



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 253 OF 2017

FORMERLY MERU ELC CASE NO 65 OF 2008

M'ARICHIA MWITHIGA KIRIGIA.....PLAINTIFF

VERSUS

ROMANO MUTHENGI NDUYO.....1ST DEFENDANT

JAMES MUCHOKI KATHENYA.....2ND DEFENDANT

LANDS ADJUDICATION & SETTLEMENT OFFICER,

THARAKA DISTRICT.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The applicant's advocate states that this application is brought to court under Article 159 of the Constitution of Kenya, Sections 3 & 3A of the Civil Procedure Act, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules.

2. The application is dated **11th October, 2018** and seeks the following orders:

1. The judgment of the court entered herein against the app/defendant dated 19.12.2017 be set aside.
2. That the honourable court be pleased to allow the app/defendant to give his defence herein in support of his defence.
3. Costs be provided for in the main case.

3. The application has the following grounds:

- i) The hearing proceeded ex-parte and without knowledge of the applicant.
- ii) The applicant has been condemned unheard and deprived of his land.
- iii) That the failure of the applicant to attend court on the hearing date was the fault of his advocate on record at that time.
- iv) The application has sufficient reasons to have judgment set aside.
- v) That it is just and fair that the judgment be set aside in the circumstances.

4. The application is supported by the affidavit of the 1st defendant/applicant sworn on **11th October, 2018** which states as follows:

I, ROMANO MUTHENGI NDUYO, adult male of Kathengecha village, Irunduni sub location, Tharaka Nithi County do hereby make oath and solemnly swear as follows:

1. That I am the 1st defendant herein and I make this affidavit in support of my application to set aside the judgment of the court dated

19.12.2017.

2. That the hearing of this suit proceeded ex parte in my absence because I was not informed of the hearing date.
3. That when I was served with the summons to enter appearance, I moved very fast to defend myself and in doing so, I appointed the firm of G.M. Wanjohi & Co. Advocates to represent me in the matter.
4. That my advocate did not inform me of the hearing date and that is why I did not attend court on the hearing date.
5. That my failure to attend court was due to the mistake, error and failure of my advocate on record and I pray that I do not be visited adversely because of the mistake of my advocate.
6. That I have always attended court whenever the matter came up and the record of the court can confirm this.
7. That as can be seen from my defence, I have a very strong defence which I pray that this honourable court grants me an opportunity to ventilate.
8. That the circumstances of this case and the nature of the dispute, and its impotence is in favour of granting the order sought herein.
9. That I am willing to compensate the respondent with costs should the court orders the application (sic).
10. That what I depone herein is true and within my personal knowledge, except where otherwise stated.

5. The application is opposed by the replying affidavit of the plaintiff/respondent sworn on **8th November, 2018** which states:

I, M'Arichia Mwithiga Kirigia, an adult male of sound mind, resident in Ntoroni village within Tharaka Nithi County and of care of P. O. Box 3295-60200, Meru, do hereby make oath and state:

1. That I am the plaintiff/respondent herein, hence competent to swear this affidavit in vehement opposition to the application dated 11.10.2018.
2. That the said application is fraught with naked lies meant to hoodwink the honourable court. The applicant is a pathological liar and so, discretion of the court should not be exercised in his favour.
3. That the applicant is an indolent litigant. Even on an assumption that his erstwhile advocates did not inform him about the hearing date as he alleges (but which is not the case), the applicant had a duty to cell-phone his said advocates or visit their offices to enquire about this case, if he was genuinely interested in defending it. He did not, inexplicably, do so and therefore, he cannot turn around after a period of about one year from 19.12.2017 when judgment was delivered herein, and purport to seek exercise of the honourable court's discretion in his favour. Where has he been for virtually one year now?
4. That in fact, the applicant has been woken up from his perpetual indolence and deep slumber by my execution of the eventual decree, a copy of which is annexed hereto as "MM 1".
5. That the applicant was not attending court as alleged. He should not be allowed to set aside a regular judgment, long after my costs have been taxed, as per a certificate of costs annexed hereto as "MM 2".
6. That I am over 78 years. I need to enjoy the fruits of my judgment, as I am living in my sunset days.
7. That I shall be prejudiced in terms of time and costs, if the case is re-opened, yet there is no justification.
8. That the applicant shall not be prejudiced as he was given a chance to be heard but he slyly wasted it.
9. That Mr. Carlpeters Mbaabu, advocate has most believably informed me that the instant application is fatally defective; the applicant has no plausible defence; if the applicant was genuinely offended by his former advocates as he alleges, he has recourse elsewhere, but not in this court; and that the oxygen principle enjoins parties and advocates to assist the court to render justice quickly without delaying it.
10. That the fore-going is true to the best of my knowledge, belief and understanding.

