



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

MISC APPLIATION NO.26 OF 2017

JEREMIAH GITAU..... 1st APPLICANT

BERNARD K THAIRU..... 2nd APPLICANT

IRENE KANYI WAINAINA.....3rd APPLICANT

VERSES

BONIFACE DAVID CHEGE.....1st RESPONDENT

BENSON MURAYA MWANGI.....2nd RESPONDENT

PETER BENU KAHORO.....3rd RESPONDENT

LOISE WANJIKU MURU.....4th RESPONDENT

VIRGINIA WANGUI NJENGA5th RESPONDENT

JAMES KAMAU MBURU.....6th RESPONDENT

PAUL KAMOTHO WAWERU.....7th RESPONDENT

PETER KINYIRIA MAKUMI.....8th RESPONDENT

SAMSON GACIBI MAINA.....9th RESPONDENT

SIMON GATEI NJUGUNA.....10th RESPONDENT

JOSEPHAT MWANGI.....11th RESPONDENT

ALICE WAMBUI NJUGUNA.....12th RESPONDENT

DAVID MACHARIA WATIRI.....13th RESPONDENT

MARY WATIRI.....14th RESPONDENT

JOSEPH NJUGUNA NGANGA.....15th RESPONDENT

FRANCIS THUO WAMBUI.....16th RESPONDENT

TERESIA MUTHONI NGANGA.....17th RESPONDENT

JOSEPH MANYARA.....18th RESPONDENT

GEORGE K. NJAU.....	19 th RESPONDENT
PETER GATHIL.....	20 th RESPONDENT
JAMES NJUGUNA MWAURA.....	21 st RESPONDENT
GRACE W. MWANGLI.....	22 nd RESPONDENT
JOHN RUGU.....	23 rd RESPONDENT
JIMFRACK PROPERTIES AGENCY LTD.....	24 th RESPONDENT
JOSEPH GITHUMBI MBURU.....	25 th RESPONDENT
MARY WANJIRU NGURE.....	26 th RESPONDENT
ESTHER WAMBUI WAITHIRA.....	27 th RESPONDENT
MOSES MBURU WAMBUI.....	28 th RESPONDENT
PACTRICK GACHAU MACHARIA.....	29 th RESPONDENT
BEATRICE WAIRIMU.....	30 th RESPONDENT
SIMON NJUGUNA.....	31 st RESPONDENT
JOSEPH NJUGUNA.....	32 nd RESPONDENT
PRISCILLAH NJERI WAIHUMBU.....	33 rd RESPONDENT
PATRICK MAINA WAMAI.....	34 th RESPONDENT

RULING

1. Before me for determination is an application by way of Notice of Motion dated 13th June 2017 which does not state under what provisions of the law it is brought under. Be as it may the Applicants in the said application seek for the following orders:

i.spent

ii.spent

iii. That this honorable court be pleased to stay and/or arrest the writing and/ or delivery of Judgment or Ruling in Nyahururu Environment and Land Court Petition No. 9 of 2017 between Boniface David Chege and 33 others Vs. The Honorable Attorney General and 4 others that is scheduled to be delivered on the 28th June 2017

iv. That this honorable court be pleased to invite the Applicants to make the necessary response to the Application and /or Petition to enable the court to make a finding based on hearing all the parties to the suit.

v. That costs be in the cause.

2. The application was supported by an affidavit sworn on behalf of the 2nd and 3rd Applicants, by the 1st Applicant, Jeremiah Gitau on the 13th June 2017, and filed on the 15th June 2017. The grounds upon which the application and affidavit were premised on included;

i. THAT the applicants were never served with any hearing Notice for Petition or Application. They were only served with an order containing temporal orders pending the hearing and determination of the application.

ii. THAT the orders were in respect to Nakuru Environment and Land Court Petition No. 42 of 2016 bearing the same parties and inter parte hearing of the application dated 30th August 2016 being set to be heard on 22nd September 2016.

iii. THAT the Applicants duly attended the Nakuru did attend court (sick) on the said date but could not locate the file as the said matter did not appear in the cause list.

iv. THAT the Respondents to the Petition (now pending for Judgment) never knew that the matter has (sick) been transferred to Nyahururu as there was no communication from the court in Nakuru as well as Nyahururu that the matter has (sick) been transferred.

v. THAT the (sick) and orders sought in the petition and application are so adverse that if they are the orders that the court is intent on delivering, and it (sick) will amount to miscarriage of justice if the Applicants are not invited to respond before such delivery of the ruling or Judgment is made.

