



**Nyaga v Muritu & 4 others (Environment and Land Case Civil Suit  
56 of 2019) [2022] KEELC 3040 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3040 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND CASE CIVIL SUIT 56 OF 2019**

**EC CHERONO, J**

**MAY 6, 2022**

**BETWEEN**

**SAMUEL MWANGI NYAGA ..... PLAINTIFF**

**AND**

**BETH WANJIKU MURITU ..... 1<sup>ST</sup> DEFENDANT**

**ANTHONY MUHORO MUTHOGA ..... 2<sup>ND</sup> DEFENDANT**

**MOSES KINYUA MUTHOGA ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, KERUGOYA ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated October 11, 2021, the 2<sup>nd</sup> Defendant/Applicant moved this Honourable Court seeking the following orders;
  1. (Spent)
  2. That the Court be pleased to grant a stay of proceedings in this matter and the formal proof in the matter be stayed pending the hearing and determination of this application
  3. That the interlocutory judgment entered against the 2<sup>nd</sup> Defendant together with all the consequential orders and the 2<sup>nd</sup> Defendant be set aside and leave be granted to them to defend the suit.
  4. That upon the grant of prayer 3 above, leave be granted to the 2<sup>nd</sup> defendant to file his defence together with the list of documents, list of witnesses and witness statements within 14 days from the date of the order.



5. That the costs of the application be in the cause.
- 2 The said application is premised on the following grounds:-
- A. That this suit is not one for liquated damages, neither is it one for pecuniary damages and therefore no interlocutory judgment could lawfully be entered in default of service of the summons to enter appearance.
  - B. That the 2<sup>nd</sup> defendant has annexed a draft defence which raises triable issues
  - C. That where the defendant shows a reasonable defence on merits, this will give this Court the chance to hear both sides thus should set the ex-parte judgment aside.
  - D. That failure to file a defence required was not intentional as the plaintiff did forward the summons to enter appearance to the defendant and/or his advocate thus the defence was not filed.
  - E. That the plaintiff will not suffer any prejudice should the 2<sup>nd</sup> defendant be allowed to defend the suit and this will give the court the chance to hear both sides and make an informed decision on merit.

### **Applicant's summary of facts**

- 3 The Applicant in his supporting Affidavit made the following depositions;
1. That I am the 2<sup>nd</sup> defendant herein hence competent to swear this affidavit on behalf of the defendant.
  2. That I am the registered owner of the parcel of land known as Kiine/sagana/4109 now sub-divided into Kiine/sagana/4640 and 4641 having purchased the same from the plaintiff through his wife, Wairimu Mwangi.
  3. That copies of the plaint in this matter without summons to Enter Appearance were served upon me together with an application by the plaintiff for injunction dated December 19, 2019 and a copy of the order whereupon I instructed my Advocates on record to file the appropriate response.
  4. That I am informed by my Advocates which information I truly belief to be true that the advocate filed a notice of Appointment of Advocates dated 6<sup>th</sup> February, 2020
  5. That the matter was slated for inter parte hearing on the March 16, 2020 when the Chief Justice Maraga on or around the March 12, 2020 announced containment measures against the Covid-19 pandemic which had been reported in the country. The raft of measures announced by the Chief Justice at the time were for the immediate closure of physical attendance of the courts by the parties until further notice.
  6. That as a result the matter did not proceed and we were later advised to file court documents and attend court through online portals provided therein
  7. That the next time the matter was in court was on the 1<sup>st</sup>, 21<sup>st</sup> October and 17<sup>th</sup> November, 2020 as per hearing notices sent to my advocate on record for the inter parte hearing of the plaintiff's application of 19<sup>th</sup> December, 2019.
  8. That I am informed by my advocates on record information I verily belief to be true that they tried to file the Replying Affidavit to the Application through the online portal but they



were not successful and the application proceeded ex-parte and the orders of injunction were confirmed by the court.

