



**Waweru v Waweru & 2 others (Environment & Land Case
E116B of 2022) [2024] KEELC 1069 (KLR) (26 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E116B OF 2022
BM EBOSO, J
FEBRUARY 26, 2024**

BETWEEN

JACINTA GATHONI WAWERU PLAINTIFF

AND

PAUL KUNGU WAWERU 1ST DEFENDANT

ESTHER MUGURE KIBOI 2ND DEFENDANT

ISAAC NJUGUNA KIBOI 3RD DEFENDANT

RULING

1. Falling for determination in this ruling is the notice of motion dated, 9/10/2023 through which the defendants seek an order setting aside the ex parte hearing proceedings that were conducted by this court on 17/7/2023. In addition, the defendants seek leave of the court to file and serve their defence. The application is premised on the grounds set out in the motion and in the supporting affidavit sworn on 9/10/2023 by Paul Kungu Waweru. The application was canvassed through written submissions dated 27/11/2023, filed by M/s Maina Njuguna & Associates.
2. The case of the defendants is that the plaintiff is their relative, and she knows their respective residences. They contend that the plaintiff is a sister of the 1st defendant and an aunt to the 2nd and 3rd defendants. It is their case that they were not aware of this suit until 30/8/2023 when they discovered that the plaintiff had filed an application in this court seeking injunctive orders against them in relation to the suit property. They subsequently learnt that the suit had been heard and was pending Judgment.
3. The defendants contend that they have a defence which raises triable issues, adding that the grant which the plaintiff used to initiate this suit was obtained by the plaintiff through concealment of facts. They add that the power of attorney which the plaintiff is relying on ceased to have force upon the demise of the donor.



4. The plaintiff opposes the application through her replying affidavit sworn on 10/11/2023 and written submissions dated 7/2/2024, filed by M/s Wambugu Muriithi & Company Advocates. The case of the plaintiff is that the 1st defendant is her brother while the 2nd and 3rd defendants are children of her late brother, Francis Kiboi Waweru. She contends that she duly served the defendants twice, to wit: (i) Physically through Stephen Njonjo, a process server, on 18/10/2022; and (ii) through a notice published in the Standard Newspaper on 14/12/2022.
5. The plaintiff contends that she has spent a lot of resources, both human and monetary, in filing and prosecuting the suit, adding that it would be unfair and inequitable to start a fresh hearing in this suit. It is her case that the defendants have been indolent and mischievous. She urges the court to reject the application.
6. I have considered the application, the response to the application and the submissions tendered on the application. I have also considered the relevant legal frameworks and jurisprudence on the key issue that falls for determination in the application. The single question to be answered in this ruling is whether the defendants have met the criteria upon which our courts exercise discretionary jurisdiction to set aside *ex parte* proceedings and enlarge the time for filing defence. The said jurisdiction is discretionary. The prevailing principle is that, this discretionsing jurisdiction is exercised to avoid injustice and hardship and is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of Justice [see *Shah v Mbogo* [19970] EA 116].
7. The case of the defendants is that they were not aware of this case until 30/8/2023 when they discovered that the plaintiff had approached this court seeking injunctive orders against them. The court record, however, reveals that, pursuant to an order issued by this court on 25/11/2022, the plaintiff published a notice in the Digger/Classifieds section of the Standard Newspaper on 24/12/2022, notifying the defendants about this case.
8. It is noted from the court record that through the order of 21/11/2022, this court directed the plaintiff to publish a prominent notice in either the Daily Nation or the Standard Newspaper. The plaintiff elected to publish the notice in the Digger/Classifieds page of the Standard Newspaper. The defendants contend that they were not aware of the case until 30/8/2023.
9. On personal service, this court looked at the affidavit of service that was before court on 21/11/2022. The court was not satisfied that all the three defendants had been simultaneously served at the same place at exactly 3.00 pm in Nembu Village. It was for that reason that the court directed the plaintiff to effect service through a prominent notice in either the Daily Nation or the Standard Newspaper.
10. Given the choice of the page/section where the plaintiff elected to publish the notice, it is probable that the defendants did not see the notice which was obscure. Secondly, the dispute in this suit relates to land. The defendants have approached the court with a plea to be heard before Judgment is rendered in the dispute. There is no evidence to suggest that the defendants deliberately elected not to respond to the summonses. The totality of the foregoing is that, the court is satisfied that the applicants have met the criteria for setting aside *ex parte* proceedings and for leave to file defence out of time.
11. The court will, in the circumstances, exercise discretion and set aside the *ex parte* hearing proceedings that took place on 17/7/2023. Further, the court will grant the defendants leave to file and serve a defence and a trial bundle in this suit within 14 days from today. The plaintiff will have the right of reply. There shall be pre-trial before the Deputy Registrar on a date to be set by the court. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF FEBRUARY 2024



B M EBOSO

JUDGE

In the presence of: -

Mr. Muriithi for the Plaintiff

Ms Nini for the Defendant

Court Assistant: Hinga

