



**Ngahu v Waruiru (Environment & Land Case 145 of 2011)
[2024] KEELC 267 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 145 OF 2011
OA ANGOTE, J
JANUARY 25, 2024**

BETWEEN

JOHN MWANGI NGAHU PLAINTIFF

AND

ALICE WAIRIMU WARUIRU DEFENDANT

RULING

1. Before the Court for determination is the Defendant’s Notice of Motion dated September 1, 2022 and brought under sections 1A and 1B of the *Civil Procedure Act* and order 9 rule 9, order 10 rule 11, order 22 rule 22 of the *Civil Procedure Rules*. The Defendant is seeking for orders that:
 - a. The firm of Kanyi Kiruchi & Co Advocates be allowed to come on record for the Defendant in place of P.K Njoroge & Co Advocates.
 - b. The Court be pleased to set aside and/or vary all consequential orders arising from this suit vide the judgement delivered on 8th May 2014 by Hon. Justice J.M Mutungi and vacate any orders made pursuant thereto.
 - c. The Court be pleased to allow the Defendant to participate in the proceedings and defend the suit.
 - d. The Court be pleased to make appropriate orders it deems fit to serve the ends of justice.
2. The application is based on several grounds and supported by an affidavit sworn by the Defendant. The Defendant deponed that she is the rightful owner of Ruiru/Ruiru East Block 1/540(hereinafter ‘the suit property’) having been allotted the same by Githunguri Constituency Ranching.
3. It was deponed by the Defendant that when the current suit was filed, she instructed the firm of P.K Njoroge & Co Advocates to defend her in the suit and that the advocates entered appearance but did not file the defence leading to an ex-parte judgement being entered in favour of the Plaintiff.



4. In asking the Court to set aside the above mentioned judgement and all consequential orders arising from it, the Defendant deponed that the matter proceeded ex-parte by no fault of her own but because of the conduct of her then advocate. She further stated that she has a triable Defence which she should be allowed to ventilate.
5. The Plaintiff filed a Replying Affidavit sworn on 16th January 2023 in which he deponed that the Defendant is guilty of laches as the judgement she is seeking to have set aside was delivered eight years ago and that she took no action in the intervening period.
6. It was deponed by the Plaintiff that there is nothing to set aside as execution was performed on 18th May 2016; that the Plaintiff is a bona fide purchaser for value without notice and the sanctity of his title was therefore protected by the law.
7. The Plaintiff further deponed that the suit property was subdivided and has consequently ceased to exist in the eyes of the law; and that the Defendant's plot is Ruiru Kiu Block 2/Githunguri/1540 and not the suit property as claimed.
8. The Defendant filed a Further Affidavit on 30th August 2023 where she reiterated that she is the owner of the suit property and that her former advocates ceased to practice thus making it difficult for her to follow up on the case.
9. The Plaintiff filed a Supplementary Affidavit on 12th September 2023. He deponed that the application should be dismissed as the Defendant has no feasible Defence that would warrant a reopening of the case.
10. The Plaintiff filed his submissions which I have considered. The Defendant did not file submissions.

Analysis and Determination

11. Based on the foregoing, the following two issues arise for determination:
 - i. Whether the firm of Kanyi Kiruchi Advocates should come on record for the Defendant.
 - ii. Whether the Judgement dated 8th May 2014 should be set aside and the Defendant be allowed to participate in the proceedings.
12. Order 9 rule 9 of the [Civil Procedure Rules](#) provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
13. As per the above section of the law, the Court can allow an advocate to come on record upon an application with notice to all the parties. I am satisfied that that condition has been met as the current application has been properly filed and served on the Plaintiff's former advocate.
14. The Plaintiff and the Defendant's former advocate having not opposed the prayer, the firm of Kanyi Kiruchi Advocates is allowed on record.



15. The principles guiding the Court on whether to set aside a judgement were stated as follows in the case of *Mbogo vs Shab* [1968] EA 93:

“Whether...in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed.”

16. In the case of *Yooshin Engineering Corporation vs Aia Architects Limited* (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR) (7th July 2023) (Judgment), the Court of Appeal stated as follows:

“What comes out clearly is that where the judgement is irregular in the sense that service was not effected, or that the judgement was improperly or prematurely entered, then such a judgement is irregular and must be set aside as a matter of right. It does not matter whether the defendant has a defence or not. The defendant only needs to satisfy the court that the judgement was irregular and that is the end of the matter. The issue of imposing conditions does not arise.

27. However, even where the judgement is regular, the court still retains the wide discretion to set the same aside though if the Court decides to set aside the judgement, depending on the circumstances, it may do so on conditions that are just. That discretion, being wide, the main concern is for the court to do justice to the parties, and in so doing the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. It has however to ask itself under what conditions, if any, it ought to set aside the judgement and such conditions, if appropriate, must be just to both the Plaintiff and the Defendant.”

17. There were no irregularities pleaded in the current case. The Defendant is therefore asking the Court to set aside a judgement that was issued regularly. While the Court has discretion to do so, the question arises as to whether such discretion should be exercised in this case.

18. The Defendant has argued that the case was dismissed because of the fault of her advocate. However, in considering the circumstances subsequent to the delivery of the judgement, it is clear that there is an unexplained delay of more than eight years between the time the judgement was delivered and the bringing of the application to set aside the said judgement.

19. Indeed, the delay in filing the current application necessitated the execution of the Judgment. That being so, and considering that no good reason has been given why the application was not filed timeously, I decline to exercise my discretion in favour of the Defendant/Applicant.

20. For those reasons, the Defendant’s application dated 1st September 2022 is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF JANUARY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Nduati for Plaintiff/Respondent



No appearance for Defendant
Court Assistant - Tracy