6. The application was heard inter partes on **14th November, 2018**.

7. Mr. Murango Mwenda, the applicant's advocate, told the court that he relied on the grounds on the face of the application and the applicant's supporting affidavit sworn on **11th October, 2018**. He told the court that the applicant was not aware of the apposite date because his advocate had failed to communicate the hearing date to him. He said that the fact that the applicant had hired an advocate and paid him was enough to demonstrate that the applicant was keen to participate in all proceedings concerning his case. He told the court that the mistake of the applicants previous advocate should not be visited upon his client. He asked the court to allow the application.

8. Mr. Carlpeters Mbaabu, the plaintiff/respondent's advocate opposed the application. He asked the court to note that the respondent's replying affidavit had not been opposed by way of another affidavit. He asked the court to deem that affidavit as containing the truth in this matter.

9. Mr Mbaabu submitted that the application had been made belatedly almost one year after the impugned judgment was delivered on **19th December, 2017**. He told the court that the long delay had not been explained in this application or in its supporting affidavit.

10. Mr. Mbaabu submitted that the applicant was awakened by the process of executing the apposite decree and recovery of costs. He asked the court to note that the apposite Ruling on the plaintiff's bill of costs dated **17th March** was delivered by Hon. Njoki Kahara, this court's Deputy Registrar, on **10th May, 2018**.

11. Regarding the applicant's previous advocate not communicating to him the apposite hearing date, Mr. Mbaabu submitted that it was the applicant's duty to keep in contact with his advocate regarding any matter being handled by the advocate on his behalf.

12. Mr.Mbaabu told the court that sections 1A and 1B of the Civil Procedure Act enjoin parties to civil proceedings and their advocates to assist the court to further the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of Civil Disputes.

13. Mr.Mbaabu told the court that Article 159 (2) (b) of the Constitution decrees that justice shall not be delayed. He said that this suit was filed in 2008 as HCCC No. 65 of 2008 and has been in the court system for the last ten years or so. He said that the court record shows that the applicant and the other defendants never attended court. He proffered this as evidence that the defendants never intended to have this case heard and determined expeditiously.

14. Finally, Mr.Mbaabu submitted that the applicant would not suffer any prejudice or detriment as he never challenged the decision of the District Land and Settlement Officer which awarded the suit land to the plaintiff. He laconically proffered that he should have appealed to the minister as provided by the law. He submitted that it was that judgment that the plaintiff was seeking to execute. He urged the court to dismiss the application and award costs to the plaintiff.

15. Mr. Kiongo, Senior Litigation Counsel in the Attorney General Office, told the court to make its independent decision.

16. I have carefully considered the pleadings filed in this application by the parties. I have also carefully considered their oral submissions.

17. Overall, I am persuaded to the position that all the points submitted by the plaintiff's advocate have merit. The impugned judgment was delivered on **19th December, 2017**. This application was filed on **30th October, 2018** although it is dated **11th October, 2018**. The filing was done over 10 months after the concerned judgment was delivered. This nearly one year delay has not been explained at all. A mere blame game that it was the applicant's advocate who was the author of the applicant's predicament does not constitute an explanation concerning the delay in the filing of this application. The cliché that: *"the mistake of an advocate cannot be visited upon his client"* is veritably hackneyed. It is the duty of a litigant to diligently follow up all processes and developments apposite to his suit.

18. It is not controverted that this court's Deputy Registrar delivered a Ruling on the plaintiff's bill of costs dated **12th March, 2018** on **10th May, 2018**. This application was filed on **30th October, 2018**, five and a half months after the said ruling was delivered. I am persuaded by the submission of the plaintiff's advocate that the applicant was only awakened by the execution proceedings. But even in this area, he woke up five and a half months later!

19. This suit was **filed in 2008**. It has remained unheard and undetermined in the judicial pipeline for close to **10 years**. I agree that as dictated by Article 159(2)(b) of the Constitution of Kenya "justice shall not be delayed". I also agree that sections 1A and 1B of the Civil Procedure Act have the overall effect that parties and courts should facilitate expeditious delivery of justice.

20. Having considered the totality of the facts and circumstances apposite to this matter, I find that the application lacks merit.

21. Therefore, this application is dismissed.

22. Costs of this application shall follow the event and are awarded to the Plaintiff/Respondent.

23. Orders accordingly.

Delivered in open court at Chuka this 11th day of December, 2018 in the presence of:

CA: Ndegwa

M/s Hayaba h/b Carlpeters Mbaabu for the Plaintiff/Respondent

Romano Muthengi – Plaintiff

P.M. NJOROGÉ

JUDGE