9. That later in the month of June 2021, the advocates informed me that they were served with a copy of the amended plaint by the plaintiff's advocates through e-mail.
10. That the amended plaint served by the plaintiff did not accompany with the summons to enter Appearance was an issue that was brought to the attention of the counsel for the plaintiff who promised to look at the issue and also follow up on the issue of the summons to Enter Appearance (see annexed copy of the amended plaint and the summons attached herein).
11. That to date no summons to Enter Appearance has been served on my advocates and thus unable to file my defence on record.
12. That I truly believe that I am entitled to the summons to Enter Appearance before any adverse step is taken against me in this matter.
13. That the only summons to Enter Appearance received by my advocates is one for Charity Wanjiru and thus I could not act on it.
14. That I truly believe that I have a good defence as per the annexed statement of defence herein, which had raised triable issues and that if the matter proceeded on formal proof, I will have lost a chance to defend myself through no fault of my own.
15. That I am willing to abide by any conditions that the court would deem fit to grant.
16. That the application had been filed without undue delay, in good faith and with full disclosure and I urge this court to grant the same.
17. That I therefore make this affidavit in support of my application herein to strike out the plaintiff's entire suit against me with costs.
18. That save where sources of information have been made what stated herein is true to the best of my knowledge and belief.

#### **Plaintiff/respondent's summary of facts**

- 4 The Plaintiff/Respondent in response filed a Replying Affidavit on 29<sup>th</sup> October, 2021 where he made the following depositions: -
  1. That the 2<sup>nd</sup> defendant/Applicant's application, the supporting affidavit and the annexures attached thereto are;
    - a. Incompetent and bad in law
    - b. A gross abuse of the court process
    - c. Brought in bad faith and
    - d. Unmeritorious.
- 5 That I am the first registered owner of all that parcel of land known as Kiine/sagana/3103 which was later illegally and fraudulently subdivided into two (2) parcels of land being Kiine/sagana/4109 and Kiine/sagana/4110. Land parcel No. Kiine/sagana/4109 was further subdivided into two (2) parcels of land to wit land parcel No. Kiine/sagana/4640 and Kiine/sagana/4641. Land parcel No. Kiine/



sagana/4640 is registered in the name of the 2<sup>nd</sup> Defendant herein whereas land parcel No. Kiine/sagana/4641 is registered in the name of the 3<sup>rd</sup> Defendant

- 6 That I commenced this suit vide a plaint dated 19/10/2021 and together with the plaint I filed a Notice of Motion application of even date under certificate of urgency. The application was heard ex-parte certified urgent and interim orders of injunction granted.
- 7 That I am informed by my advocates on record which information I believe to be true that on 17/01/2020 they served the 2<sup>nd</sup> Defendant with copies of the Notice of Motion application filed under certificate of urgency, plaint, list of witnesses, witness statements, list of documents all dated 19/12/2019 together with the summons to Enter Appearance and a court Order both dated 20/12/2019. The Defendant was served at his business premises known as Marula Poles Yard located at Makutano village along Sagana-Makutano Highway, Ndia District Kirinyaga County. Annexed herein and marked 'A' is a copy of the affidavit by the process server who effected service.
- 8 That I am informed by my advocates on record which information I believe to be true that the 2<sup>nd</sup> defendant filed a Notice of Appointment of Advocate and later filed his Replying Affidavit dated 16<sup>th</sup> March, 2020 and filed on 19/10/2020
- 9 That I am further informed by my advocates on record which information I believe to be true that the 2<sup>nd</sup> Defendant has always been served with all the notices when the matter was coming up either for hearing or mention but the 2<sup>nd</sup> Defendant never appeared in court either in person or through his legal representatives.
- 10 That contrary to the allegations in paragraph 8 of the Supporting Affidavit, the Court by a Ruling delivered on 5<sup>th</sup> March 2021 allowed my application for injunction having taken the 2<sup>nd</sup> Defendant's Replying affidavit dated 16<sup>th</sup> March 2020 into consideration. Annexed herein and marked 'B' is a copy of the said court ruling.
- 11 That the 2<sup>nd</sup> Defendant having been served with copies of the summons to Enter Appearance and having failed to Enter Appearance within the stipulated time, my advocates on record proceeded to request for judgment under order 10 rule 10 of the civil procedure Rules 2010 which interlocutory judgment was entered accordingly as I am advised by my advocates on record which advice I believe to be true.
- 12 That in the course of this case I got to learn that the 3<sup>rd</sup> defendant had passed away and I therefore moved the court vide an application dated December 16, 2020 seeking substitution of the 3<sup>rd</sup> Defendant with his legal representative. My application was allowed and my advocate on record proceeded to amend my pleadings, took out fresh summons in the name of Charity Wanjiku and effected service upon her on 14/06/2021 as I am informed by my advocates on record which information, I believe to be true. Annexed herein and marked 'C' is a copy of the affidavit by the process server.
- 13 That I am informed by my advocates on record which information I believe to be true that they have never been contacted by the 2<sup>nd</sup> Defendant's advocate on the issue of summons to enter Appearance being accompanied by the Amended plaint.
- 14 That I only Amended my plaint in order to bring in the 3<sup>rd</sup> Defendant's legal representative into this case and the 3<sup>rd</sup> Defendant's legal representatives were served with a copy of the same.
- 15 That in light of paragraph 6 above, the 2<sup>nd</sup> Defendant was duly served with the summons to enter Appearance but failed to file defence in time hence the interlocutory judgment.



