



REPUBLIC OF KENYA



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**Nzimbi v Ndetei & 2 others (Environment & Land Case 44 of 2017)  
[2022] KEELC 14669 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14669 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 44 OF 2017**

**TW MURIGI, J**

**NOVEMBER 2, 2022**

**BETWEEN**

**MASON MWEMA NZIMBI ..... PLAINTIFF**

**AND**

**KIHO NDETEI ..... 1<sup>ST</sup> DEFENDANT**

**KINGOLA NDETEI ..... 2<sup>ND</sup> DEFENDANT**

**KYENGO MUINDI NDETI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before this Court for determination is a Notice of Motion dated May 10, 2022 brought pursuant to the provisions of Articles 159(2) and 47 of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act in addition to Order 42 Rule 6, Order 36 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 where the Applicants seeks for the following orders: -
  - 1) Spent.
  - 2) That leave be granted to the firm of Messrs Kilonzo & Co Advocates to come on record for the Defendants in the place of the firm of Messrs Paul Kisongo & Co Advocates pending the hearing of this Application.
  - 3) That there be a stay of execution of the summary judgment dated October 12, 2017 pending the hearing and determination of this Application.
  - 4) That the status quo ante after the summary judgment be maintained on the suit premises to wit Land Reference No Makueni/Kivani/1082 pending the hearing and determination of this application.



- 5) That the summary judgment and order dated October 12, 2017 and all subsequent proceedings thereto be set aside and the main suit herein reinstated for hearing on merits.
  - 6) That alternatively, the Honourable Court be pleased to stay the operation of the summary judgment dated October 12, 2017 and give a conditional order for the Defendants to comply with pre-trial directions within 21 days or such reasonable period failure of which the summary judgment to take effect.
  - 7) That the costs of this application be in the cause.
2. The application is premised on the grounds on its face together with the supporting affidavit sworn on May 10, 2022 by Kiio Ndeti on his own behalf and that of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

### **The Applicants' Case**

3. A summary of the grounds and the averments is that the Court vide an application dated September 2, 2016, allowed the Plaintiff's application for Summary judgment on October 12, 2017. That the said decree authorized the permanent eviction of the Defendants from LR No Makueni/Kivani/1082 and that the warrant of vacant possession was executed by the Plaintiff through this Court and the OCS Kola Police Station on January 23, 2020. He went on to state that the Plaintiff applied to this Court for the arrest and committal to civil jail of the Applicants on the grounds of disobedience of Court orders and caused their arrest and prosecution on a charge of forcible detainer in Kilungu PMCR No 481/2019.
4. The Applicant further averred that vide the Ruling of Hon Justice Mbogo delivered on February 8, 2022, the Defendants' application dated July 13, 2020 was struck out for want of adoption of the consent dated May 4, 2020. The Applicants further averred that they were not served with any notice for the proceedings leading to the summary judgment and the subsequent execution thereof.
5. The Applicants argued that the suit herein affects their constitutional right to own land whose violation will permanently affect their livelihoods.
6. The Applicants contended that the proceedings herein are a nullity for want of disclosure of Machakos HCCC No 225 of 2008 Muema Mbwii & 4 others Vs Joseph Muasa Mbwii & Another which was determined on November 25, 2009 and involved the same parties or their representatives in title. That in its judgment, the Court declared the eviction proceedings were a nullity and held that the Plaintiff/ Respondent was not entitled to evict the Defendants/Applicants. He argued that the parties therein as well as their successors in title are bound by the said ruling since no appeal had been filed against the said ruling. He asserts that the Defendants are the beneficial owners of LR No Makueni/Kivani/1082.
7. The Applicants contended that the suit herein is res judicata on account of the previous Court proceedings. He maintains that the Defendants have a sound defence and it is in the interest of justice that they should be heard on merit.
8. The Applicants further averred that their former Advocates did not inform them of the proceedings which led to the summary judgment being entered against them. They argued that the mistake of their former Advocates should not to be visited upon them. Lastly, it is averred that the Plaintiff will not suffer any prejudice if the application is allowed since he will have a chance to prosecute his claim on merit.



## **The Respondent's Case**

9. In opposing the application, the Plaintiff/Respondent vide his replying affidavit sworn on June 9, 2022 averred that the application is res judicata as a similar application dated July 13, 2020 seeking for the same orders was struck out with costs by Hon Justice Mbogo. That in the Court's ruling dated February 8, 2022, Hon Justice Mbogo correctly found that the Defendants who were represented by the firm of Paul Kisongo & Co Advocates, had proper notice of the proceedings which led to the summary judgment. He further averred that the matter did not proceed ex parte as the application for summary judgment was served upon the firm of Paul Kisongo & Co Advocates on September 15, 2016. That in response to the application, the Defendants filed a replying affidavit sworn by Kiio Ndeti on May 23, 2017 and thereafter filed their submissions on July 11, 2017.
10. The Plaintiff/Respondent contends that this suit and the execution thereof has been concluded hence it cannot be reinstated. He further averred that that this Court has no jurisdiction to entertain this matter since Messrs Paul Kisongo & Co Advocates had lodged a Notice of Appeal dated October 24, 2017 against the summary judgment dated October 12, 2017.
11. The Plaintiff went on to state that the Defendants are trespassers on his land and that they have their own land namely LR No Makueni/Kivani/327 where they have constructed their homes. He further averred that the present dispute commenced before the Minister in Minister's land appeal Case No 203 of 1986. That in its decision, the Minister subdivided the land and the Plaintiff got Plot No 1082. That after the Minister's appeal was determined, he sued Joseph Muasya Mbwii and Ndeti Mbwii in Nairobi HCCC No 1452 of 1987 and sought for eviction orders which were eventually granted on February 22, 2007.
12. That after issuance of the eviction orders, the Plaintiff filed an application dated October 31, 2007. However, the matter was transferred from High Court Nairobi to Machakos High Court where the application was heard and the ruling was delivered by Justice Lenaola on November 25, 2007.
13. The Plaintiff maintains that the Defendants herein were not parties to that dispute and hence, they are not bound by the determination thereof. In addition, he stated that the said ruling is time barred since it was issued 13 years ago.
14. He further averred that after the demise of the 2<sup>nd</sup> Defendant, he filed Makueni CMCC No 66 of 2022 against the Defendants which was heard and determined on merit. That in its judgment delivered on May 25, 2022, the Court declared that him as the owner of land parcel number Makueni/Kivani/1082. He argued that to re-open this case would amount to res judicata or an indirect appeal by the Applicants.
15. In addition, the Plaintiff stated that the Defendants had not sought for leave to file a defence out of time. The Plaintiff contends that the application is incompetent for the non-existence of leave of the Court to file an application under the name of a deceased person. He argued that the 1<sup>st</sup> Defendant has no capacity to swear an affidavit on behalf of the 2<sup>nd</sup> Defendant who was deceased as at May 12, 2022.
16. It was further averred that the Defendants have not advanced any valid reason to set aside the summary judgment. He contends that he has been denied the right to use his property. He argued that the application is incompetent and an abuse of Court process as the firm of Kilonzo & Co Advocates had not sought for leave to come on record after judgment was entered.

## **The Applicants' Response**

17. The 1<sup>st</sup> Applicant vide a supplementary affidavit sworn on July 25, 2022



18. It is the Applicants position that there is no pending appeal as the Notice of Appeal filed on October 24, 2017 had automatically lapsed by operation of the law. That the ruling of Court dated November 25, 2009 in Machakos HCCC No 225 of 2008 constitutes their defence for res judicata as the matters were settled in favour of their late father Ndetei Mbui, and being his heirs in title, the ruling is binding on the Plaintiff.
19. The 1<sup>st</sup> Applicant further averred that issue that the for determination in Makueni CMCC No 66 of 2022 related to a burial dispute as opposed to a land ownership claim. He argued that they were seeking to challenge the Plaintiff's title to the suit property on the basis that it was obtained unprocedurally and through material non-disclosure. That the Defendants seek to set aside the summary judgment in order to defend the suit in line with the annexed draft Defence and Counterclaim.
20. It is again argued that the firm of Paul Kisongo & Co Advocates has no objection to the Defendants changing their legal representation. He maintains that the Plaintiff will not suffer any prejudice if the orders sought are granted as he lives in Plot No 326 Kivani and not on the suit property. In addition, he stated that the Defendants are willing to pay costs for what has been done so far in the case. He asserts that the Defendants will suffer irreparable loss by losing their inheritance if the summary judgment stands.

