



**Charara v Kirui Alias Joshua Kipngetch Kirui (Environment & Land
Case 72 of 2018) [2022] KEELC 3265 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 72 OF 2018**

MC OUNDO, J

JUNE 2, 2022

BETWEEN

MARY CHEPKEMOI CHARARA PLAINTIFF

AND

**WILLIAM KIPNGETICH KIRUI ALIAS JOSHUA KIPNGETICH
KIRUI DEFENDANT**

RULING

1. Before me for determination are two applications dated the February 3, 2020 and February 14, 2020 respectively to which I shall make my determination starting with the earlier application upon whose determination shall affect the latter application.
2. The said application dated February 3, 2020 by way of a Notice of Motion is brought pursuant to the provisions of Order (sic) 1A, 1B, 3, 3A and 63 (e) & 80 of the *Civil Procedure Act*, and order 22 rule 22, order 10 & 51 of the *Civil Procedure Rules*, where the defendant/applicant seeks for orders that the judgment and decree of October 16, 2019 and the consequential orders arising therein be set aside and/or there be stay of execution arising for the said Judgment so as to give him an opportunity to present his evidence and defend the suit. The said application was supported by the grounds on its face as well as the supporting affidavit sworn by the defendant/applicant, on the February 3, 2019. The application was disposed of by way of written submissions.
3. The applicant's contention herein is that the matter proceeded ex-parte despite there having been no service effected upon him of the originating summons or any Hearing Notice and therefore he was unaware of the suit herein. That the plaintiff/respondent had deliberately failed to serve the applicant with court summons. That he had a good defense as a registered owner of the suit land wherein he had been in occupation for over 50 years, and therefore he stood to suffer undue and irreparable loss wherein he would be greatly prejudiced should the plaintiff/respondent execute the judgment and decree as he stood to lose a portion of his land.



4. That he was aggrieved by the decree and more so by the process server namely the Joseph Cheruiyot Chepkwony who had sworn an affidavit of service where he had lied when he deponed that he had served him (defendant/applicant) with the summons and the hearing notice on three occasions.
5. That no such pleadings had ever been served upon him and he had refused to sign apart from the impugned Decree which he had received and signed. He wondered why he would not the execute court papers yet he was experienced with court cases and was aware of the need to act on court Summons.
6. The defendant/applicant further submitted that since the parcel of land where he had been residing for 50 years was registered in his name, that it would be draconian and unfair to cancel his title and evict him from therein without due process. He sought for his application to be allowed.
7. The said application was opposed by the plaintiff/respondent's replying affidavit of 1 March 2, 2020 as well as the written submissions of February 10, 2022 where the plaintiff/respondent's stand was that the said application was made in bad faith as the matter had proceeded to full hearing before judgment had been rendered.
8. That the defendant/applicant was not truthful in his application when he denied having been served with the originating summons. That the defendant/applicant had been aware of all the stages when the matter commenced, but failed to enter appearance and defend the suit and instead chose to address the court by various correspondences a process not known in law.
9. That the defendant/applicant was trying to deny her the fruits of a judgment having previously struggled to grab the portion of land measuring 1.5 acres to be excised from land parcel No. LR Kericho/Litien/625, land which she had been in occupation for decades. That the judgment had been regularly and properly entered and she had proceeded with honesty and transparency required to process the suit land.
10. The plaintiff/respondent accused the defendant/applicant of laches and submitted that he could not now turn around to claim that he was not aware of the matter herein. She sought for the application to be dismissed with costs.
11. The second application is the one dated February 14, 2020 brought under the provisions of order 22 rule 20 of the *Civil Procedure Rules* and section 3 and 3A of the *Civil Procedure Act* and supported by both the grounds therein, the affidavit sworn by the plaintiff Mary Chepkemioi Charara on an equal date as well as their written submissions of 10th February 2022. In the said application, the plaintiff/applicant therein seeks to execute the judgment delivered on September 27, 2019. She also seeks for an eviction order against defendant/respondent as well as an order to the Land Registrar to cancel the title deed to No. LR Kericho/Litien/625 and thereafter issue her and the defendant/respondent herein with new titles in the ratio of 3.5 acres to 3.5 acres respectively and finally that the OCS Litein police station to ensure compliance of the order.
12. The plaintiff/applicant's contention is that despite judgment having been entered in her favour wherein the court had directed the defendant/ respondent to subdivide and transfer to her a portion of 3.5 (sic) acres out of No. LR Kericho/Litien/625 wherein she would subsequently take possession, the defendant/respondent herein has refused to deliver vacant possession of the said portion of land to her.
13. That the defendant/respondent's refusal to deliver vacant possession of the portion of land was denying her the fruits of justice wherein his continued occupation of the subject property was unlawful and constituted contempt of court orders. The plaintiff/applicants sought that her application be allowed as prayed.



