



REPUBLIC OF KENYA



**Gikandi v Mwatela & 5 others (Environment & Land Case
220 of 2017) [2024] KEELC 105 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 220 OF 2017
SM KIBUNJA, J
JANUARY 24, 2024**

BETWEEN

FREDRICK GIKANDI PLAINTIFF

AND

NYAMAWI MWATELA 1ST DEFENDANT

KESI BORA JIRA 2ND DEFENDANT

MGOWA CHALE MWAKERA 3RD DEFENDANT

JOHO CHALE MWAKERA 4TH DEFENDANT

ANDAZI BAI CHIBURA 5TH DEFENDANT

MCHARI MOZOMBA ZERO 6TH DEFENDANT

RULING

[NOTICE OF MOTION DATED 30TH JUNE 2023]

1. The defendants moved the court through the Notice of Motion dated the 30th June 2023 that is under Order 51 Rule 1, Order 8 of the *Civil Procedure Rules*, Section 1A, 1B & 3A of the *Civil Procedure Act*, and Articles 159 (2)(d) of the *Constitution* of Kenya, seeking for;
 1. “Spent.
 2. Spent.
 3. That the interlocutory judgment entered as against the defendants/applicants on 25th January 2019, the judgement of the honourable court dated 2nd day of November 2020 and all consequential orders and decree be set aside unconditionally.



4. That the defendants/applicants be granted leave to file a defence and counterclaim out of time and that the draft defence annexed herewith be deemed as duly filed and served on time upon payment of the requisite court filing fees.
5. That costs be provided for.”

The application is grounded on the nine (9) grounds on its face and supported by the affidavit of one Nyamawi Mwatela, the 1st defendant, sworn on 30th June 2023, in which he deposed inter alia that the applicants were not served with any summons to enter appearance, pleadings or notices; that he became aware of the suit on 10th June 2023 when he was served by one IP Matano, the Deputy OCS, Shimoni Police Station, when he sought to enforce an eviction order of this court against the applicants; that they instructed the present counsel who requested the plaintiff’s counsel for some 60 days to enable them to peruse the file and get copies of the proceedings; that their request was not granted and upon perusing the record, they discovered that the plaintiff requested for an interlocutory judgment, which was entered against them on 25th January 2019, after the plaintiff made a misrepresentation to the court that the applicants had been served; that the matter was heard through formal proof and judgement entered; that they have a genuine defence raising triable issues, and a claim of adverse possession to the plaintiff’s suit; that the judgment delivered on 2nd November 2020 is an irregular judgment which ought to be set aside and the applicants be granted leave to file a defence; that their application was filed expeditiously and without any inordinate delay.

2. The application is opposed by the plaintiff through his replying affidavit inter alia deposing that the defendants were served with the summons and pleadings but did not file their responses, prompting the plaintiff to request for judgment against them; that on 14th November 2018, the Deputy Registrar directed the plaintiff to serve the defendants afresh, and service which was effected on 19th November 2018; that after the judgement was entered, the same could not be executed as the court file went missing, prompting the plaintiff to apply to reconstruct the court file; that the reconstruction application was served upon the defendants but they did not participate in the prosecution of the same; that the application is unmerited as the applicants were served with all the pleadings on more than three occasions and cannot be granted a third bite of the cherry when they slept on their rights; that he used the police officers from Shimoni Police Station in identifying the number of squatters on the suit property and not to threaten or evict the defendants as alleged; that he had reached an arrangement with the defendants’ counsel, Dennis Balicha, for them to vacate the suit property, and that some of the squatters vacated leaving a few; that the court should allow the plaintiff to enjoy the fruits of his judgement; that the application should be dismissed and he be allowed to proceed with the eviction process. The plaintiff also filed affidavits by Joseph Kombo Kibarua and Rashid Mwinyi sworn on the 2nd October 2023 and 22nd September 2023 confirming the position inter alia that the defendants had been served with the suit papers.
3. The court issued directions on filing and exchanging submissions on the 11th October 2023. The learned counsel for the defendants filed their submissions headed “Certificate of Urgency” and dated the 17th November 2023, while that for the plaintiff filed theirs dated the 26th November 2023, both of which the court has considered.
4. The issues for the determinations by the court are as follows:
 - a. Whether the defendants have made a reasonable case for the judgement herein to be set aside, and they be allowed to file their defence.
 - b. Who pays the costs in the application?



