



**Gathere v Kaburi & 3 others (Environment & Land Case  
664 of 2017) [2024] KEELC 756 (KLR) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 756 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 664 OF 2017  
MN GICHERU, J  
FEBRUARY 19, 2024**

**BETWEEN**

**SAMUEL KAGIMA GATHERE ..... PLAINTIFF**

**AND**

**KENNEDY MONCHERE KABURI ..... 1<sup>ST</sup> DEFENDANT**

**ALLOYS NYAMBWORO OSORO ..... 2<sup>ND</sup> DEFENDANT**

**GH MEENYE T/A KIRIMA ADVOCATES ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is on the notice of motion dated 8/5/2023. The motion which is by the second defendant is brought under Sections 3A, 80 and 100 of the *Civil Procedure Act*, Order VI rules 12, 14 and 16, order 7 rule 8, order 9 rule 3, order 44 rule 1, order 50 rule 1 *Civil Procedure Rules* and all other enabling provisions of the law.
2. The motion seeks the following residual orders,
3. Setting aside of the judgment dated 16/1/2023 and the decree dated 6/4/2023 as against the second defendant.
4. That the second defendant be granted unconditional leave to file his defence within 14 days after the hearing and determination of this motion.
5. Any other or further orders that may favour the cause of justice.
6. That the costs of this application be in the cause.



3. The motion is based on seven (7) grounds and is supported by an affidavit sworn by the second defendant and dated 8/5/2023. The affidavit has three (3) annexures. In summary the applicant is saying that he was never served with the originating summons and other court processes in this case and it is only in early May that auctioneers raided his home with a proclamation and warrants of attachment and sale. He was shocked to learn that a suit was filed, heard and concluded without his knowledge or participation. He therefore craves to be heard before he is condemned as is required by the rules of natural justice.

4. The motion is opposed by the plaintiff/decreed holder who has sworn a replying affidavit dated 15/8/2023 in which he replies as follows.

Firstly, the second defendant was represented by the firm of Meenye and Kirima Advocates as per the notice of appointment dated 26/6/2015 and the said firm never ceased acting for the second defendant.

Secondly, the application as presented does not raise any triable issue to warrant the setting aside of the judgment on record.

Thirdly, the current counsel is not properly on record for failure to comply with the mandatory provisions of order 9 rule 9 of the Civil Procedure Rules.

Fourthly, the second defendant was given sufficient opportunity to defend himself in these proceedings and his only options are to seek review of the judgment or appeal against it.

Finally, the continued delay in concluding this case prejudices the decreed holder who paid the entire purchase price for the land to the defendants and has never got the land that he bought or the refund of the purchase price that the court ordered.

5. I have carefully considered the motion in its entirety including the affidavits, the annexures, the grounds and the entire record and I find as follows.

Firstly, the application is brought under the Old Civil Procedure Rules that were revoked by legal notice no. 151/2010. It is now more than 13 years since the said rules were revoked. I do not know why counsel for the second defendant decided to use the old rules. This omission by counsel is however not fatal to the application because the court is under a duty to do substantial justice in each case and to look at substance rather than the form.

6. Secondly, I find that the second defendant was represented in this case by the firm of Meenye and Kirima Advocates. The notice of appointment filed by the said firm and dated 26/6/2015 clearly states that the said firm represented Kennedy Monchere Kaburi and Alloys Nyambworo Osoro the second defendant. Again the replying affidavit sworn by the first defendant and dated 26/8/2015 states as follows in paragraph 1.

“That I am the 1<sup>st</sup> defendant herein and, as such, I am competent and duly authorized by the second defendant to swear this affidavit in answer to the application herein”.

I believe both the advocate and the first defendant that the second defendant was represented and that he participated in the case. This means that he was duly served as per the affidavit by Francis N. Matu, process server and that is why he instructed his former counsel.



7. The affidavit by the process server which is on record and is dated 6/5/2015 states as follows at paragraph 8,

“That however, the 1<sup>st</sup> defendant called on 5/5/2015 and informed us that both he and the 2<sup>nd</sup> defendant could not make it to court on 6/5/2015 but he promised to come to the officer for deliberations on this matter on Monday, the 11<sup>th</sup> May 2015”.

To counter such overwhelming evidence of service and representation, the second defendant needs more than his own affidavit to prove absence of service. He needs the affidavits of the first defendant and his former counsel to explain why they had to file a false affidavit and a false notice of appointment of advocate. His failure to do so leaves his affidavit uncorroborated and seriously undermined by the available evidence of service and representation by counsel.

8. Thirdly, in the current application, the second defendant has not made any attempt to demonstrate what his defence will look like. He has not made any attempt to show us how his defence will be different from the one offered by his counsel and co-defendant. Neither has he shown that he will present new evidence to prove that the plaintiff is in possession. This will not be possible to prove because it is not disputed that the plaintiff is not in possession of the suit land. Yet we know that it was one of the obligations of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to put the plaintiff in possession. We also know that under clause 5.2 of the agreement dated 10/7/2012, time was of essence and the period of completion was 45 days. This therefore means that the 2<sup>nd</sup> defendant has nothing new to say. He wants to be heard just for the sake of it and not because he has something new or triable.

9. Finally, under order 9 rule 9 *Civil Procedure Rules*, it is provided as follows.

“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 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”.

In this case, the 2<sup>nd</sup> defendant was represented by the firm of Meenye and Kirima. Judgment has already been delivered. The new counsel must first file an application to come on record and serve it upon the outgoing counsel or obtain the consent of the outgoing counsel to come on record. He has not complied with the mandatory provisions of order 9 rule 9 *Civil Procedure Rules*. He is therefore not properly on record.

10. For the above stated reasons, I find no merit in the notice of motion dated 8/5/2023 and I dismiss it with costs to the decree holder.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 19<sup>TH</sup> DAY OF FEBRUARY 2024.**

**M.N. GICHERU**

**JUDGE**

