



Njuguna & another v Kamau (Environment & Land Case 166 of 2018) [2024] KEELC 1017 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1017 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 166 OF 2018
MN GICHERU, J
FEBRUARY 28, 2024**

BETWEEN

ELIZABETH NJUGUNA 1ST PLAINTIFF

JULIAN NJUGUNA 2ND PLAINTIFF

AND

STEPHEN NJUGUNA KAMAU DEFENDANT

RULING

1. This ruling is on the application dated 28/3/2023. The application which is brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 12 Rule 7 and 51 of the Civil Procedure Rules and all other enabling provisions of the law is by the plaintiffs and it seeks the following orders.
 - a. The setting aside of the order dated 15/2/2022 dismissing the plaintiffs’ suit.
 - b. Giving the case the earliest possible hearing date.
 - c. The costs of the application be provided for.
2. The application is based on nine (9) grounds and is supported by an affidavit sworn by Elizabeth Njuguna the first plaintiff. In summary, the plaintiffs are blaming their former counsel for failure to inform them of the hearing date of 15/2/2022 when their suit was dismissed for non attendance by themselves and their counsel.
3. The application is opposed by the defendant who has sworn a replying affidavit dated 8/5/2023 in which he replies as follows.

Firstly, he is the registered owner of the suit land.

Secondly, the plaintiffs are his daughters and married. They have adult children who have children. The first plaintiff , in 2010, visited her parents home for the burial of her mother and occupied the



defendant's matrimonial home with her husband and children. They refused to leave and they rendered the defendant homeless. In 2014, they moved out and the defendant took over his house and he lives peacefully

4. Thirdly, on 31/12/2015, the plaintiffs filed a similar suit, ELC No. 3 of 2016 where they sought injunctive orders which the court dismissed.

Fourthly, this is not the first time for the plaintiffs to file an application to set aside the dismissal of this case.

5. Fifthly, the plaintiffs filed ELC Case No. E006/2023 at Ngong Law Courts after their case was dismissed on 15/2/2022. This case is between the same parties and over the same land.

Finally, the application has been brought after inordinate delay.

6. Counsel for the parties filed written submissions dated 12/9/2023 and 9/10/2023 respectively. The plaintiffs' counsel identified two issues as follows.

- i. Whether the application should be allowed?
- ii. Whether the defendant will suffer any loss or injustice should the plaintiffs' suit proceed to hearing?

7. I have carefully considered the application in its entirety including the affidavits, the grounds, the annexures, the submissions and the case law cited therein as well as the issues as identified. I make the following findings.

Firstly, the application should have been by notice of motion and not by chambers summons. Order 51 Rule 1 Civil procedure Rules proves as follows.

“All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide”.

This omission by counsel is however not fatal to the application because the court should always look at the substance rather than the form.

8. Coming now to the first issue, I find that the application should ordinarily be allowed especially because there is no evidence that the plaintiffs were informed of the hearing date of the case by their counsel.

This is more so because on 7/10/2021, the court gave the following directions.

“Hearing on 15/2/2022. Application to cease acting together with the hearing notice to be served upon the plaintiff by their counsel within 30 days”.

There is nothing to show that this order was ever complied with by the plaintiffs' counsel. That being the case, it is quite probable that the plaintiffs were unaware that the case would be heard on 15/2/2022.

9. Under Order 12 Rule 7, the court has unfettered discretion to set aside a dismissal such as the one in this case upon such terms as may be just. The only thing that stands in the way of the court exercising its discretion in favour of the plaintiffs is the case filed at Ngong Magistrates Court being ELC Case No. E006 of 2023 Elizabeth Wangari Njuguna –versus- Stephen Njuguna Kamau.

In that suit the first plaintiff seeks to be registered as a co-owner of L.R. Ngong/Ngong/2939 while in this one, she seeks the court to reinstate her property rights by unconditionally allowing her and her sister, Julian Njuguna, access and peaceful stay at the suit land. In fact, the plaintiff stands to gain more



in the Ngong case than in this case because, if she succeeds, she will be registered as a co-owner while in this case all that she will get is access and peaceful occupation.

10. If the current application were allowed, the Ngong suit would stand the risk of being struck out for contravening Order 4(1) (f) of the *Civil procedure Rules* which provides as follows.
 1. The plaint shall contain the following particulars –
 - f. an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and the cause of action relates to the plaintiff named in the plaint”

Allowing the application would therefore render paragraph 13 of the plaint dated 12/1/2023 to be false.

11. Regarding the second issue, I find that the defendant will suffer great prejudice if the application were allowed. He would have to defend two parallel suits over the same subject matter with the same plaintiff who is his daughter. He would incur double costs. Worst still, this court would be offending Section 7 of the *Civil Procedure Act* which forbids it from trying a suit in which the subject matter is directly and substantially in issue in another court of competent jurisdiction.
12. For the above stated reasons, I find no merit in the application dated 28/2/2023 and I dismiss with costs to the defendant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 28TH DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE

