



**Gituma v Kaburu (Environment and Land Appeal E031 of 2023)
[2024] KEELC 1594 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E031 OF 2023**

CK NZILI, J

MARCH 13, 2024

BETWEEN

EVALYN NKIROTE GITUMA APPELLANT

AND

GACHUU M'NKARACHIE KABURU RESPONDENT

JUDGMENT

1. The appellant, as a defendant lower court had been sued the respondent as the plaintiff for trespass to her LR No. Nyayo/Sirimon Scheme/5754. He had sought eviction orders. The appellant failed to file a defense after entering an appearance. An interlocutory judgment was entered on 17.8.2020. The case proceeded for formal proof on 8.6.2021. The respondent testified as PW 1 and produced a search certificate, title deed, demand letter, and judgment as P. Exh No. 1-4, respectively. Eventually, a judgment was delivered on 22.10.2021, ordering the eviction of the respondent from the suit land.
2. By an application dated 29.11.2022, the appellant sought for stay of execution and the setting aside of the judgment, as well as leave to defend the suit. The respondent opposed the application by a preliminary objection dated 7.12.2022, under Order 9 Rule 9 of the Civil Procedure Rules and a replying affidavit sworn by Gachua M'Nkari Kaburu on 6.12.2022. In a ruling dated 20.4.2023, the trial court declined to set aside the judgment and all the consequential orders but confirmed the firm of Okubasu Munene & Kazungu LLP Advocates as on record for the respondent.
3. The appellant appeals against the said ruling on the basis that the trial court erred in law and, in fact, in:
 - i. Finding her indolent yet it was her advocate on record who failed to communicate on the status of her suit.
 - ii. For ignoring the undisputed fact that she had been in occupation of the suit land for over 20 years where she had made extensive development.



- iii. For holding that the three-year period was inordinate where, plausible reasons were tendered.
 - iv. For visiting mistakes by counsel on record on her which were excusable.
 - v. For failing to consider the draft defence and counterclaim, which had raised triable issues and sufficient cause for setting aside.
 - vi. For exercising the discretion capriciously and improperly against rules of natural justice.
 - vii. For failing to consider the affidavit evidence or the authorities cited.
4. With leave of court, parties agreed to canvass the appeal by written submissions, whose deadline of filing was set for 15.1.2024. The appellant relied on written submissions dated 12.1.2024 and isolated three issues for the court's determination. It was submitted that the appellant had tendered sufficient reason justifying the delay of three years since she had instructed an advocate who had assured her of compliance with court processes.
 5. The appellant submitted that she had taken all the necessary steps to defend her interests in the suit property. Regarding triable issues, the appellant submitted that the trial court failed to refer to her draft defense and counterclaim and annexures to that, among them a sale agreement and undisputed occupation since 2002; otherwise, she was not a trespasser but a purchaser for value where constructive trust was applicable. Reliance was placed on *Tree Shade Motor Ltd vs D.T Dobie Co. Ltd* C. A No. 38/1992.
 6. Concerning the reliefs sought, the appellant submitted. The respondent had not demonstrated what loss he would suffer, incapable of being compensated by way of costs, unlike her who has been in possession of extensive development on the land. She urged the court to give her an opportunity to be heard. Reliance was placed on *Stecol Corp Ltd vs Susan Awuor Mudembi* (2021) eKLR.
 7. Lastly, the appellant submitted that the ultimate goal and purpose of the judiciary was to hear and determine disputes fully, and in this instance, she should not be locked out of the doors of justice.
 8. An appellate court of the 1st instance has the mandate to re-assess and reanalyze the lower court record to come up with independent findings as to facts and the law while mindful that the trial court had the benefit of seeing and hearing the witnesses firsthand. See *Abok James Odera t/a AJ Odera & Associates vs J.P Machira t/a Machira & Co. Advocates* (2013) eKLR.
 9. In this appeal, the service of summons upon the appellant is not disputed. The firm of P.E.M Majau & Co. Advocates filed a memorandum of appearance dated 5.2.2020 for the appellant. Later on, on 6.2.2020, the law firm filed a notice of appointment as agents of the appellant. From 6.2.2020, the appellant had 15 days to put in a defense and, if available, a counterclaim. None was filed until a request for the interlocutory judgment was made on 29.7.2020. An affidavit of service sworn by John M'Ikiara on 20.1.2020 was filed, showing that the appellant was served with a summons to enter an appearance on 18.1.2020 at her home.
 10. Entry of judgment was made, and a formal proof date was set for 8.6.2021. Eventually, judgment was entered on 22.10.2021 a notice dated 13.11.2022 for the entry of judgment was served upon the appellant on 18.11.2022 by John K. M'Ikiara, who filed an affidavit of service sworn on 21.11.2022. The service prompted the appellant to the appointment of her current lawyers on record, who filed a notice of change of advocates on 30.11.2022, followed by applications dated 27.11.2023.



