



REPUBLIC OF KENYA



Kimwele v Kubora & another; Mwanzia (Intended Plaintiff) (Environment & Land Case 16 of 2017) [2024] KEELC 3420 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE 16 OF 2017**

JM MUTUNGI, J

APRIL 29, 2024

BETWEEN

MWANZIA KIMWELE PLAINTIFF

AND

KITHOME KUBORA 1ST DEFENDANT

IBRAHIM MUSINGA 2ND DEFENDANT

AND

SAMUEL MWANZIA INTENDED PLAINTIFF

RULING

1. The matter for determination before the Court is an application dated 19.09.2023 wherein the applicant sought for orders that:
 - i. Spent.
 - ii. Spent.
 - iii. Leave be granted to the Applicant/Intended Plaintiff to be enjoined in this suit in substitution of the Plaintiff who is mentally and physically incapacitated.
 - iv. Leave be granted to the Applicant's Advocate M/s Muimi & Muimi Co. Advocates to come on record on behalf of the Plaintiff instead of the Firm of M/s Mulinga Mabaluka & Co. Advocates.
 - v. This Honourable Court be pleased to and hereby set aside the Judgment dated 28.05.2021 and vacate all consequential orders thereto pending the inter partes hearing and final determination of the present application, and the main suit herein.



- vi. Costs of this application be provided for.
2. The application is premised on the grounds set out on its body and the Supporting Affidavit sworn by the Applicant/ Intended Plaintiff herein. The Applicant's case is that he is the biological son of the Plaintiff and that the Plaintiff is terminally ill having suffered a stroke on or about October 2020. The Applicant deponed that the Plaintiff had previously instructed the Firm of M/sMulinga Mbaluka & Co. Advocates to act for him in the matter. That on 13.09.2023, the Defendants in the company of their agents entered the Plaintiff's residence and began demolishing permanent structures on the suit property. The Applicant averred that the Defendants only stopped when they noticed the Plaintiff was bedridden and immobile.
 3. It was his evidence that no notice was served prior to the demolition and further, that they were not aware of the proceedings herein as they only later discovered that their Advocate on record had ceased attending Court. That the matter proceeded ex parte to the detriment of the Plaintiff and his family members. He deponed that the Defendants/Respondents had warned that the demolition would continue within seven days as they had Court orders warranting the same. The Applicant urged that he be enjoined in this suit to protect the interests of the Plaintiff who is currently incapacitated and other family members occupying the suit property. That the substitution if allowed will not prejudice the Defendants/Respondents in any way.
 4. The application was opposed by way of a Replying Affidavit sworn by the 1st Defendant/Respondent who averred there was no subsisting suit pending determination for the Intended Applicant/Plaintiff to be enjoined. That the Applicant was a mere busy body who cannot have a better title than his father. The 1st Defendant deponed that the plaintiff and his sons have always employed delaying tactic to ensure that this suit did not progress as the Plaintiff continued to sell portions of the suit land to unsuspecting buyers. The 1st Defendant deponed that the Plaintiff was in Court on 26.11.2019 though his Advocate was absent and had written a letter to Court precipitating the matter to be adjourned to 28.01.2020 when neither the Plaintiff nor his Advocate attended the Court.
 5. The 1st Defendant averred that medical records exhibited had nothing to do with year 2020 as all related to the year 2022 well after the suit had been dismissed and the 2nd Defendant had obtained Judgment on his Counterclaim. That the record showed the efforts made by the Court to have the Plaintiff prosecute this matter to no avail. The 1st Defendant averred that there was no material placed before the Court to warrant the exercise of the Court's discretion in favor of the Applicant. The Respondents thus urged the Court to dismiss the application for being bereft of merit.
 6. Directions were given that the application be fixed for inter partes hearing on 24.10.2023. The hearing did not take place as the Applicant was not ready and his Advocate on record was allegedly engaged before another Court in Nairobi.
 7. Mr. Njoroge, Counsel for the Respondents argued that the Applicant's sole intention was to frustrate Court process as he enjoyed the ex parte orders issued by the Court. He urged that the application be dismissed for the same was not only frivolous but also in want of merit.
 8. The Court in making its ruling stated that given that both parties had filed their pleadings, it would proceed to review the said pleadings to enable it render its Ruling on the application. It is against that backdrop that I proceed to determine the application herein.
 9. I have read and considered the application and the Replying Affidavit sworn by the 1st Defendant in response and the issue for determination is whether the Applicant has satisfied the requisite threshold to warrant the exercise of discretion in his favour.



10. It is the Applicant's case that the Plaintiff has been prevented by old age and medical condition from conducting the prosecution of this case to his detriment. The Applicant attached the Plaintiff's attendance documents indicating he had been attending hospital for treatment but responding to this assertion the Respondents averred that the Supporting documents exhibited related to year 2022 yet Judgment in this matter was rendered in May 2021 and hence argued the exhibited documents lacked any relevance.

Under Prayer 3 of the application the Applicant prays as follows:-

3. That leave be granted to the Applicant/Interested Plaintiff, Samuel Mwanzia to be enjoined in this suit in substitution of the Plaintiff who is mentally and physically incapacitated.
11. The medical documents other than the Portreitz District Hospital Mombasa Discharge Summary made on 2/5/2022 relate to Laboratory request for tests and x-ray and do not constitute medical reports and as observed all relate to year 2022. The Applicant did not bring a medical report relating to the Plaintiff to affirm that during the time the suit was heard in 2021 the Plaintiff was suffering from a mental condition and/or any other infirmity that would not allow him to attend to any legal issues. Although the Applicant depones that the Plaintiff had a stroke in October 2020 no material or evidence was availed.
12. Under Section 26 of the *Mental Health Act*, Cap 248 Laws of Kenya, it is the Court (the High Court) that has mandate to make an order for the management of the estate of any person suffering from mental disorder upon making inquiry. The Act defines a person suffering from mental disorder to mean:-

“A person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcoholic substance.”

Section 26(3) of the *Mental Health Act* provides for the making of inquiry in the following terms:-

- (3) Whereupon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.

Order 32 Rule 15 of the *Civil Procedure Rules* also makes provision as to how a person could be found to be of unsound mind so as to be held to be in capable of protecting their own interests. The person has to be adjudged as to be of unsound mind upon the Court making inquiry as to the state of his mental health.

13. I am not satisfied that on the material furnished by the Applicant that the Plaintiff can be held to have been of unsound mind and/or to have had such infirmity as may have made him unable to attend to his affairs including his legal matters in the year 2021. There is no evidence to support any such finding.
14. The Applicant has sought to have the exparte Judgment entered on 28th May 2021 set aside, and for him to be substituted as the Plaintiff and to be allowed to prosecute the suit on behalf of his father. I have held that the Plaintiff was not prevented by any justifiable cause from prosecuting his case as it



has not been demonstrated that he had any infirmity that could have prevented him from doing so. The suit was heard on 24/2/2021 and the record shows that the Plaintiff was duly served in person and his Advocates then on record M/s Mulinga Mbaluka & Co. Advocates were equally served. The Judge held the service to have been proper and permitted the matter to proceed exparte as neither the Plaintiff or his Advocates attended Court. Judgment was delivered on 28th May 2021 whereby the Plaintiff's suit was dismissed while the 2nd Defendant's Counterclaim was allowed.

15. Following the entry of Judgment, the 2nd Defendant Judgment Creditor made several applications, firstly for amendment of the Judgment on 28th June, 2021 which was served on the Plaintiff's Advocates on record. Secondly, application for execution and various mention notices were served on the Plaintiff on diverse dates as per the Affidavits of service filed in Court. It was not until 22nd September 2023 that the Applicant filed the instant application nearly after 2 years and 4 months after the delivery of the Judgment. It is difficult to believe that the Applicant, as the Plaintiff's son, even assuming his father had the challenge that he alleges he had, did not know of the pendency of this case. The case has had a long history as it originated from Kyuso Magistrate's Court before it was transferred to Garissa ELC for hearing and determination.
16. The delay of over two years before making the application to set aside the Judgment is inordinate and is not explained and is therefore in excusable. Apart from the Applicant not being able to satisfy the Court that the Plaintiff has an infirmity to warrant the Court to allow him (the Applicant) to substitute the Plaintiff there is no proper basis, upon which the Court can exercise its discretion to set aside the exparte Judgment delivered on 28th May 2021.
17. I find the Notice of Motion dated 19th September 2023 to be lacking in merit and order the same dismissed with costs to the Defendants.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 29TH DAY OF APRIL 2024.

J. M. MUTUNGI

ELC - JUDGE