3. The above mentioned Application was placed before me ex-parte on the 16th June 2017 wherein it was argued by the M/s Wangechi, Advocate who held brief for Mr. Maragia, Counsel for the Applicants/Respondents. After having heard the submission by Counsel, I directed that the application be served for inter-parties hearing which was scheduled for the 22nd June 2017.

4. On the 22nd June 2017, when the Applicants'/Respondents' Application by way of Notice of Motion dated 13th June 2017 came up for hearing, Counsel for the parties, Mr. Maragia and Mr. Wanjohi were present respectively.

Applicants'/Respondents' case

5. Mr. Maragia relied on both his supporting affidavit sworn on the 13th June 2017 and filed on the 15th June 2017 as well as a further Affidavit sworn on the 21st June 2017, by the same deponent Mr. Jeremiah Gitau and filed on the 22nd June 2017.

6. Mr. Maragia submitted that, when the matter was fixed for mention on the 14th November 2016, directions were taken in the absence of its clients who had not been served with any notices.

7. Counsel further submitted that the hearing Notice dated 20th January 2017 did indicate that the hearing of the Petition was to be held in Nakuru law Courts and NOT in Nyahururu Law courts.

8. On the issue as to why his clients had not filed any papers in response to the Petition, Counsel submitted that his clients, the Applicants did not file their response because they were not aware that they ought to have done so and that this irregularity should be read in conjunction with Article 159 of the Constitution. He further submitted that it was therefore only fair that his clients be given a chance to respond to the same.

9. Counsel further submitted that the Applicants had no intention of delaying the case but were only asking to be given a chance to respond to the Petition.

Respondents /Petitioners' Response

10. The Respondents /Petitioners' Counsel in response relied on the replying Affidavit sworn on behalf of the other Respondents /Petitioners' by the 1st Respondent /Petitioner, on the 21st June 2017 and filed in court on the same day, as well as the authorities filed therein.

11. Counsel submitted that the service of the Petition as well as the interlocutory injunction filed on the 30th August 2016 have not been denied by the Applicants/Respondents. No response has been filed to the Petition No. 9 of 2017 formally Nakuru ELC No. 42 of 2016 to date.

12. Further submissions were to the effect that the provisions of section 15(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules is to the effect that:

(2) (a) A respondent not in the category of sub rule (1) shall within seven days file a memorandum of appearance and either a—

(i) replying affidavit; or

(ii) statement setting out the grounds relied upon to oppose the petition.

Counsel submitted that the court had not been given a reason why the said response has not been filed to date.

13. Counsel submitted further that if a party came before court seeking leave to file their papers out of time, then the cardinal rule was for that party to attach their response to the said application seeking leave, to enable the court evaluate whether there were triable issues or not. In so submitting Counsel relied on the case of **Harun Rashid Khator suing as the representative of Rashid Khator (Deceased) v Sudi Hamisi & 11 others [2014] eKLR** where Justice O A. Angote held that':

The failure to annex a draft Defence on an application to set aside a regular ex-parte judgment is fatal to such an Application. In the circumstances, I find and hold that the Application is a non-starter on that ground alone.

14. On the issue of the matter having been transferred from Nakuru to Nyahururu with parties not being notified, Counsel submitted that neither he nor his clients had received any communication to that effect but only came to know by chance that the matter had been transferred. That notwithstanding, when they appeared in the Nyahururu Environment and Land Court on the 9th March 2017, the court on its own motion directed that service be effected on the other party which they did. The said service has not been disputed.

15. On the issue of the matter having not having been listed in the cause list of 29th May 2017, as is stated on the face of the application of

the Certificate of Urgency, Counsel attached the cause list of that day which was marked as annexure 'BDC4'. The same clearly showed that the matter had been listed for hearing on that day, the 29th May 2017.

16. Counsel submitted that even after the Applicants/Respondents had known that the matter was scheduled for Judgment on the 28th June 2017, it took them 15 days to file the present application, which delay has not been explained. This kind of conduct, submitted Counsel, demonstrated the Applicants'/Respondents' lack of seriousness and deliberate tactic to delay justice.

