



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 779 OF 2017

PAUL NGIGI NJOROGE.....PLAINTIFF/RESPONDENT

VS

EDWARD PETER WAWERU NJOROGE.....DEFENDANT/APPLICANT

RULING

1. The application before the Court is dated the 26/11/2020 filed by the Applicant seeking orders as follows;

a. Spent

b. Spent

c. That the judgment entered on the 15/6/2020 and all its consequent orders be set aside and the Defendant be granted leave to defend the suit and the same be heard on merits or as the Court may direct.

d. Costs of the application be provided for

2. The application is supported by the grounds annexed thereto and the supporting affidavit of the Applicant sworn on the 26/11/2020. It is his case that he was not informed of the hearing and judgment dates by his previous Advocates Messrs Nyantika & Co Advocates and Ngugi Mwaniki & Co Advocates. That it is his current Advocates Kahuthu & Kahuthu Advocates who informed him of the judgement, which judgement was found in the Kenya Law Reports portal. That he did not instruct the law firm of Ngugi & Co Advocates. He opined that failure to inform him of the hearing dates by his counsel was intentional and deliberate and meant to ensure that he loses his land.

3. That the Applicant stands condemned unheard if the application is not granted. That the judgment of this Court is unprocedural and should be set aside as it was issued summarily and without my knowledge.

4. Further that he stands to be prejudiced if he is made to share the land that was gifted to him by his late brother with ghosts and unknown people. Interalia, that the Plaintiff misled the Court as to the ownership of the land. That the suit land was not family land. That it was owned by Lawrence Njenga Njoroge who acquired it from Ndukuyu Gathecere, the first registered owner. That he has lived on the land since 1972 and none of his parents or siblings are buried on the suit land.

5. The application is opposed by the Plaintiff/Respondent vide a Replying affidavit dated the 8/6/2021 and filed on the 9/6/2021. The Respondent contends that the issue of representation of the Applicant cannot be blamed on him as he was not privy to the agreement between the Applicant and his counsels. That the application is made in bad faith and with unclean hands. Further he urged the Court to dismiss the application since the Applicant has failed to disclose that he transferred the suit land to Josephine Njeri Waweru during the pendency of this suit. In that regard he termed the application an abuse of the process of the Court.

6. The Applicant submitted that he was kept in the dark as to the hearing and judgment dates by his instructed Advocates Messrs Nyantika & Co Advocates. That at no time did he instruct the firm of Ngugi Mwaniki & Co. Advocates and only came to his knowledge when he retrieved the file from Nyantika & Co Advocates. He urged the Court to grant the application to afford him the opportunity to ventilate his case.

7. The issue for determination is whether the application has merit.

8. The power of the Court to set aside judgement is a discretionary. In the case of **Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd**[\[2014\]](#) the Court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.[4]); the discretion is intended to be exercised to avoid injustice or hardship resulting from accidental, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice(see Shah vs. Mbogo[5]). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See Sebei District Administration vs Gasyali.[6]) It also goes without saying that the reason for failure to attend should be considered.”

9. I consider it necessary to provide the background of this case. The Plaintiff filed suit on the 6/10/2017 seeking orders inter alia that Parcel No. Muguga/Kahuho/408 is family land and that the title held by the Defendant be cancelled to allow distribution to family members in equal shares. It was his case that the defendant fraudulently caused himself to be registered as owner of the suit land in total disregard of the other family members.

10. The Defendant filed a defence on the 19/12/2017 and denied that he held the suit land in trust for the Plaintiff. He also denied fraud and put the Plaintiff in strict proof.

11. It is the Applicant's case that his Advocates were Nyantika & Co Advocates. However, it is on record that the defence is filed by the firm of Ngugi & Co. Advocates alongside the list of witnesses, list of documents and witness statement of the Applicant. The Applicant has not contested that he did not sign the witness statement filed by the said firm of Advocates. On the 22/2/2019 the said firm filed the list of issues on behalf of the Applicant as well as the defendants written submissions with respect to the suit.

12. To justify this position, the Applicant has relied on the pleadings (plaint) in CMCC No 240 of 2017 filed in Kikuyu Law Courts. I have seen the Plaint dated the 18/8/2017 which was drawn by the firm of Nyantika & Co Advocates. I must state that this case is different from the instant suit and perhaps the Applicant is confusing the cases as I can see it involves the same parties and the same subject matter but filed in different Courts.

13. Fast forward there is a change of Advocates from Ngugi & Company Advocates to the current Advocates on the 23/10/2020. There is none with respect to the firm of Nyantika & Company Advocates.

14. It is therefore the conclusion of the Court that the firm of Ngugi & Company Advocates has been representing the Applicant up and until the filing of the change of Advocates which application was granted by the Court on the 23/11/2020.

15. According to the record the matter came up for hearing on the 22/7/2019 when it was adjourned at the instance of the Applicant's counsel. The Applicant was condemned to pay Kshs 5000/- being adjournment fees.

16. On the 1/10/2019 the Applicant was represented by Mr Achoki advocate whose brief was held by Mr Omari. Mr Achoki was said to be attending Court in Nairobi and had requested that he would be ready to proceed at noon the same day. The Court noted that the hearing date having been taken by consent of the parties, ordered the case to proceed. The Applicant was absent in Court.

17. The Applicant's explanation is that he was kept in the dark by his Advocates and that he was not aware of both the hearing and the judgement dates. The Applicant did not endeavour to file an affidavit by his advocate as to the veracity of this claim nor did he demonstrate the Advocate acted deliberately with intention to deprive him the suit land.

18. Going by the record it is evident that the Applicant's lawyer who had conduct of the case fixed the hearing by consent and even asked for the file to be put aside until when he could attend Court. The allegation that the Applicant was kept in the dark cannot be verified given the absence of any supporting evidence by the Applicant.

19. The overriding objectives of the Court as set out in section 1A of the Civil Procedure Act (CPA) are geared at facilitating the just expeditious proportionate and affordable resolution of civil disputes. Section 3 of the CPA provides that a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objectives of the Act and in effect to participate in the processes of the Court and to comply with the directions and orders of the Court.

20. It is on record that the Applicant was absent in Court on the hearing

day. This speaks volumes on the side of the Applicant as the case belongs to the Applicant and not the Advocate. The allegation that he was kept in the dark by his own counsel does not hold water. I say so because his Advocate was present in Court. The Applicant had a duty to attend Court for the hearing of his defence in the case. This in my view this is a litigant not deserving of the discretion of this Court. Litigation must come to an end. And in this case it did.

21. Before I pen off, the Court has perused the title on record which shows

that the Applicant transferred the substratum of the suit to a third party during the pendency of the suit thereby divesting himself of the rights and interests in the suit land. Should that be the case then the more reason the Applicant is disentitled to the orders sought.

22. The Court is not persuaded that this is a case deserving exercise of its

discretion.

23. Having now carefully considered the application, the affidavit evidence

and the written submissions, the Court finds that the application is unmerited. It is disallowed.

24. The costs shall be borne by the Applicant.

25. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 1ST DAY OF NOVEMBER, 2021 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff / Respondent - Absent

Mr. Kahuthu for Defendant/Applicant

Ms. Phyllis Mwangi – Court Assistant