5. The court has carefully considered the grounds on the application, the affidavit evidence presented by both sides, the submissions by the learned counsel, the record and come to the following determinations:

a. That from the record, this suit was instituted by the plaintiff against the six defendants vide a plaint dated 20th June 2017, seeking inter alia for declaration that he was the bona fide owner of Kwale/Kidimu/460, suit property, eviction order against the defendants and costs. The affidavit of service sworn by one Samuel L. Ndenge on 19th November 2018, details how he served each of the defendants individually with the summons together with the pleadings on 28th September 2018. The defendants did not enter appearance or file their defence and the plaintiff requested for interlocutory judgment against the defendants vide his letter dated the 9th November 2018. Interlocutory judgement was then entered and hearing proceeded through formal proof. The court then delivered its judgement in favour of the plaintiff on the 2nd November 2020.

b. In the said judgement, the court proceeded to find that the plaintiff had proved his case on a balance of probabilities and entered judgment for the plaintiff against the defendants in the following terms:

a. A declaration that the plaintiff is the legal and bonafide owner of all that parcel of land known as Kwale/Kidimu/460.

b. The defendants and/or their agents, servants or other persons claiming through them be and are hereby ordered to vacate and deliver vacant possession to the plaintiff within 30 days from the date of service of this decree herein upon them, in default the plaintiff shall be entitled to an order of eviction for removal of the defendants from the suit property under supervision of an authorized police officer from the nearest police station.

c. The plaintiff shall have costs of the suit.

After the court delivered its judgement on 2nd November 2020, the court file appear to have gone missing soon thereafter. The plaintiff began engaging the court for a search for the same and eventually filed ELC Miscellaneous Application no 48 of 2021 for reconstruction of the file. The application was allowed and after reconstruction of the file, the plaintiff was able to extract the decree on the 20th February 2023. The decree was served upon the 1st defendant on 16th February 2023, by one Michael Thoya Mbwana, a licenced court process server, as sworn on 16th February 2023 in his affidavit of service.

c. The judgement entered in favour of the plaintiff on 2nd November 2020, is being challenged by the defendants, for reasons inter alia that they were never served with summons, notices or pleadings. They termed the judgement as irregular and sought for it to be set aside, and that they have a defence to the plaintiff's claim that has triable issues. The plaintiff has rebutted that assertion and availed affidavit of service confirming the defendants were, indeed served with summons to enter appearances and failed to do so. The plaintiff insisted that the judgement was regular as it followed the formal proof hearing after the defendants failed to enter appearance and or file defence. That he should be allowed to enjoy the fruits of his judgement.



- d. The provision of Order 10 Rule 6 of the [Civil Procedure Rules](#) provides for instances where interlocutory judgements may be entered as follows:

“Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form no 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.”

A close reading of the above provision reveal that the instances where interlocutory may be applied for and entered do not include land claim matters. It follows that even where interlocutory judgement has been entered in land claim matters like in the instant case, it has no consequences as the suit has to be set down for hearing. The plaintiff’s claim herein, as captured in the plaint, is not for a liquidated claim or general damages for the above rule to apply. Even though the interlocutory judgment was applied for and entered, the matter was eventually set down for hearing. The purpose of a formal proof hearing is for the court to assess the value of the goods and or damage caused that can be awarded by the court. A claim for land does not fall under this category and as such, there can be no interlocutory judgement entered in a land claim. In the case of [Apollo Muinde & 2 others v Ernest Oyaya Okemba](#) [2019] eKLR, the court held;

“The claim before this court was not one seeking pecuniary damages and neither was it one that was a claim for detained goods. It was a case seeking declaration of ownership of land and a mandatory injunction. Those are not prayers upon which one can apply for interlocutory judgment. In a situation where no appearance is filed to such a suit, or an appearance is filed and no defence is filed within the specified period, the avenue of the plaintiff is to apply for a date for hearing, and even then, since he has no interlocutory judgment in his favour, he needs to serve the defendant with a hearing notice, unless the court orders otherwise, for the matter will actually be proceeding for full hearing on merits and the defendant needs to be informed of this and opt whether to attend or not. If the defendant has actually made an appearance, then clearly, he must be served through his counsel, if he has one, or if in person, he must be personally served. “Formal proof” cannot be undertaken in a case where one claims a declaration of ownership of land or is seeking orders of permanent and/or mandatory injunction, or such other related claims.”

It follows that the interlocutory judgement that was entered on 25th January 2019 was of no effect in this matter, and whether or not it is set aside does not really matter. The entry of the interlocutory judgement did not vitiate the hearing that followed, and as the defendants had neither entered appearance nor filed defence, the plaintiff was not obligated to serve them with hearing notices.

- e. Though the defendants had alleged at prayer 4, ground 7 and paragraphs 13 of the supporting affidavit that their defence raises triable issues, no draft defence was annexed to the application and the court is unable to make a determination one way or the other on that issue. I have seen a supplementary affidavit sworn by the 1st defendant on the 17th November 2023 that was filed with their submissions of even date. Remembering that directions on filing and exchanging submissions were given on 11th October 2023, it follows that the said affidavit was



filed without leave of the court, and as there is no evidence that it was ever served upon the plaintiff's counsel, it will not be considered. The supplementary affidavit is hereby struck out for the above reasons.

- f. From the analyses of the facts presented, the court finds the judgement delivered on the 2nd November 2023 was regular and the defendants have therefore failed to establish the threshold of setting aside the said judgement and to reopen the proceedings herein.
 - g. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the defendants will meet the plaintiff's costs.
6. From the foregoing conclusions, the court finds and orders as follows:
- a. That the defendants' notice of motion dated the 30th June 2023 is without merit.
 - b. That the said application is therefore dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 24TH DAY OF JANUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff: Mr. Lijoodi.

Defendants: No appearance.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