17. While on this point, Counsel relied on the case of **Peterson Moturi Moranga vs. Kennedy Marube Nyabuto & another [2014] eKLR** where Justice Okong'o held :

'I have formed the view that the defendants refused deliberately for reasons only known to enter appearance and to defend this suit. The plaintiff went to great length to notify them of this suit to the extent that he used the services of three process servers to serve summons upon the defendants. Even after interlocutory judgment was entered, the plaintiff again served the defendants with a notice for the formal proof which was again ignored by the defendants. Taking all factors into account, I don't think that the defendants deserve to have the discretion of this court exercised in their favour...'

The 1st defendant's application was found to lack merit and was accordingly dismissed.

18. Counsel urged the court to find the Applicants/ Respondents' Application void of any merit and to dismiss it with costs to his clients.

Determination

19. Before making my determination, I wish to point out at this juncture that counsel for the Applicants'/Respondents' in his submission, relied on a further Affidavit sworn by Mr. Jeremiah Gitau on the 21st June 2017 the and filed on the 22nd June 2017 despite not having sought leave of court to file the same.

20. **Order 53, rule 4(2) the same is clear to the effect that:**

The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits

21. The applicant ought not to have filed any affidavits further to the one filed at the initial filing stage without the leave of the Court. However I note that the subsequent affidavit does not introduce any new material or fresh facts, it is therefore purely superfluous. To deny this application on the basis of such a procedural flaw would be contrary to Article 159(2) (d) of the Constitution. Therefore nothing turns on the issue of the said further affidavit.

22. I have looked at the proceedings of the Environment and Land Court Petition No. 9 of 2017, formally Nakuru ELC No. 42 of 2016 which was initially filed on the 30th August 2016 in Nakuru Environment and Land Court and later transferred to the Nyahururu Environment and Land Court on the 27th January 2017. From the proceedings, it is clear that;

23. On the 31st August 2016, the Petitioners filed their Petition dated 30th August 2016 which they brought under a galaxy of provisions of the Constitution of Kenya. The said petition was filed together with an application by way of a motion also dated 30th August 2016.

24. On 31st August 2016, the matter which was filed under Certificate of Urgency was placed before my brother Justice Sila Munyao who issued the following orders ex-parte:

- i. the parties to maintain the status quo
- ii. prayer 2 granted as drawn
- iii. Interparte hearing for the 22nd September 2016

25. On the 22nd September 2016 Mr. Nguyo Advocate appeared for the 1st and 2nd Respondents and requested for time respond to the Application. There was no appearance for the Applicants/Respondents although they had been served and an affidavit of service dated 16th September 2016 filed in court on the 22nd September 2016. The court granted all the Respondents 30 days to respond to the Application and Petition and Scheduled the 14th November 2016 as a mention date to give further directions. Interim orders were also extended. Further orders were to the effect that the 3rd-5th Respondents (the Applicants herein) be served with the Mention Notice.

26. An affidavit of service dated 29th September 2016 was subsequently filed on the 14th November 2016 indicating that the Applicants/Respondent had been served with the Mention dates for taking Directions at the **Nakuru High** court for the 14th November 2016.

27. However, on the 14th November 2016 when the matter came up for mention, no appearance had been entered by the Applicants/Respondents. The court thus directed that pending the hearing of the Petition, that orders sought in prayer 2 of the application

dated 30th August 2016 do remain in force to preserve the subject matter. Further, that the Petition be heard by way of Affidavit evidence and written submissions. Counsel for the Petitioners was directed to file and serve his written submissions within 30 days. Corresponding leave was granted to the Applicants/Respondents to respond within 30 days after service.

28. The hearing of the Petition was thus slated hearing for the 9th March 2017, with a Hearing Notice to the Respondents to issue.

29. On 9th March 2017, the matter was placed before me, having been transferred from the Environmental and Land Court (herein referred to as ELC) Nakuru.

30. On that day, Mr. Wanjohi, Counsel for the Petitioners was present. However there was neither appearance nor filing of any documents by the Applicants/Respondents. Mr. Wanjohi informed the court that although he had filed his submissions in the ELC Nakuru file, he had subsequently filed the same in the present file which the court took note of.

31. Counsel informed the court that although he had diligently served the Respondents with all the Notices as directed by the court and evidenced by the Affidavits of Service filed thereafter, there had been no response nor attendance from them. He then prayed for another date and undertook to serve. The court obliged him and fixed the matter for hearing on the 29th May 2017.