### **Submissions**

21. The application was canvassed by way of written submissions.
22. The Defendants/Applicants submissions were filed on July 26, 2022.
23. Learned Counsel submitted that the only issue for determination is whether there is sufficient cause to set aside the summary judgment and hear both parties on merit.
24. Counsel contends that from onset, the Court did not delve into the issue of whether the defence raises triable issues. That the Defendants/Applicants application dated February 8, 2022 was struck out on account of issues of representation, thus the issues raised therein were not dealt with.
25. Counsel argued that the Applicants had sought for leave for the firm of Kilonzo & Co Advocates to come on record in place of Kisongo & Co Advocates and that no objection was raised by the firm of Paul Kisongo & Co Advocates. Counsel further submitted that the Applicants having been dispossessed by the Respondent who alleges that he has a good title to the property, risk losing their entire inheritance.
26. That besides the Applicants Constitutional rights to a fair hearing being at stake, the matter involves legal issues of re judicata and sub judice which the Defendants should be allowed to ventilate in their defence.
27. In addition, it was submitted that the Respondent took advantage of the mistake by their former Counsel who failed raise the issue of res judicata. To buttress his submissions Counsel relied on the following authorities: -
  - a) *Ternic Enterprises Limited v Waterfront Outlets Limited [2018] eKLR.*
  - b) *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Co Ltd & 2 Others [2017] eKLR.*
  - c) *Enock Kirao Mubanyi v Hamid Abdalkla Mbarak [2013] eKLR.*
  - d) *JAM v BOS [2019] eKLR.*



- e) [\*Patriotic Guards LTD v James Kipchirchir Sambu \[2018\] eKLR.\*](#)
28. The Plaintiff/Respondent's submissions were filed on July 18, 2022. Counsel submitted that the Defendants had an Advocate on record who appeared for them on all occasions. That the Applicants did not present any evidence to demonstrate that Ms Paul Kisongo & Co Advocates did not inform them about the proceedings leading to the summary judgment. That on the contrary, the 1<sup>st</sup> Defendant swore and filed a replying affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants opposing the application for summary judgment. Counsel contends that the Defendants have not sought leave for to file their defence in both the previous and the present application. Counsel submitted that the summary judgment was regularly entered and maintains that the Defendants have not given any valid reasons to set aside the summary judgment.
29. In addition, the Plaintiff submitted that this Court while exercising its discretion, ought to look at the reasons for failure to file a defence, the length of time between the entry of judgment and when the application to set aside is brought, whether the intended defence raises triable issues and the prejudice likely to be suffered by each party. That summary judgment was entered on October 12, 2017 and the application for setting aside was filed after three years on July 24, 2020 without any explanation for the delay. That even in the present application, the Defendants have provided any explanation for the delay.
30. Counsel maintains that the Respondent will suffer prejudice as execution has been completed. The Plaintiff further submitted that the issue of ownership having been determined by a competent Court cannot be reopened as it would amount to res judicata. Counsel further submitted that the Defendants have not annexed a draft defence to demonstrate that it raises triable issues. In a nutshell Counsel reiterated the contents in the replying affidavit sworn by the Plaintiff/Respondent. To buttress his submission Counsel relied on the following authorities: -
- a) [\*SK Tarwadi v Veronoica Mueblemann \[2019\] eKLR.\*](#)
- b) *The members of the Local Congregation of Buruburu Community Centre Church of God in East Africa (Kenya) v Executive Council of the members of the Local Congregation of Buruburu Community Centre Church of God in East Africa Kenya [2020] eKLR.*
- c) [\*Murithi Ngwenya v Gikonyo Mwangi & 2 Others \[2018\] eKLR Halima Bare & 13 Others v Maendeleo Ya Wanawake Organization \[2004\] eKLR.\*](#)

### **Analysis And Determination**

31. Having considered the pleadings, the application, affidavits and the rival submissions, I find that the issue that arises for determination is Whether there is sufficient cause to set aside the summary judgment dated October 12, 2017.
32. This suit was initially filed before the ELC at Machakos as ELC Case No 241 of 2015 before it was eventually transferred to the ELC at Makueni. The Plaintiff instituted this suit vide a Plaint dated December 4, 2015 and sought for the following orders against the Defendants jointly and severally: -
- 1) An order does issue to remove the Defendants, their servants, agents and or whosoever from the said land parcel number Makueni/Kivani/1082.
  - 2) A permanent injunction restraining the Defendants jointly and severally whether by themselves or through their appointed agents, servants or employees from residing on all that parcel of land known as Makueni/Kivani/1082 by entering re-entering passing, re-passing building, re-building.



- 3) A temporary injunction restraining the Defendants jointly and severally whether by themselves or through their appointed agents, servants and/or employees from trespassing on all that property known as Makueni/Kivani/1082 by entering, re-entering, passing, re-passing, building, re-building pending the hearing and determination of this suit.
  - 4) Cost of the suit and interest thereon.
  - 5) Any other relief that the Honourable Court may deem fit to grant.
33. The record shows that on December 21, 2015, the firm of Paul Kisongoa & Co Advocates entered appearance on behalf of the Defendants by filing a memorandum of appearance on December 30, 2015. However, the Defendants did not file a Defence. On June 23, 2016, the Plaintiff's Advocate requested for interlocutory judgment against the Defendants for failure to file a defence. The Court did not enter the Interlocutory judgment as the claim was for recovery of land. Thereafter, the Plaintiff filed the application dated September 2, 2016 and sought for the following orders: -
- 1) That summary judgment be entered in favour of the Plaintiff against the Defendants as prayed in the Plaint dated and filed on December 4, 2015.
  - 2) That the cost of this application and for the suit be borne by the Defendants.
34. It is clear from the Court record that the firm of Paul Kisongoa & Co Advocates was acting for the Defendants. It is crystal clear that the Defendants Advocate was served with the application dated September 2, 2016. In opposing the application, the 1<sup>st</sup> Defendant filed a replying affidavit on his behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. On May 30, 2017 the matter was mentioned with a view of taking directions on the disposal of the application. Both parties were represented in Court by their respective Advocates. Mr Kamolo held brief for Mr Mutinda for the Plaintiff/Applicant and Mr Kisongoa Counsel for the Defendants informed the Court that they had agreed to dispose of the application by way of written submissions. By consent of the parties herein, the Court directed that the application dated September 2, 2016 be canvassed by way of written submissions.
35. Both parties filed their respective submissions. The Defendants' submissions were filed on July 11, 2017 while the Plaintiff's submission were filed on July 4, 2017. On July 17, 2017 the Court set the ruling date in the presence of Mr Mutinda Kimeu Advocate for the Plaintiff/Applicant and Mr Mukula who held brief for Mr Kisongoa for the Defendants/Respondents. The Court rendered its ruling on October 12, 2019 which allowed the application in terms of prayer 1 and 2 of the application.
36. Being aggrieved by that ruling, the Applicants Counsel filed a Notice of Appeal on October 24, 2017.
37. The Applicants averred that they were not served with the hearing notice. They further averred that they were not aware of the proceedings that led to the summary judgment since they were not informed of the same by their former Advocate. It is crystal clear that the Defendants were duly served with the application dated September 2, 2016. It is clear from the Court record that the Applicants who were represented by the firm of Paul Kisongoa & Co Advocates participated in the proceedings which led to the issuance of the summary judgment. The Applicants cannot turn around and claim that they were not aware of the proceedings that led to the issuance of the summary judgment.
38. The Applicants stated the suit herein is res judicata on account of Machakos HCCC No 225 of 2008. They argued that the Respondent took advantage of their former Advocates failure in raising the issue of res judicata. This Court finds and holds that the Applicants ought to have raised the issue of res judicata in their replying affidavit to the application dated September 2, 2016 and not in the present application.



- 39. The Applicants delayed in filing the application as the ruling was delivered on October 12, 2017 and the present application was filed on May 12, 2022. No explanation was given for the delay.
- 40. This Court finds and holds that the application for summary judgment was heard and determined on merit. I find that the Application before this Court is in essence an appeal against the ruling dated October 12, 2017, which is guised as an application to set aside the summary judgment. This Court cannot therefore set aside the summary judgment as doing so would amount to sitting on appeal against the decision of a Court of concurrent jurisdiction which is unacceptable under the law.
- 41. In the end, I find that the application dated May 10, 2022 is unmerited and the same is hereby dismissed with costs to the Plaintiff/Respondent.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2022.**

**IN THE PRESENCE OF: -**

- Court Assistant – Mr. Kwemboi**
- Mr. Mapesa for the Defendants/Applicants**
- Mr. Kimeu for the Plaintiff/Respondent**