11. In the supporting affidavit sworn on 29.11.2022, the appellant was silent when she last visited the former law firm on 6.2.2020, to provide witness statements and a list of documents or sign the verifying affidavit to any counterclaim. Her readiness to prosecute the defense and or counterclaim has to be established based on averments made in her supporting affidavit and not elsewhere.
12. The onus was upon the appellant to show that she had paid her lawyers and furnished her with documentation and a list of witnesses. The case belonged to the appellant and not her former lawyers. It was a shared responsibility, and the most significant share of it was and remained with the appellant. It is not enough to level blame on lawyers for a responsibility essentially belonging to a client to equip the lawyer with requisite material, financial or otherwise, to defend the client's interest. Good faith must be demonstrated with reason from the annexures to the supporting affidavits. No single receipt or correspondence was attached to show that the appellant from 6.2.2020 had made any conduct with her former lawyers.
13. Even after several issues for their conduct were raised in the replying affidavit by the respondent, sworn on 6.12.2022, the appellant never sought to file a further affidavit to clarify that she had done all that was expected of her as a client but was failed by her lawyers; that there was no bad faith; that her alleged sale agreement was not illegible or was referring to a different parcel number that he was willing to surrender security and that her defense or counterclaim was raising some triable issues.
14. Additionally, the respondent had raised a preliminary objection on Order Rule 9 Civil Procedure Rules. The appellant did not endeavor to contract the former lawyer on record. If the appellant had surrendered any documents to the former lawyer, prudence would have expected that, at the very least, when she was notified of the entry, she would disclose to the court if she visited the law firm to retrieve the documents and or establish why the law firm had failed to execute her instructions.
15. By failing to disclose those facts, the irresistible inference in law is that the appellant had lost interest or touch with her erstwhile law firm and can only blame herself. The notice of change dated 6.12.2022, was filed without leave. The only attempt to show sufficient cause was by blaming the erstwhile law firm. To submit that the lawyers always informed her that the suit was in progress without stating in the affidavit the last conduct made and whether she had signed any witness statement and offered a list of documents was a statement from the bar, made without substantiation. To state that the former lawyer had frustrated her and the omission was all hers was again not included in the supporting affidavit written submissions; however, powerful or convincing cannot replace affidavit evidence.
16. The appellant blames the trial court for not considering the draft defense, a counterclaim and written submissions. The cited cases of *Films Rover International vs Cannon Films Ltd* 1988 ALL ER 722, *Harrison Wanjohi Wambugu vs Felista Wairimu Chege & another* (2013) eKLR, *Belinda Murai & others vs Amoi Wainaina* (1978) KLR 2782, *Philip Chemwolo & another vs Augustine Kubende, MK vs MWR & another* (2015) eKLR are distinguishable from the facts in the instant appeal. The trial court had not been supplied with facts by the appellant accounting for her conduct between 6.2.2020 and 30.11.2022.
17. Article 159 of the *Constitution* is not a panacea for all ills, misdeeds, and mistakes to adhere to procedural steps in the administration of justice. A party invoking the discretion of the court must disclose all the material facts and, where necessary, own up to his or her mistakes, omissions, and or inadvertent mistakes. In this appeal, the appellant distanced herself from the former law firm and tried to play blamelessness. A case belongs to a party and not the lawyer. A litigant has the responsibility to make a follow-up and defend their interests at every stage of their case. A party cannot escape that responsibility by apportioning blame to her erstwhile lawyer.



18. A party must show how diligent they have been to defend their rights. Abdication of the responsibility may take various forms including the abandonment or sheer negligence of their responsibilities to ensure the wheels of justice do not grind to a halt for lack of instructions. See *Savings and Loans Ltd vs Susan Wanjiru Muritu* NRB Milimani HCC No. 397 of 2002. In *Duale Mary Ann Gurre vs Amina Mohammed Mahamood & another* (2014) eKLR, Mutugi J held a client was a principal who has an obligation and duty to ensure that the lawyer as an agent continues to carry out the instructions as given for litigation belongs to the principal but not the agent.
19. The law has not defined maximum or minimum delay. It all depends on the circumstances of each case and a reasonable explanation for the delay. See *Cecilia Wanja Waweru vs Jackson Wainaina Muiruri & another* (2014) eKLR. The appellant failed to bridge the gap between 6.2.2020 and 30.11.2022. It was upon her to disclose her diligence in visiting, calling and or appraising her advocates or record the progress.
20. Regarding triable issues, procedural law, and substantive law are co-joined twins. One complements the other. The appellant urges this court to find that the trial court sacrificed her at the altar of justice on procedural technicalities without consideration of substantive justice. There is no dispute that the appellant was given an opportunity to be heard but squandered it by failing to engage her former lawyers and ensure her interests for a fair hearing, access to justice and substantive justice were followed.
21. In *Tanathi vs Jeremiah Kimigbo Mwakio & 3 others* (2015) eKLR, the court held that while negligent mistake by counsel may be excusable, the situation became different when a litigant knowingly and willingly condones such negligence or exhibits a careless attitude. In the replying affidavit, the respondent raised issues that the annexures to the supporting affidavit were illegible and did not disclose triable issues. In *Mwangi vs Kariuki* (1998) LLR 2632 Sha J.A held that mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude.
22. The case by the respondent was on trespass. The respondent had already produced a title deed and a demand letter dated 17.12.2019 and a judgment in CMCC ELC No. 72 of 2018 filed by the appellant regarding the sole agreement dated 16.8.2002 over the suit land. The court held the suit was statute-barred and not proved to the required reasons. The issues raised in the defense and counterclaim are the same issues raised by the appellant in the previous suit which she was trying to relitigate.
23. The appellant has told the court that the trial court did not look into her draft defense and counterclaim; otherwise, it would have found it raised triable issues. The respondent had filed and produced as exhibit the previous judgment. Triable issues entitle a party to have his day in court and ventilate their defense or claim. The issues must be bona fide and meritorious. They should not be frivolous, vexatious or amount to an abuse of the court process. See *Job Kilach vs Nation Media & another* (2015) eKLR.
24. Res-judicata is a doctrine that bars a party from relitigating already concluded and determined on merit, issues between the same or similar parties or parties litigating under the same umbrella over the same subject matter, already dealt with by a court of competent jurisdiction. See *Maina Kiai vs IEBC & others* (2017) eKLR *Lotta vs Tanaki* (2003) 2 EA 556.
25. In this appeal, the appellant wanted to have a second bite of the cherry through the draft defense and counterclaim. The issues raised do not, in my view, amount to triable issues that could have fairly been arguable before a court of law as held in *Lalji t/a Havakkep Building Contractors vs Carousel Ltd* (1989) KLR. The appellant had no defense or merits against the claim for trespass. She had lost in enforcing the alleged sale agreement in the previous suit. She had admitted occupation on the land. No further justification had been pleaded. Constructive trust would have been included in the previous



suit. A party cannot litigate in installments to defeat the doctrine of res judicata or, after losing in a previous suit, wear a different hat, clothe himself differently, and approach the court on the exact cause of action but using a different name. That is what the doctrine of res-judicata seeks to cure. See *Glady's Nduku Nthuki vs. Letsbege (K) Ltd (Mueni Charles Maingi (I.P.))* (2022) eKLR, citing with approval *Gurbachan Singh Kalsi vs Yowani Ekori* C. A no. 62 of 1958 & *Mburu Kinyua vs Gabcini Tuti* (1978) KLR 69, *Nancy Mwangi t/a Worthlin Marketers vs Airtel Network (K) Ltd* (2014) eKLR and *E.T. vs A.G. & another* (2012) eKLR.

26. The upshot is that I find the appeal without merits. It is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 13th DAY OF MARCH, 2024

In presence of

C.A Kananu

Appellant

Miss Kerubo for Rimita for respondent

Mwirigi B for Okubasu Munene for the appellant

HON. C K NZILI

JUDGE

