



**Wainaina v Wangugi & another (Environment & Land Case
127 of 2019) [2024] KEELC 966 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 127 OF 2019
JG KEMEI, J
FEBRUARY 22, 2024**

BETWEEN

RAPHAEL KINUTHIA WAINAINA DECREE HOLDER

AND

PHILIP KIARIE WANGUGI 1ST JUDGMENT DEBTOR

SOPHIA NYANDIRI WANGUGI 2ND JUDGMENT DEBTOR

RULING

1. Vide a Notice of Motion dated 20/3/2023 filed pursuant to Article 159 *Constitution of Kenya*, Order 51 Rules 1, Order 45 Rules 1 & 2 and Order 12 Rule 7 of the *Civil Procedure Rules*, the Applicants/ Judgement Debtors seek Orders that;
 - a. Spent.
 - b. The firm of Muiruri Cheserek & Co. Advocates be granted leave to come on record in place of the firm of Messrs J.k Ngaruiya.
 - c. Spent.
 - d. The Honorable Court be pleased to set aside its Judgment of the 29th day of September 2022.
 - e. This Honorable Court be pleased to substitute Philip Kiarie Wangugi, the 1st Defendant herein with Jane Wambui Wangugi the intended 1st Defendant.
2. The Application is based on the grounds that Judgment was delivered herein on 29/9/2022 in the absence of the Defendants and their appointed Counsel, J.K Ngaruiya Advocates leading to issuance of a Decree on 20/1/2023 for eviction. That the matter was heard *ex parte* and the dispute relates to the suit property, Chania/Makwa/1493, where the late Margaret Nyambura (the Defendants' mother) resided on since 1958 as pleaded in the amended defence and Counterclaim. That upon Margaret Nyambura's



- passing on, Philip Kiarie Wangugi prepared a witness statement and substituted her. That Philip Kiarie Wangugu (Philip), representing his siblings and being unaware of the hearing, has been substituted with Jane Wambui Wangugi as the legal representative of the late Margaret Nyambura's estate vide Thika CM's Succ. Cause No. E014 of 2023 hence the Application
3. The Application is supported by the Affidavit of even date of Jane Wambui Wangige, the 1st Applicant. Rehashing the above grounds, she annexed a copy of the Limited Grant of Administration dated 15/2/2023 as JWW2 and JWW1- receipts of payments in favor of J.K Ngaruiya Advocates for legal representation in the suit. She averred that Philip was never notified of the hearing and aggrieved by the impugned Judgment, and upon service of the Decree, they have swiftly moved the Court for the prayers sought.
 4. The Application is vehemently opposed by the Plaintiff/Respondent.
 5. Raphael Kinuthia Wainaina swore his Replying Affidavit on 25/5/2023 and termed the Application as untenable for want of the Applicants' locus standi to swear the Affidavit in the suit, that the matter was heard *ex parte* despite due service upon the Defendants as shown by RKW1 – copies of hearing notice and email extract. Further that the Defendant's Counsel was served with the copy of the submissions on 19/5/2022 and intimated to Court that he will be making an Application to set aside the proceedings but never did. That upon entry of Judgment, the Decree was extracted and served on the Defendants on 29/9/2022. That the Application is unmerited and ought to be dismissed with costs.
 6. In a rejoinder, Philip Kiarie Wangugi, 1st Judgment Debtor, filed a Further Replying Affidavit (sic) dated 7/6/2023. He conceded that Jane Wambui Wangugi is his biological sister and they both represent the interests of their late mother Margaret Nyambura Wangugi. That Jane was actively involved in the litigation of this case and he gave her the receipts annexed as JWW1. That he also handed over the litigation of the suit as evidenced by JWW2.
 7. On 20/3/2023 directions were taken to canvass the Application by way of written submissions.
 8. The Applicants through the firm of Muiruri Cheserek & Co. Advocates filed submissions dated 19/4/2023. According to them, despite service of the Application upon the Respondent, it has elicited no response and it is thus unopposed.
 9. The Applicants outlined the factual history of the case spanning over 19 years since its filing. That they duly appointed a Counsel to represent them but they were never notified of the hearing date and urged the Court not to visit the mistake of Counsel on them. Citing Article 50 of the Constitution of Kenya, they beseeched the Court on account of evidence produced, to set aside the Judgment to pave way for fresh hearing. Reliance was placed on the Court of Appeal decision in Patriotic Guards Ltd Vs. James Kipchirchir Sambu [2018] eKLR on the exercise of Court's discretion in setting aside *ex parte* Judgment.
 10. On behalf of the Respondent, the firm of Muturi Njoroge & Co. Advocates filed submissions dated 6/6/2023. The Respondent submitted that the Applicant will not suffer any prejudice on the basis of execution of a decree by eviction because their continued occupation of the suit is trespass and unlawful. That the Applicants' failure to attend Court in person or through their Counsel is inexcusable as they were duly informed and as such the Respondent is entitled to enjoy the fruits of his Judgment.
 11. In a rejoinder, the 1st Applicant reiterated that she has the requisite locus standi and lawful authority to take up the instant cause of action.
 12. The main issue for determination is whether the Application is merited.



