



**Chitswa v Nzaka & another (Environment & Land Case 111 of 2014)
[2022] KEELC 14964 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 111 OF 2014**

M SILA, J

NOVEMBER 3, 2022

BETWEEN

VICTOR DENA CHITSWA PLAINTIFF

AND

NATHANIEL MUNGA NZAKA 1ST DEFENDANT

ENOS KAMORA 2ND DEFENDANT

RULING

1. There are two applications before me. One is dated March 22, 2022 filed by the plaintiff/decree holder. All the plaintiff wants is for an order directing the OCS Rabai Police Station to provide security to the court bailiff to execute the decree so as to evict the defendants from the land parcel No 134 Uwanja Wa Ndege. The basis of this application is that the plaintiff has judgment against the defendants for vacant possession and that the defendants have failed to so vacate. The second application is dated May 10, 2022 filed on behalf of the 1st defendant, Nathaniel Munga Nzaka. The application seeks orders to set aside the judgment delivered on February 25, 2020 and have the case re-opened. It also seeks orders to have the law firm of M/s Daniel Orenge & Company Advocates come into the suit on behalf of the 1st defendant in place of the law firm of M/s J O Magolo & Company Advocates.
2. The background is that the plaintiff filed suit on May 20, 2014 respectively against Nathaniel Munga Nzaka and Enos Kamora. He pleaded to be the registered proprietor of the leasehold interest in the Plot No 134 Uwanja wa Ndege (the suit land). He pleaded that on May 10, 2014, the 1st defendant entered the land and started construction on it, claiming to have been authorized by the 2nd defendant. He pleaded that the 2nd defendant alleges to be the owner of the plot. In the suit, the plaintiff wished to have the defendants permanently restrained from the suit land. No appearance was filed within the specified time and the plaintiff applied for judgment in default. On April 6, 2016, a notice of appointment of advocate on behalf of the defendants was filed by the law firm of M/s J O Magolo & Company Advocates, and on October 28, 2016 was filed an application to set aside the interlocutory judgment.



Ruling was delivered on July 18, 2017 and the interlocutory judgment set aside with the defendants being allowed to file defence out of time.

3. On October 28, 2019, the matter came up for hearing. Mr Magolo appeared for the defendants and sought adjournment on the ground that he no longer has instructions as the defendants took their file away. I declined to adjourn and ordered the case to proceed. The plaintiff gave evidence leading to judgment in his favour on February 25, 2020. When judgment was delivered both defendants were present. The plaintiff subsequently drew a bill of costs which was taxed on August 26, 2021 in absence of counsel for the defendants.
4. The application by the 1st defendant to set aside the judgment is based on grounds that the 1st defendant did not have representation and service was not done upon him; that the 1st defendant was not therefore aware of the matter being fixed for hearing save for the judgment date when someone informed them through phone that their names appeared for a case coming up for judgment; that the 1st defendant is desirous of defending the case. The supporting affidavit is sworn by Daniel Orange who is the advocate appearing for the 1st defendant. He has deposed that the defendants were being previously represented by the law firm of M/s J O Magolo & Company Advocates. He deposes that he is informed by the 1st defendant that he (1st defendant) is not aware of the 2nd defendant and that the owner of the land in dispute is one Enos Ayub who is now deceased and is a cousin of the 1st defendant. Mr Orange has deposed that the wrong party was therefore sued in the case and that the correct party or his legal representative needs to be sued so that the matter in controversy is dealt with. He has added that the 1st defendant risks being jailed for failing to pay the costs. He has continued to state that judgment cannot be enforced against a person who is deceased and that it will prejudice the 1st defendant.
5. The application is opposed by a replying affidavit sworn by the plaintiff. He has deposed that after filing suit on 20 May 2014, the defendants were served and appointed M/s J O Magolo & Company Advocates. He has stated that they then filed an application to set aside the interlocutory judgment, which was allowed, after which the matter proceeded for hearing and judgment entered. He has averred that the defendants were present when judgment was delivered. He avers that the 1st defendant cannot be heard to say that he did not have representation in the suit and that no explanation has been given for the delay in filing this application. He has pointed out that the 2nd defendant is Enos Kamora and the death certificate annexed is of one Enos Ayub Buko. He thinks that the 1st defendant has come to court with unclean hands.
6. In his submissions, counsel for the 1st defendant submitted *inter alia* that the 2nd defendant died in April 2021 and that the person who appeared in court for judgment was not the 2nd defendant since he was not alive at that time. Counsel submitted that the estate of the 2nd defendant is desirous of continuing with this case if the application by the 1st defendant is allowed. She submitted that the correct name of the 2nd defendant was Enos Buko Ayub and that there is no one in the 2nd defendant's estate called Enos Kamora. She wondered how the plaintiff would execute the decree against the 2nd defendant who is deceased. On his part, Mr Lewa, learned counsel for the plaintiff questioned why it has taken more than two years for the 1st defendant to file the subject application. He pointed out that the record shows that both defendants were present in court when judgment was delivered.
7. I have considered all the above. There is the application by the plaintiff seeking to execute the judgment and the other application filed on behalf of the 1st defendant seeking to set aside the judgment. I opt to start with the 1st defendant's application, for if it is allowed, then the plaintiff's application will have to fall by the wayside.



