



**Ndindiri v Irimu & 3 others (Environment & Land Case
E023 of 2022) [2024] KEELC 234 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 234 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E023 OF 2022
EK WABWOTO, J
JANUARY 18, 2024**

BETWEEN

MONICAH NYAKIRINGA NDINDIRI PLAINTIFF

AND

DR MUNENE IRIMU 1ST DEFENDANT

PRISCILLA CHEGE 2ND DEFENDANT

DAVID MBIYU MUHIA 3RD DEFENDANT

EDWARD KIMANI NGANGA 4TH DEFENDANT

RULING

1. This ruling is in respect to the Notice of Motion Application dated 20th September 2023 which was accompanied by a Supporting Affidavit sworn by Edward Kimani Nganga. The Application was brought under Section 3A of the *Civil Procedure Act* and Order 12(Rule 7), Order 40(1) and 50(1) of the *Civil Procedure Rules* under which the following orders were sought:
 - i. ...spent.
 - ii. ...spent.
 - iii. ...spent.
 - iv. That this Honourable Court be pleased to grant, a stay of execution of the Decree issued on 13th September, 2023, judgment issued on 29th June 2023 and all subsequent proceedings herein pending the hearing and determination of this application.
 - v. That this Honourable Court be pleased to set aside the Judgment issued against the Defendants/Applicants on 29th June, 2023 herein together with all proceedings in this matter.



- vi. That this honourable court be pleased to re-open the Plaintiffs case for denovo hearing and to grant the Defendants an opportunity to participate in the trial by defending the suit.
 - vii. That costs of this application be in the cause.
2. The Application was based on several grounds including that:
- a. This suit was filed by the Plaintiff/Respondent against the Defendants/Applicants on 27th January 2022. On 6th February 2022, pursuant to instructions from the Defendants/Applicants, their former advocates Messrs. Kamau Chege & Kagunyi Advocates filed a defence against the Plaintiff's/Respondent's claim.
 - b. That the Defendants/Applicants further instructed their said former advocates to file a suit against the Plaintiff/Respondent and on 26th May 2022 ELC Constitutional Petition Number E019 of 2022 was filed against the Plaintiff/Respondent herein by the four Defendants being the officials of Eastern Thome Self Help Group supported by their 49 members. Sometime in November, 2022 the Defendants'/Applicants' former advocates informed the Defendants/Applicants that these two suits had been consolidated by the court with directions that they will be heard together.
 - c. The Defendants/Applicants have always been keen to defend themselves against the Plaintiff's/Respondent's claim and to also prosecute ELC Constitutional Petition Number 8019 of 2022 against her.
 - d. To this end the Defendants/Applicants have always kept tabs on the case by regularly inquiring from its erstwhile advocates the progress of the suit and the said advocates always advised the Defendants/Applicants that the case is progressing on well and the only challenge was getting a hearing date.
 - e. The Defendant/Applicants were therefore taken aback when on 14th September 2023, their former advocates forwarded to the 4th Defendant a demand letter dated 4th September, 2023 from the Plaintiff/Respondent's advocates which letter was demanding from the Defendants/Applicants payment of Kshs. 31,172,537.59/= pursuant to the judgment delivered in this suit.
 - f. Upon the Defendants/Applicants seeking an explanation from their former advocates they were given the run around with the said advocates finally intimating that they were also shocked at the turn of events as they had never been served with a hearing notice.
 - g. The Defendants/Applicants opted to instruct their current advocates on record to peruse the court file and establish what transpired and how the judgment was delivered without their participation.
 - h. On perusal of the court file the advocates found out that the judgment was delivered on 29th June, 2023 in the absence of the Defendants/Applicants, advocates. From the judgment it also became evident that the matter proceeded in the absence of both the Defendants' former advocates and the Defendants.
 - i. Thus, the trial was conducted and judgment given with no participation from the Defendants/Applicants who were never notified by their erstwhile advocates of the hearing date in the matter.



