufficient for purposes of a setting aside application as long as it is not one which is hopeless and improbable.
18. In the premises, the court is of the opinion that even though the Defendant has not rendered a reasonable explanation for her failure to defend the originating summons and her failure to follow up with her advocates on the progress of the case the Defendant's proposed defence to the action raises some triable issues fit for interrogation at the trial. The Defendant's indolence can be penalized in costs whilst allowing her to defend the action. There is no evidence on record to demonstrate that the Defendant has sought to deliberately evade, obstruct or delay the course of justice. See *Shah –vs- Mbogo & another* [1967] EA 116.

Whether the Defendant is entitled to the consequential orders sought

19. Since the court is inclined to allow the Defendant's application for setting aside the *ex-parte* judgment, the court is of the view that the Defendant is entitled to file a Replying Affidavit in answer to the summons and for the same to be admitted out of time. The court shall, therefore, allow the consequential orders sought to enable the Defendant to defend the suit. The Defendant's draft replying affidavit annexed to the affidavit shall be deemed as duly filed upon payment of court fees.

Who shall bear costs of the application

20. 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. Although the Defendant has succeeded in her application the court has found that she was the party in default in failing to defend the suit at the opportune time. Accordingly, the costs of the application shall be borne by the Defendant in any event.

F. Conclusion and Disposal Order

21. The upshot of the foregoing is that the court finds merit in the Defendant's notice of motion dated June 8, 2023 and is inclined to allow the same in the following terms:
- a) The *ex-parte* judgment dated May 4, 2023 is hereby set aside together with all consequential orders.
 - b) The Defendant is hereby granted leave to change advocates from the firm of M/S. Naomi Muriithi & Co Advocates to M/S. Murimi Mbago & Muchela Advocates.
 - c) The Defendant's draft Replying Affidavit annexed to her application is hereby admitted out of time and shall be deemed as duly filed upon payment of the prescribed court fee.
 - d) The Plaintiff shall be at liberty to file a further affidavit together with a supplementary trial bundle within 14 days from the date hereof.
 - e) The Defendant shall file her indexed and paginated trial bundle within 14 days upon the lapse of the period specified in order (d) hereof.
 - f) The Defendant shall pay the Plaintiff's thrown away costs of the application in the sum of Kshs. 25,000/= within 14 days from the date hereof.
 - g) In the event of the Defendant's default in compliance with orders (e) and (f) hereof within the stipulated period the notice of motion dated June 8, 2023 shall stand dismissed with costs without further orders.
 - h) The suit shall be mentioned on December 7, 2023 to confirm compliance and fix a hearing date.
- Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 9TH DAY OF NOVEMBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

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Y. M. ANGIMA

JUDGE