8. The matter proceeded for hearing in absence of counsel for the defendants for he failed to appear at the hearing upon his application for adjournment being rejected. Judgment was delivered in presence of the defendants, or at least in presence of persons who identified themselves as the defendants. Of extreme significance, there is no affidavit sworn by the 1st defendant to support the application filed on his behalf. What has been filed to support the application is an affidavit sworn by his advocate. The facts deposed therein are not the sort of facts that are within the knowledge of the advocate swearing the affidavit. If the 1st defendant wished to set aside the judgment, it was incumbent upon him to swear the supporting affidavit and give reasons why the judgment should be set aside. The 1st defendant attended court when judgment was delivered, and he has not bothered to swear an affidavit to say why he did not deem it fit to apply for the judgment to be set aside shortly after its delivery. In the affidavit sworn by counsel, it is said that the 2nd defendant is dead and that the 1st defendant is cousin to the deceased 2nd defendant. Again, I reiterate that these are matters of fact that ought to have been deposed by the 1st defendant himself. If the 2nd defendant is indeed deceased, the 1st defendant must know the person who described himself as 2nd defendant when judgment was delivered, and he also needs to explain why he did not alert court that the person describing himself as 2nd defendant was a masquerader, if that is the case. In any event, I wonder why counsel for the 1st defendant is going at lengths to address matters related to the 2nd defendant as he only acts for the 1st defendant. If indeed the 2nd defendant is deceased and his estate is aggrieved, nothing has stopped them from filing an application for consideration.
9. Moreover, even if I am to accept the affidavit of counsel, it appears as if the 1st defendant is saying that the judgment should be set aside because it is the 2nd defendant who owns the land. The 1st defendant himself does not lay claim to the land and does not assert any right to the land. I therefore see no need to set aside the judgment since the 1st defendant has no competing interest over the land. He suffers no prejudice if he is removed from it. In any event, he has not produced any document to demonstrate that the land is owned by the 2nd defendant or any other person apart from the plaintiff.
10. The long and short of what I am saying is that I do not find the application filed on behalf of the 1st defendant properly supported by a competent affidavit nor are there cogent reasons provided as to why the judgment needs to be set aside. The result is that I do not find merit in the 1st defendant's application dated May 10, 2022 and it is dismissed with costs, save that I will allow the law firm of Daniel Orengé & Company to come in place of M/s J O Magolo & Company on behalf of the 1st defendant.
11. Having dismissed the application by the 1st defendant, I have no reason not to allow the application by the plaintiff to execute the judgment and seeking to have orders for police assistance. The plaintiff's application dated March 22, 2022 is therefore allowed as prayed.
12. The plaintiff shall have the costs of both applications as against the 1st defendant.
13. Orders accordingly.

DATED AND DELIVERED THIS 3RD DAY OF NOVEMBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA

In presence of :-

Mr Lewa instructed by M/s Lewa & Associates for plaintiff

Ms Shamsa instructed by M/s Daniel Orengé & Co. Advocates for 1st defendant



Court Assistant – Wilson Rabong'o.