32. On the said date, the 29th May 2017, when the matter came up for hearing, there was neither appearance nor a filed response by the Applicants/Respondent.

33. An Affidavit of service dated the 10th March 2017 had been filed in court on the 29th May 2017 indicating that the Applicants/Respondents had been served with the hearing notice which indicated that the suit had been set down for hearing on the 29th May 2017 at the **High Court in Nyahururu**.

34. Since the petition had been certified ready for hearing on the 14th November 2016 and there having been no response nor appearance by the Respondent despite the numerous services of the hearing notices as herein above enumerated, I allowed the Petitioners to proceed to prosecute their Petition dated the 30th August 2016 the absence of the Applicants/Respondents notwithstanding and reserved the delivery of the Judgment for the 28th June 2017.

35. The present application was subsequently filed on the 15th June 2017 under Certificate of Urgency.

36. Having looked at the sequence of events leading to the filing of the present application, I find that the excuse given that the Applicants/Respondents did not know that they were to file their defence to the petition cannot hold water. Ignorance of the law is not an excuse. Further a litigant owes a duty to be vigilant of judicial proceedings pending in court against him. This line of argument must fail.

37. On the second issue that the Applicants/Respondents were not served with the notices, as enumerated above, the court record speaks for itself. I find that they were properly served in all the instances where the court directed for service to be effected.

38. I also find that the Applicants/Respondents knew that the matter had been transferred to the Nyahururu High court a fact that is also averred in their affidavit sworn on 13th June 2016 at para 4-5

Para 4

‘attended the Nakuru court for the hearing of the application on the 22nd September 2016the matter was not in the cause list...’

para 5

‘ we sought the advice of our Advocate ... he informed us that all matters whose jurisdiction lay within Nyahururu had been transferred to the said court.....’

39. I find that counsel for the Applicants/Respondents was not truthful when he stated on the face of his application under certificate of urgency that on the 29th May 2017, when his clients came to **Nyahururu Court** for mention of the matter, (Petition)the same had not been listed. Indeed the matter had been listed for hearing as evidenced by the Respondents/Petitioners’ annexure marked as annexure ‘BDC 4’

40. From the year 2016 when Petition was filed, to the 29th May 2017 when the same was finally argued, and further even upon filing of the present Application, the Applicants/Respondents have neither filed any papers in response nor appeared in court to prosecute the same, despite effective service.

41. The upshot of the foregoing is that the Applicants/Respondents have not only failed to give reasonable explanation why they failed to enter appearance or to attend court for the hearing of the Petition, notice of which had been duly given to them, but have also failed to demonstrate on a prima facie basis that they have a defence to the Petitioners’ claim of which they should be given an opportunity to put the same forward. In the case of **Shah –vs- Mbogo and Another [1967] E. A 116**. The court held as follows at page 123:-

“I have carefully considered in relation to the present application, the principles governing the exercise of the court’s

discretion to set aside a judgment obtained ex parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

42. In the present case, I find that the Applicants/Respondents have deliberately sought by evasion or otherwise, to delay the course of justice.

43. The Applicants/Respondents have also failed to demonstrate why this court should stay and/or arrest the writing and/ or delivery of the Judgment in Nyahururu Environment and Land Court Petition No. 9 of 2017 between Boniface David Chege and 33 others Vs. The Honorable Attorney General and 4 others that is scheduled to be delivered on the 28th June 2017.

44. From my analysis of the events that occurred before Judgment was due to be delivered, the Applicants/ defendants refused deliberately for reasons only known to them to enter appearance and to defend the suit in question.

45. The Respondents/Petitioners went to great length to notify them of the suit by serving notices upon them which notices were ignored until they heard that a Judgment was due for delivery that is when they woke up from their slumber. The delay in filing their defence, which has not been filed to date, to the Petition is inordinate, inexcusable and has not been satisfactory explained. The Applicants/ defendants have not demonstrated any solid ground for extension of time.

46. Taking all factors into account, and although the rule of natural justice, *audi alteram partem*, requires a party not to be condemned unheard I am not convinced that that the Applicants/ defendants deserve to have the discretion of this court exercised in their favour. In the circumstances, the application dated 13th June 2017, has no merit. The same is accordingly dismissed with costs to the Respondents/Petitioners.

It is so ordered.

Dated and delivered at Nyahururu this 28th day of June 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE