



Tembo & another v Gichuhi & 2 others; Sadique (Applicant) (Environment & Land Case 303 of 2018) [2025] KEELC 904 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 303 OF 2018
YM ANGIMA, J
FEBRUARY 27, 2025**

BETWEEN

ESTHER JOHN TEMBO 1ST PLAINTIFF

**JULIUS MWAVITA TEMBO ALIAS JULIUS MWAVITA MWARUMBA
(SUING OR AND ON BEHALF OF THE LATE TEMBO MWAVUNA
TEMBO) 2ND PLAINTIFF**

AND

ZIPPORAH WAMBUI GICHUHI 1ST DEFENDANT

THE REGISTRAR OF LANDS, LAND 2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

AND

ASHRAF MOHAMED SADIQUE APPLICANT

RULING

A. Introduction

1. By a judgment dated 22.11.2022 the court entered judgment in favour of the plaintiffs and against the defendants in the following terms.
 - i. A declaration that the plaintiffs through the original Plaintiff the late Tembo Mwavuna Tembo are the lawful and/or legal owners of the suit premises, being Plot No Kilifi/Kijipwa/205 situate at Msumarini-Kikambala within Kilifi County.
 - ii. A declaration that the suit premises, being Plot No. Kilifi/Kijipwa/205 was fraudulently and/or illegally and/or unlawfully allocated to 1st Defendant and consequently the Title Deed made



in favour of the 1st Defendant herein is hereby revoked and a new one be issued in favour of the Plaintiffs.

iii. Costs to the Plaintiff.

1. It would appear that the applicant herein, Ashraf Mohamed Sadique Majothy, was not a party in the proceedings when the suit was heard and determined. Being aggrieved by the said judgment he filed the instant application seeking to set aside the said judgment.

B. Applicant's application

3. By a notice of motion dated 20.08.2024 expressed to be brought pursuant to the provisions of Article 50 of *the Constitution* of Kenya, Sections 1A, 1B, 3A of the *Civil Procedure Act* (Cap.21), Order 42 rule 6, Order 50 rule 6, Order 5, rule 1 of the Civil Procedure Rules, (the Rules) and all other enabling provisions of the law, the applicant sought, inter alia, leave to be joined as an interested party or defendant; the setting aside of the judgment dated 22.11.2022 and unconditional leave to defend the suit.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the applicant on 20.08.2024. The applicant contended that he was never served with court process at the material time and that he came to know of the judgment much later after conclusion of the suit. It was his case that he was the registered proprietor of the suit property and that he had been wrongfully excluded from the proceedings by the plaintiffs who had only sued persons who had no legal interest in the suit property. It was further the applicant's case that he only become aware of the judgment in August 2024 when a dispute over the suit property was before a village elder in Kilifi.

C. Plaintiffs' response

5. The record shows that the plaintiffs filed general grounds of opposition dated 30.09.2024 opposing the said application on the following grounds;
 - a. That it was fatally defective.
 - b. That it was bad in law and incompetent.
 - c. That it was frivolous, scandalous and vexatious.
 - d. That it was an abuse of the court process.

D. Defendants' response

6. There is no indication of the defendants having filed any response to the application. There is even no indication of the defendants having been served since there is no affidavit of service on record to demonstrate such service.

E. Directions on submissions

7. It would appear that when the matter was listed for directions it was directed that it shall be canvassed through written submissions. The record shows that the applicant filed written submissions dated 08.11.2024 whereas the plaintiff's submissions were also dated the same date.



F. Issues for determination

8. The court has perused the applicant's notice of motion dated 20.08.2024, the plaintiffs' grounds of opposition, as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the applicant has made out a case for his joinder in the suit.
 - b. Whether the applicant has made out a case for setting aside of the judgment dated 20.11.2022.
 - c. Who shall bear costs of the application.

G. Analysis and determination

a. Whether the applicant has made out a case for his joinder in the suit

9. The court has considered the material and submissions on record in this matter. The gist of the applicant's case was that he had a legal interest in the suit by virtue of being the registered owner thereof and that he had been deprived of the property through a suit to which he was a party. He contended that he was not aware of the suit upon filing and that he only became aware of the judgment in August 2024 when he was summoned by a village elder over a dispute regarding the suit property.
10. It was also the applicant's case that there was previous litigation and judgment in Malindi HCCC No. 59 of 2018 over the same matter and that the instant suit was meant to undermine or defeat the decree issued in that suit. He did not, however, exhibit a copy of the judgment and decree in the said case.
11. The plaintiffs submitted that the applicant had no locus standi to file the instant application because he was not the registered proprietor of the suit property. They submitted that the copy of the title deed exhibited by the applicant showed that the registered owner was one, Anwar Ali Mohamed Sadique and not the applicant, Ashraf Mohamed Sadique Majothy.
12. The court has noted that even though the applicant swore that he was the registered proprietor of the suit property in paragraph 3 of the supporting affidavit, the title deed he exhibited showed that it was registered in the name of a different person namely, Anwar Ali Mohamed Sadique of ID No. 0565641/63. The applicant did not attempt to explain the discrepancy in the names and he did not explain the relationship, if any, between him and the registered owner.
13. It is also evident from the copy of the land register he exhibited that entry No. 2 on the basis of which the title deed was issued on 24.10.1996 was cancelled by the land registrar on the same day on the basis that the entry was made by error. In the premises the court is not satisfied that the applicant has demonstrated, on a prima facie basis, that he has a legal interest in the suit property to warrant his joinder as either an interested party or defendant.

b. Whether the applicant has made out a case for setting aside the judgment dated 22.11.2022

14. Whereas the court has a wide discretion to set aside an ex-parte judgment, such discretion must be exercised judicially and upon sound principles. It should be exercised in order to meet the ends of justice and the applicant has an obligation to lay a basis upon which the court may exercise such discretion in his favour.
15. That court has already found that the applicant has failed to demonstrate that he is the registered owner of the suit property or that he has a legitimate legal interest in it. The court has further noted that although the applicant referred to the existence of a previous suit among the parties being Malindi



HCCC No.59 of 2018, he did not exhibit a copy of the resultant judgment dated 22.11.2022 rendered in that suit.

16. In the premises, the court is not satisfied that the applicant has demonstrated a case to warrant a setting aside of the judgment dated 22.11.2022. The court is of view that it could not serve any useful purpose to set aside the said judgment when the applicant does not appear to have a plausible defence to the plaintiffs' claim.

c. Who shall bear costs of the application.

17. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a consequence, the plaintiff shall be awarded costs of the application.

H. Conclusion and disposal order

18. The upshot of the foregoing is that the court finds no merit in the applicant's application dated 20.08.2024. The court is, however, of the opinion that no leave of court is required for the applicant to engage an advocate of his choice since he has not previously acted in person in the suit. As a consequence, the court makes the following orders for disposal of the application.;
 - a. The notice of motion dated 20.08.2024 is hereby dismissed in its entirety.
 - b. The plaintiffs are hereby awarded costs of the application.

It is so ordered.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 27TH DAY OF FEBRUARY, 2025.

In the presence of:

No appearance for the Plaintiff

No appearance for the Defendants

Mr. Mkan for the Applicant

Court Assistant Gillian

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Y. M. ANGIMA

JUDGE