- j. Consequently, save for the filing of the Defence the Defendants/Applicants did not participate in this case and was therefore denied an opportunity to be heard against the rules of natural justice,
 - k. The Defendants/Applicants former advocates failed and/or neglected to inform the Defendant/Applicant of the hearing date of this matter resulting in the Defendant/Applicant failing to appear in court to defend themselves.
 - l. That the mistakes of the Defendant/Applicants' former advocates in failing to advise the Defendants/Applicants about the hearing date and also failing to attend court should not be visited upon the Defendants/Applicants who are innocent.
 - m. That the failure by the Defendants/Applicants to attend court is excusable because it was not aware of the hearing date and as such this honourable court ought to exercise its discretion and allow the Defendants/Applicants to defend themselves.
 - n. That the Defendant/Applicants have a good defence against the Plaintiffs/Respondent's claim as going by the issues raised in ELC Constitutional Petition Number E019 of 2022, the Defendants/Applicants were acting under instructions from the members of Eastern Thome Self Help Group whereas in this suit they were sued in their personal capacities and have thus been made to bear the burden of their actions as agents of the Group.
 - o. It is in the interest of justice, fair play and equity that the Defendants/Applicants be given an opportunity to not only defend itself against the Plaintiffs/Respondent's claim but also prosecute ELC Constitutional Petition Number E019 of 2022.
 - p. That this application was made and filed diligently and without unreasonable delay in light of the circumstances of the case and the fact that the Defendants/Applicants only became aware of the judgment on 14th September, 2023.
3. The application was canvassed by way of written submissions pursuant to the directions issued by this court.
 4. The 2-4th Defendants filed submissions dated 25th October 2023 and affidavits sworn by Dr. Munene Irimu dated 11th October and by Edward Kimani Nganga sworn on 23rd October 2023. On the other hand, the Plaintiff filed written submissions dated 30th October 2023 and Replying Affidavit sworn by Rose Wanjiru Ndindiri on 2nd October 2023.
 5. Having considered the application, rival affidavits and written submissions filed by the parties, the main issue for determination is whether the application meets the threshold for stay and setting aside of the judgement delivered on 29th June 2023.
 6. On the issue of granting stay, the Court is guided by Order 42 rule 6 of the *Civil Procedure Rules*, 2010 which provide as follows;

“....No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem



just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

No order of stay shall be made under sub rule (1) unless-

- a) The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and
 - b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
7. This Court is well aware of the delicate balance of the right to fair hearing vis a vis the right to enjoy the fruits of the Judgement. The defendants submitted that the failure to participate in the trial process was an error on the part of Defendants’ previous advocate. Having known of the judgement only recently, they now seek to remedy their current predicament.
8. Perusal of the Court record herein confirms that a hearing notice was served upon Defendants’ Advocate on 16th November 2022. Following service of the hearing notice, no further action was taken by the advocate until 20th September 2023 when a Notice of Change was filed by the firm of Sherwin Njoroge as instructed by the 2nd-4th Defendants. The Court takes cognizance of the many authorities citing that Counsel’s error should not be visited upon the client. Nonetheless, it cannot absolve or excuse the inactivity of the client. The law upholds the vigilant therefore each must carry their share of the load as they navigate the corridors of justice.
9. In this instance, the Defendants are in a unique situation being that ELC E019 OF 2022 was held in abeyance which gives them an opportunity to ventilate their issues at trial. With regards to re-opening of the case, the Court of Appeal in *Standard Chartered Financial Services Limited & 2 others v Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 others* [2016] eKLR highlighted that the Court exercises discretionary powers when determining to re-open a case. In *Samuel Kiti Lewa v Housing Finance Company & Another* [2015] eKLR, the Court would not grant the plea if it is intended to fill gaps in the evidence. Lastly, the plea cannot be granted if there is inordinate and unexplained delay on part of the Applicant. In the instant case, none of the defendants participated in the trial owing to the mistake of the advocate and for the interest of justice and in light of Article 50 of the *Constitution*, this court shall grant the defendants an opportunity to file their defence and participate in the suit after setting aside the judgement delivered herein. The said suit shall now be heard afresh in the presence of all the defendants.
10. In the foregoing, the Application dated 20th September 2023 is dispensed with in the following terms:
- a. The proceedings, judgment and decree issued herein as set aside on condition that the defendants shall pay to the plaintiff thrown away costs assessed at Kshs. 100,000/= payable forthwith and in any event not later than 30 days from the date hereof.
 - b. In the event that the defendants fails to comply with the foregoing conditions (1) the orders given herein setting aside the judgment delivered on 29th June 2023 and ordering a fresh hearing shall stand set aside and the said judgment shall stand reinstated without any further reference to the court and the plaintiff shall be at liberty to proceed with the execution thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF JANUARY 2024.



E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Agwata h/b for Mr. Majimbo for the Plaintiff

Mr. Onindo for the 1st Defendant.

Mr.Njoroge for the 2nd-4th Defendant.

Court Assistant; Caroline Nafuna.

