



**Kaiganaine v Wanderi & another (Sued as the administrators of Estate of Walter Maitai Mathenge)
(Environment & Land Case E022 of 2021) [2024] KEELC 655 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E022 OF 2021
JO OLOLA, J
FEBRUARY 15, 2024**

BETWEEN

JOHN GACHANGA KAIGANAINA PLAINTIFF

AND

MATHENGE WANDERI 1ST DEFENDANT

MUCHANGI MAITAI MATHENGE 2ND DEFENDANT

**SUED AS THE ADMINISTRATORS OF ESTATE OF WALTER MAITAI
MATHENGE**

RULING

1. By the Notice of Motion dated 18th July, 2023 but filed herein on 7th August, 2023 Mathenge Wanderi (the 1st Defendant) prays for orders as follows:
 1. ...
 2. That the 1st Defendant/Applicant's defence, witness statements and documents now already on record be deemed as duly filed and served on time;
 3. That the Plaintiffs witnesses who testified on 17th July, 2023 be recalled for cross-examination by the 1st Defendant/Applicant's Counsel;
 4. That the costs of this application be provided for; and
 5. That in the interest of justice, the Court be at liberty to issue such other or further orders as it shall deem just and expedient in the circumstances.
2. The application is supported by an Affidavit sworn by the 1st Defendant's counsel record – Jeremy Njenga and is based on the grounds that:



- (i) The matter proceeded in the absence of the 1st Defendant and/or his counsel on 17th July, 2023 and hence the Plaintiff's witnesses were not cross-examined;
 - (ii) The subject matter involves land and due to the emotive nature thereof, all Parties need to be given a chance to ventilate their case including the right of cross-examination;
 - (iii) The failure to be in Court or have requisite pleadings on record by the hearing date was purely inadvertent and based on an unsound decision made by one of the associate Counsel's in the 1st Defendants Advocates chambers and mistakes of counsel should not be visited on the innocent litigant, the 1st Defendant;
 - (iv) None of the parties is bound to suffer any prejudice that cannot otherwise be mitigated upon by way of award of reasonable costs; and
 - (v) The interest if justice dictates that the orders sought be granted as the Applicant otherwise stands to suffer great prejudice and injustice;
3. John Gachanga Kaiganaine (the Plaintiff) is opposed to the application. In his Replying Affidavit sworn on 21st September 2023, the Plaintiff avers that the time for filing a defence has run out and that as things stand no application for extension of time has been made by the 1st Defendant.
 4. The Plaintiff further avers that going by his conduct when the Court was dealing with an application dated 30th September, 2021 during which the 1st Defendant applied repeatedly for extension of time to file a Replying Affidavit, it was clear that he was out to delay the conclusion of this matter.
 5. I have carefully perused and considered the 1st Defendant's application as well as the response thereto by the Plaintiff. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 6. By his application before the Court, the 1st Defendant urges that his Statement of Defence, Witness Statements and documents now already on record to be deemed as duly filed and served on time. In addition, the 1st Defendant urges the Court to recall for cross-examination all the three (3) witnesses who testified herein in support of the Plaintiff's case on 17th July, 2023 for cross-examination.
 7. The 1st Defendant's application is supported by an Affidavit sworn by his Advocate Jeremy Njenga in which Counsel deposes that this matter proceeded in his absence and that of the 1st Defendant on 17th July, 2023 and that the witnesses were therefore not cross-examined and that it is in the interest of justice that they do so.
 8. It is the Learned Counsel's case that this is a matter involving the emotive issue of land and that accordingly all Parties need to be given a chance to ventilate their case including a right of cross-examination. He further avers that their failure to have their Statement of Defence, Witness Statements and other documents on record as at the hearing date was purely inadvertent and that the same was based on an unsound decision made by an unnamed associate Counsel in his chambers who had decided that they should not file the defence as the 1st Defendant had not been personally served with the summons to enter appearance. Counsel concludes that mistakes of Counsel should not be visited on his client who is otherwise an innocent litigant.
 9. It was important to note that a month before the present application was filed in court, this matter had come up for hearing on 17th July, 2023. On the said dates Mr. Njenga Advocate informed the Court virtually that he was not ready to proceed with the hearing as he was held up in Nairobi where he had



two other matters coming up. It was Counsels' case that two days earlier he had written to his colleagues and indicated he would not be ready to proceed.

10. At that point in time, the record reveals that the Counsel then representing the Plaintiff objected to the adjournment on account that the 1st Defendant had never filed and/or served the Plaintiff with a Statement of Defence in these proceedings. When he contested that position, Counsel for the 1st Defendant was given 20 minutes by the Court to check his file and avail the said copy of the Statement of Defence he claimed to have filed. At the expiry of that period, Counsel conceded that they had not filed a Defence and urged the Court to grant them time to comply.
11. Following that application, this Court ruled that there was no proper reason given to the Court why the 1st Defendant's pleadings were not yet on record long after the period for filing the same had lapsed and even after the suit was set down for hearing. In the premises the Court declined the application for adjournment and ordered that the trial proceeds.
12. When the trial later commenced, neither the 1st Defendant nor his Counsel on record was in Court and the Plaintiff and his witnesses testified and closed their case. Given that scenario, I did not think it was open for the 1st Defendant to proceed a month later without setting aside the orders issued on 17th July, 2023 to lodge his pleadings and documents in Court and to invite the Court to deem them as duly filed and served in time. It was similarly not tenable without setting aside the said orders for the Court to recall the Plaintiff who had closed his case to have himself and his witnesses recalled for cross-examination by the 1st Defendant.
13. Arising from the foregoing, I was persuaded that the pleadings and documents filed by the 1st Defendant after the orders of 17th July, 2023 and without any leave of the Court being sought were filed in *abuse of the Court process. As was stated by the Court of Appeal in Muchanga Investments Limited - vs- Safaris unlimited (Africa) Limited & 2 Others* (2009) eKLR 229:

“The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and frivolous, vexatious or oppressive.”
14. As it were, abuse of judicial process also means abuse of the legal procedure or the improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two Court processes. By the said two Court processes, the Party is engaged in some gamble, a game of chance to get what he wants from the judicial process by whatever means.
15. In the matter before me and as rightly submitted by the Plaintiff, the 1st Defendant has since 29th November, 2021 when the proceedings herein commenced demonstrated extreme indolence towards the conclusion of this matter. He has previously disregarded timelines set by the law on pleadings and has had to plead successfully on more than two occasions for extension of time to have the timelines set by the Court extended in his favour. This time round he has not applied for extension of time and I am not persuaded in any event that he would be deserving of such discretion from the Court any further.
16. It follows that I did not find any merit in the Notice of Motion dated 18th July, 2023 as filed herein on 7th August, 2023. The same is dismissed with costs to the Plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 15TH DAY OF FEBRUARY, 2024.**



.....

J. O. OLOLA

JUDGE

In the presence of:

Mr. Ng'ang'a holding brief for Muchiri Wa Gathioni for the 2nd Defendant

Mr. Gichigo for the Plaintiff

No appearance for the 2nd Defendant

Court assistant - Kendi

