



**Kimani v Munye (Environment & Land Case 370 of 2017)
[2024] KEELC 935 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 370 OF 2017**

JG KEMEI, J

FEBRUARY 22, 2024

BETWEEN

PETER MWANGI KIMANI PLAINTIFF

AND

SERAH WANJIRU MUNYE DEFENDANT

RULING

1. The subject of this Ruling is the Defendant/Applicant's Notice of Motion dated 6/9/23 expressed under Sections 1A, 1B, 3 & 3A Civil Procedure Act, Order 5 Rules 5 & 6 and Order 51 Rule 1 Civil Procedure Rules for Orders that;
 - a. Spent.
 - b. The Court be pleased allow the firm of Mwangi Kiai Advocates LLP to be on record for the Respondent herein.
 - c. Pending hearing and determination of this matter, the orders of this Honorable Court dated 12th June 2023 be vacated.
 - d. The costs of this Application be in the cause.
2. The Application is based on the grounds thereat as read with the Supporting Affidavit of even date of Serah Wanjiru Munye, the Defendant/Applicant. She admitted receiving orders of this Court dated 12/6/2023 from the Plaintiff/Respondent but averred that she was not aware of the ongoing Court case. That she has never received any statement of claim in respect of this case and now that she has instructed an Advocate to act for her, she seeks an opportunity to be heard on merit. That there is no prejudice the Plaintiff would suffer if her Application is allowed as prayed.
3. Peter Mwangi Kimani, the Plaintiff filed his Replying Affidavit sworn on 21/9/2023. He deponed that the Defendant is lying under oath in her Supporting Affidavit and therefore guilty of perjury. That



the impugned Court order has already been executed after being duly served upon the Defendant vide the Return of Service of Jefferns Kitemi sworn on 21/6/2023. That he has always served the Defendant personally and through her Counsel of all the proceedings and notices herein and her averments therefore are untrue. That the current Defendant's Advocates are improperly before Court for failure to file a notice of change of Advocates. That the instant Motion is a delaying tactic to stall the hearing and allowing it will cause him prejudice yet he is the registered owner of L.R No. Nguirubi/Ndiuni/66.

4. On 11/9/2023 directions were given to canvass the Application by way of written submissions.
5. The Applicant through Mwangi Kiai LLP Advocates filed submissions dated 27/9/2023. Two issues were drawn for determination to wit; whether the Applicant was duly served prior to granting ex parte orders of 12/6/2023 and whether the Respondent exceeded the scope of the said Court order by demolishing and evicting the Applicant herein.
6. On the first issue it was argued that service of the Notice of Motion of 18/5/2023 was not properly done as provided for in law. That the Plaintiff bore the burden to prove that the Motion was served upon the Defendant and not service of the ex parte Court order. Further that the said process server Jefferns Kitemi did not provide his professional qualifications. That there is no proof of service of the said Motion and Court order upon Muhuhu Advocates who were on record for the Defendant. The Court was urged to find that service of pleadings was defective and set aside the orders of 12/6/2023. In any event, it was submitted that the Plaintiff used the ex parte order to illegally and wrongfully demolish the Applicant's home leaving her family in the cold.
7. The firm of Mercy Kareithi & Co. Advocates filed submission dated 27/9/2023 on behalf of the Respondent. A singular issue was framed for determination which is; whether the Applicant is entitled to the orders sought. It was submitted that the Application is bereft of merit, based on perjury, filed late in the day and therefore an abuse of Court process. That the Applicant was personally served with the impugned order on 21/6/2023 and has all along been aware of the instant case. Further that the Application is overtaken by events as the assailed Court order has already been executed. That her claim that her Advocates did not inform her of the hearing of the Application dated 18/5/2023 means she lost her right of reply to the Application. That the Application seeking to set aside the ex parte order has been inordinately filed three months after the order was granted. Lastly that the Applicant's Counsel herein are strangers to the suit having failed to serve a notice of change of Advocates in line with Order 9 Rule 5 of the [Civil Procedure Rules](#).
8. Considering the record before Court and the rival submissions herein, it is my view that the main issue for determination is whether the Application is merited.
9. The Defendant relies on Sections 1A, 1B, 3 and 3A [Civil Procedure Act](#) collectively known as the oxygen principles. The main objective of these provisions is to ensure to facilitate the just, expeditious, proportionate and affordable resolution of disputes.
10. Prayer 2 of the instant Motion seeks leave for the firm of Mwangi Kiai Advocates to be on record for the Applicant. The only instance Counsel is expected to seek leave to come on record is post Judgment – see Order 9 Rule 9 of the [Civil Procedure Rules](#). Any other change of Advocate before delivery of Judgment as rightly submitted by the Respondent and provided for in Order 9 Rule 5 [Civil Procedure Rules](#) does not require this Court's order or leave to come on record. The prayer thus is misguided and it falls on the wayside.
11. Unto her 3rd prayer, for the Court to vacate its order of 12/6/2023, the Applicant seems to speak from both ends of her mouth. On one side she deposes that she had no knowledge of any ongoing Court



case against her as she has never been served and on the other, accuses her erstwhile lawyers for not informing nor updating her on the progress of her matter. Be that as it may and thankfully so, this Court is a Court of record and the record speaks for itself as follows.

12. This suit was filed on 24/5/2017. It is an old matter at 6 years now. The Respondent having failed to prosecute his matter, it was dismissed for want of prosecution on 8/4/2021. The dismissal order, upon Application by the Respondent, was vacated and suit reinstated for hearing on 6/6/2022. The record bears pleadings filed by both parties and in particular the firm of Muhuhu Advocates acting for the Applicant. Specific reference is made to the record of 30/3/2023 when parties appeared before the Hon. Deputy Registrar and Counsel Anne Ngigi holding brief for Muhuhu Advocates informed the Court that they are seeking leave to file an Application to cease acting. The Court graciously granted two weeks as prayed. No Application was filed as intimated.
13. On 22/5/2023 the same Counsel Anne Ngigi told the Court that the client (Defendant) had settled the issue of instructions. She went ahead to confirm being served with the Plaintiff's Application dated 18/5/2023 and prayed for time to respond to it. To buttress this record, see the Return of service sworn on 5/6/2023 by John Ochieng Ouma confirming service via email. That email was received and acknowledged by Muhuhu Advocates as per annexure marked JOO-1.
14. Accordingly, the issue of improper service raised by the Defendant is overruled based on the record before Court.
15. In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR Waki J.A stated that;

“It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by Counsel.”
16. That position was recently affirmed by Odunga J.A in *Carla v Marelli & 2 Others* [2023] KECA 1385 KLR and cited with approval the Supreme Court holding in *Daniel Kimani Njibia v. Francis Mwangi & Another* [2015] eKLR that:-

“Even as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a Court of law and not mercy. It is also bound by the law and more so the *Constitution* which binds all.”
17. In the end the Application is not merited. It is for dismissal with costs to the Plaintiff/Respondent.
18. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kareithi for Plaintiff/Respondent

Defendant/Applicant – Absent but served

Court Assistants – Phyllis/Oliver