- 16 That the 2<sup>nd</sup> Defendant has not stated or given any reasons why his advocates never wrote any letter to mine asking to be served with copies of the summons to enter appearance before he filed the instant application yet he had knowledge of the existence of the instant suit. The 2<sup>nd</sup> defendant's current application is therefore a mere afterthought.
- 17 That I have looked at the 2<sup>nd</sup> Defendant's defence and I believe the same is;
- (a) A shame
  - (b) Does not raise any triable issues
  - (c) Full of denials
- 18 That Charity Wanjiru was duly served as enumerated in paragraph 11 above. The allegations that the 2<sup>nd</sup> defendant's advocates were served with her summons are false because there is no receiving stamp from the said advocates acknowledging receipt of the same. Further, even if they were erroneously served with the said summons, they did not write to my advocates complaining about the same as am informed by my advocates on record which information I believe to be true.
- 19 That on October 15, 2021 my advocates inform me which information I believe to be true that they served the 2<sup>nd</sup> Defendant with copies of notice of entry of judgment and a formal proof hearing notice. Annexed herein and marked 'D' is a copy of the said notices.
- 20 That I honestly believe that it's the above captured service that jolted the 2<sup>nd</sup> defendant from their slumber and they moved the court vide the application under consideration to delay the fair hearing of this matter
- 21 That when viewed wholly and cumulatively, the 2<sup>nd</sup> Defendant's application militates against Sections 1A and 1B of the Civil Procedure Rules 2010 and the orders sought as I am advised by my advocates on record which advice I believe to be true.
- 22 That the 2<sup>nd</sup> Defendant is guilty of laches as he has failed to satisfactorily explain the reason for the delay in filing his application after an inordinately long delay in the circumstances.
- 23 That I verily believe that the application before court has been filed to serve its sole purpose of delaying the fair hearing of my suit.
- 24 That as demonstrated above, the 2<sup>nd</sup> Defendant has come to court with unclean hands and is therefore undeserving of exercise of this court's discretion.
- 25 That the Defendants have been utilizing the suit properties whereas I have been kept away from the same. It's only fair I be allowed to prosecute my suit without further delay because I am now an old man and the suit property was the crystallization of my labour and hard work for many years.
- 26 That it is in the interest of justice that the orders sought by the 2<sup>nd</sup> Defendant/Applicant are denied and I be allowed to prosecute my case.

### **Legal Analysis And Decision**

- 27 I have considered the application, the supporting Affidavit and Replying Affidavit as well as the annexures thereto. I have also considered the pleadings proceedings and the rival submissions as well as the applicable law. The Applicant has moved this Honourable Court under 10 Rules 4, 5, 6, 9 & 11 of the *Civil Procedure Rules*, seeking inter-alia that the interlocutory judgment entered against the 2<sup>nd</sup> defendant together with all consequential orders be set aside. The Applicant is also seeking an order



for stay of proceedings and formal proof. The application is based on grounds shown on the face of the said application and the supporting affidavit of the Applicant.