14. In response and in opposition of this second application, the defendant/respondent herein via a replying affidavit of October 13, 2020 and the submissions of March 21, 2020 took the position that the said application had been filed to scuttle the hearing and determination of his application dated the February 3, 2020. That the plaintiff/applicant in the second application now sought for 3.5 acres to be excised from land parcel LR Kericho/Litien/625 which was not compliant with the impugned ex-parte judgment she had obtained. That the said application had no basis, was unmerited and an abuse of the court process for which it ought to be dismissed with costs as it did not seek to solve issues but to compound the same. That the evicting him (defendant/respondent) from the suit land without due process would be draconian. And finally that here would be no prejudice to the Plaintiff were the matter heard and determined on merit

Determination

15. Having considered the first application herein seeking to set aside the judgment, of the September 27, 2019 and the submissions for and against allowing the said application, we shall revert to the law applicable for setting aside judgment or dismissal and that is order 12 rule 7 of the *Civil Procedure Rules* which stipulates that;

Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.

16. I have considered the reasons that were presented by the applicant/defendant seeking to set aside the ex-parte judgment delivered on September 27, 2019, reopen their case and present the evidence. I have also considered the averments herein deponed for failure to enter appearance or prosecute their defence. I have keenly perused the affidavits filed in support of the application to find out whether the applicant had valid reasons for the said failure.
17. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until the entry of the Judgment herein. After judgment had been delivered in favour of the plaintiff as prayed in the plaint and a decree extracted on the October 18, 2019, the defendant/applicant then filed his application dated February 3, 2020 seeking the orders as herein above stated. Of interest is that the said application and submissions had been filed by the firm of Ochieng Ghai & Co Advocates. The provisions of order 9 rule 7 of the Civil Procedure Rules are clear to the effect that Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.
18. It is therefore clear that a notice of appointment of advocates has to be filed in court and served in accordance with the provisions of order 9 rule 7 of the *Civil Procedure Rules*. In the instant matter no such notice was filed and the firm of Ochieng Ghai & Co Advocates purported to come on record, and sought to have the court set aside the Judgment of September 27, 2019 and its decree thereon and to have the suit reinstated.
19. In the case of *Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi* [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of



procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

20. Indeed the issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached. Although the applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 7 of the *Civil Procedure Rules* above is mandatory and thus cannot be termed as a mere technicality.
21. Having found that the procedure set out by the law under order 9 rule 7 of the *Civil Procedure Rules* was not followed by Messers Ochieng Ghai & Co Advocates, it goes that the said firm is not properly on record and has no legal standing to move the court on behalf of the defendant/applicant. The application before me dated the February 3, 2020 is therefore struck out with cost.
22. This then brings me to the second application dated the February 14, 2020 wherein the plaintiff/applicant therein seeks to execute the judgment delivered on September 27, 2019. The same misfortune befalls the defendant/respondent’s replying affidavit of the October 13, 2020 which was drawn and filed by the firm of Messers Ochieng Ghai & Co Advocates in total disregard to the provisions of order 9 rule 7 of the *Civil Procedure Rules*. The end result is that this application remains unchallenged.
23. An order of the court must be obeyed by the parties without conditions unless there is stay order granted by the court, and not to be circumvented in the name of technicalities which are merely meant to delay justice and thereby subject successful parties to mere pious explorers in the judicial process. I thus allow the application dated February 14, 2020 with no costs.
24. Execution shall strictly abide as per the Judgment of September 27, 2019 and its decree thereon of the October 16, 2019.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 2ND DAY OF JUNE 2022

M.C. OUNDO

ENVIRONMENT & LAND

JUDGE

