



**Nduva v Kurrarru & 2 others (Environment & Land Case
843 of 2017) [2024] KEELC 3627 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 843 OF 2017**

MN GICHERU, J

APRIL 30, 2024

BETWEEN

PATRICK KIVAI NDUVA PLAINTIFF

AND

NOAH MORERIA OLE KURRARRU 1ST DEFENDANT

COOPERATIVE BANK OF KENYA 2ND DEFENDANT

JAMES MAINA MBURU 3RD DEFENDANT

RULING

1. This ruling is on the notice of motion dated 15/12/2021. The motion which is by the third defendant seeks the following residual orders.
 - c. That the court be pleased to set aside its judgment dated 16/7/2021 and the third defendant be granted leave to defend the suit.
 - d. That the court do set aside the interlocutory judgment against the 3rd defendant dated 25/01/2018.
 - e. That there be a stay of execution of the judgment and decree dated 16/10/2021.
 - f. That the court be pleased to expunge the name of the 3rd defendant having been merely an agent and servant of the 1st defendant.
 - g. That the costs of this application be provided for.
2. The motion which is brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Orders 12 rules 2 and 7, 50 and 51 rules 1, 3, 12 and 14 and 15 of the Civil Procedure Rules and all enabling provisions of the law is based on twenty two (22) grounds, a supporting affidavit with five (5) annexures which include a copy of draft defence.



3. In summary, the 3rd defendant deposes as follows.

Firstly, after he was served with summons to enter appearance, the 3rd defendant instructed the firm of Nyareru and Co. Advocates to represent him. All along the said firm assured him that they were representing him as expected.

Secondly, it was only recently that he learnt that the law firm he instructed did not file the necessary pleadings.

Thirdly, the 3rd defendant has a good defence which raises triable issues and he should not be condemned unheard and the failures of his counsel should not be visited upon him.

4. The motion is opposed by the plaintiff who has sworn a lengthy replying affidavit whose contents can be summarized as follows.

Firstly, the 3rd defendant was always aware of this matter and was always represented as the court record will show.

Secondly, on the dates of 6/2/2018 and 20/6/2018 when the case came up for pretrial conference, the court accommodated the applicant's counsel by giving him sufficient time to file his defence which he failed to do so even on subsequent dates of 25/7/2018, 4/10/2018, 7/2/2019, 2/5/2019, 23/10/2019, 20/2/2020 and 15/10/2020.

Thirdly, the applicant failed to take advantage of all the indulgences extended to him by the court.

For the above and other reasons, he prays that the motion be dismissed with costs.

5. Counsel for the parties filed written submissions on 24/5/2023 and 15/11/2023 respectively. The 3rd defendant's counsel identified the following four (4) issues for determination.

1. Whether or not the 3rd defendant should be condemned unheard because of the mistakes of his counsel.
2. Whether or not the 3rd defendant should be allowed to defend this case.
3. Whether the applicant's defence raises triable issues.
4. Who pays thrown away costs, if any.

6. I have carefully considered the motion in its entirety including the grounds, affidavits, annexures, the written submissions by the learned counsel for the parties and the law relied upon. I make the following findings on the issues raised.

On the first issue, I find that it is not only the 3rd defendant's counsel who made mistakes. The 3rd defendant also made many mistakes. The record shows that this suit was filed in February 2016, yet on 15/10/2020, more than 4 ½ years later, the 3rd defendant had not bothered to contact his counsel to find out how his case was faring. Four and half years is a long time to let a case where one is alleged to have defrauded another of over Kshs. 60 million keep hanging over his head. Had the 3rd defendant been conscientious and eager to clear his name of this hefty fraud, he would have followed up his advocate for all those years. I find that it was a grave mistake on the part of the 3rd defendant to take it easy. His advocate cannot be blamed for this laxity.

7. It would be an injustice to the plaintiff to allow this case which is more than 8 years old to start afresh to accommodate a party who slept on his rights for all those years. The 3rd defendant was allowed sufficient time to defend himself but he failed to file his defence even after much indulgence extended to him by the court. The Constitution in Article 159 (2) (b) provides that justice shall not be delayed. In Section



3 of the *Environment and Land Court Act*, it is provided that the principal objective of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of disputes governed by the Act. The law expects that land cases should be expedited so that land rights are determined in good time so that land is released to development and investment rather than being tied up in endless and circuitous litigation. It is the 3rd defendant who has disallowed himself from defending the case.

8. I have looked at all the twenty two (22) paragraphs of the 3rd defendant's draft defence and except for five paragraphs all the rest are mere denials and they fail to engage the plaintiff's case even after the elaborate judgment that says that it is the 3rd defendant who introduced the 1st defendant and vouched for him as the owner of several properties that he wanted to sell in cash and kind. Such a strong case deserves a strong defence and not mere denials.
9. Finally on thrown away costs, I find that they do not apply. They would have applied if the motion had merit but since it does not, they will not arise. For the reasons given, I find no merit on the motion dated 15/12/2021 and I dismiss it with costs to the plaintiff.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 30TH DAY OF APRIL 2024.

M.N. GICHERU

JUDGE