13. Prayer (b) of the Motion seeks leave for the firm of Muiruri Cheserek to come on record for the Defendants in place of J.K Ngaruiya Advocates. This prayer is determined first in accordance with Order 9 rule 10 *Civil Procedure Rules*.

14. The requirement to seek leave to come on record post-Judgment is captioned under Order 9 Rule 9 *Civil Procedure Rules* that;

“9. Change to be effected by order of Court or consent of parties [Order 9, rule 9.]

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

(a) upon an Application with notice to all the parties; or

(b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

15. The right to legal representation by Counsel of a party’s choice is a tenet to ensure fair hearing. The Plaintiff has not advanced strong objection to granting the request for the firm of Muiruri Cheserek to come on record. The prayer is allowed.

16. Have the Applicants met the requisite threshold for this Court to set aside the Judgment delivered on 29/9/2022? It has been argued that the hearing of the case and resultant Judgment took place in the absence of the Applicants and their Counsel. That the Applicants were never notified of the hearing by their erstwhile former Counsel. In rebuttal, the Respondent has deposed that the Applicants were fully aware and their Counsel was well notified of the ongoing proceedings and at some point, he wished to file an Application to set aside *ex parte* proceedings. The Court proceedings of 19/5/2022 bear witness to that position.

17. The Respondent pointed out that the Application is defective for being accompanied with a Supporting Affidavit sworn by a stranger to the proceedings. Whereas this is a valid point and it is enough to have the motion struck out, the Court will nevertheless consider the motion on its merits in light of the constitutional provisions for access to justice and fair hearing. In addition, the Court has considered the affidavit of Philip Kiarie Wangugi which he deposes under para 6 thereat that the Supporting Affidavit of the deponent was made with his express authority and consent. Without seeming to set a precedent the Court abhors this kind of pleadings and I say no more.

18. The legal provisions of setting aside Judgment is anchored in Order 12 rule 7 of the *Civil Procedure Rules* that;

“7. Setting aside judgment or dismissal [Order 12, rule 7.]

Where under this Order judgment has been entered or the suit has been dismissed, the Court, on Application, may set aside or vary the judgment or order upon such terms as may be just.”



19. It is trite that setting aside of ex parte Judgments under this Rule is a discretionary exercise of the Court. In the celebrated case of *Shah Vs. Mbogo* (1979) EA 116, the Court gave guidelines on the exercise of discretion when dealing with Applications to set aside judgment as hereunder-
- “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 exparte. This discretion is intended so 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 cause of justice.”
20. It is not in dispute that the Applicants were duly represented by the firm of J K Ngaruiya Advocates. The Applicants have annexed copies of receipts dated 4/6/2021 and 24/6/2021 to that end. It is their contention that the Advocate failed to inform them of the ongoing proceedings and in particular the hearing and delivery of Judgment. The Respondent disputes this and contend that the Applicants were fully aware and represented in Court.
21. The Applicants have not availed any cogent evidence to support the averments advanced against their former Counsel. Having shown that they heeded the Counsel’s call to pay filing fees, it was incumbent upon them to follow up the status of their case, knowing the chequered history since its filing in 2003.
22. It has been widely accepted that a litigant should not suffer due to the mistakes of their Counsel. However, litigants are also duty bound to follow up on their cases and/or matters to ensure that their Advocates attend Court and prosecute the cases as they should. Section 1B of the *Civil Procedure Act* which refers to the overriding objective of the Court and gives a further duty to litigants to ensure that their matters are prosecuted without delay and within the minimal judicial resources available. Therefore, the Applicants herein had a role to play in the administration of justice by making a follow up from their Counsel and the Court Registry to ensure apt and timely prosecution of the case to assist the Court achieve the overriding objective.
23. In *Habo Agencies Limited Vs. 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.”
24. That position was recently affirmed by Odunga J.A in *Carla Vs. Marelli & 2 Others* [2023] KECA 1385 KLR and cited with approval the Supreme Court holding in *Daniel Kimani Njibia Vs. 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.”
25. Last but not least, the Prayer (e) for substitution of 1st Defendant is now moot in view of the above findings.
26. In the end, the Application (save for prayer b) fails with costs to the Respondent.
27. 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;

Plaintiff – Absent but served

Muiruri for 1st and 2nd Defendants

Court Assistants – Phyllis/Oliver