- 28 At paragraph 3 of the supporting Affidavit, the Applicant stated that he was served with copies of a plaint, verifying affidavit, list of witnesses, witness statements, list of documents, a notice of motion application under certificate of urgency and a court order but no Summons to Enter Appearance. On February 6, 2020, the 2<sup>nd</sup> defendant/Applicant instructed the firm of Macharia Gakaria & Associates Advocates who filed a Notice of Appointment of Advocates dated the same date. From the court record, there are copies of Summons to Enter Appearance issued to the defendants including the 2<sup>nd</sup> Defendant/Applicant herein dated 20/12/2019. There is also an affidavit of service sworn by one process server namely, Simon G. Kamau. At paragraph 4 of the said affidavit of service, the process server deposed how he effected service of Summons to enter Appearance and all court processes upon the 2<sup>nd</sup> Defendant herein. Those averments under oath have not been controverted. The 2<sup>nd</sup> defendant/Applicant did not seek to cross-examine the said process server on the contents of the affidavit of service.
- 29 The Notice of Motion application which had been filed contemporaneously with the plaint and ostensibly served with the disputed Summons to enter Appearance was responded to by the 2<sup>nd</sup> Defendant by way of a replying Affidavit sworn on 16<sup>th</sup> March, 2020. If the 2<sup>nd</sup> Defendant/Applicant who was represented by an advocate had not been served with Summons to enter Appearance as he alleges, he should have asked to be supplied a copy by counsel for the plaintiff or better still, check from the court record.
- 30 I am indeed satisfied that the 2<sup>nd</sup> Defendant/Applicant, just like the rest of the other defendants were duly served with Summonses to enter appearance and other court processes as deposed by the process server through his affidavit of service which has not been challenged.
- 31 It is also to be noted that the 2<sup>nd</sup> defendant/Applicant in prayer NO. 2 of the application is seeking an order for setting aside an interlocutory judgment and all consequential orders entered against him. However, there is no indication when the purported interlocutory judgment and/or adverse orders were issued against the 2<sup>nd</sup> defendant/Applicant herein.
- 32 The only prayer worth considering in this application is whether the 2<sup>nd</sup> defendant/Applicant can be granted leave to file defence out of time. Though the 2<sup>nd</sup> Defendant/Applicant is seeking an order for setting aside an interlocutory judgment, He has not demonstrated when the purported interlocutory judgment was entered. The truth of the matter is that the dispute in this case is a claim for land which does not qualify for entry of interlocutory judgment where any of the defendants fail to either enter appearance or file defence. That explains why no interlocutory judgment was entered for the plaintiff through his letter of request dated 29/07/2021. Section 7 Rule 1 of the Civil Procedure Rules states as follows;

“Where a defendant has been served with a Summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”.

- 33 The 2<sup>nd</sup> Defendant/Applicant in this case has not given sufficient reasons why he failed to file his defence within the stipulated period. On my part, unless a party gives reasonable explanation for failing to comply with time lines given in law or directions given by the court, I have little or no sympathy at all. The court requires to balance the reasons given by the Applicant for failing to file his defence in time and his right to be heard. If the delay is deliberate and prolonged, the remedy is to reject such an application. Having carefully considered the facts and the explanation given by the 2<sup>nd</sup> Defendant/



Applicant, I find that denying the Applicant leave to file defence would be drastic. How, that does not mean he will go scot-free as if there has been no breach.

34 The upshot of my finding is that the Notice of Motion dated 11<sup>th</sup> October 2021 is allowed in the following terms:

1. The 2<sup>nd</sup> Defendant/Applicant to file and serve his Defence upon payment of thrown away costs of Kshs. 20,000 to the plaintiff within fourteen (14) days from today.
2. If the costs referred in paragraph (1) above are not paid as directed, the defence filed will stand struck out and the plaintiff will be at liberty to proceed with this case as an undefended suit.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 6<sup>TH</sup> DAY OF MAY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

Mr. Ndegwa for the Plaintiff/Respondent

Respondents/Advocate – absent

Kabuta – Court Assistant.

