



**Wamuyu (Suing as the Legal Representative of the Estate of Stephen Mbaruku Kariambaki - Deceased) & 2 others v Gathua (Environment & Land Case 7 of 2021) [2024] KEELC 3507 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3507 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT & LAND CASE 7 OF 2021**

**AK BOR, J**

**APRIL 23, 2024**

**BETWEEN**

**EUNICE WAMUYU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN MBARUKU KARIAMBAKI - DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**  
**JOHN MAINA ..... 2<sup>ND</sup> PLAINTIFF**  
**PATRICK KIAMA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**NDEGWA GATHUA ..... DEFENDANT**

**RULING**

1. Through the application dated 30/11/2023, the Defendant seeks to have the proceedings in this suit set aside and the matter set down for pretrial conference and hearing of the suit at the next convenient date. The application was made on the grounds that the matter proceeded for hearing of the Plaintiffs' suit on 8/11/2023 in the absence of the Defendant, whose advocate had filed an application to cease acting and that the Defendant was therefore condemned unheard because he did not have a chance to cross-examine the Plaintiffs' witnesses.
2. The Defendant swore the affidavit in support of the application in which he deponed that he worked for gain and resided in Karatina and that he instructed an advocate on 5/5/2022 to represent him in the matter but the advocate failed to file a defence or prosecute the case. He averred that he was not granted an opportunity to participate at the hearing on 8/11/2023. He added that he was an elderly man and was not tech-savvy although he struggled to stay up to date with modern communication methods. He averred that he picked his documents from his previous advocate and was in the process of retaining another advocate to represent him which posed a challenge because he was a man of limited means. He



relied on the practice directions safeguarding vulnerable litigants including elderly persons in accessing justice. He urged that the mistakes of his advocate should not be visited upon him and attached a draft statement of defence to his affidavit.

3. In his replying affidavit sworn on 15/12/2023, the 3<sup>rd</sup> Plaintiff, Patrick Kiama, opposed the application and averred that the right to access justice under Article 48 of the Constitution applied to both parties in proceedings. He emphasised that the Defendant was aware of the hearing date having sent his sons to court on 19/4/2023 to seek an adjournment on grounds of illness and his old age. His sons indicated that the Defendant required time to instruct an advocate and the court put off the hearing to 22/5/2023. The Plaintiffs maintained that the Defendant was aware of the last hearing date but failed to appear in court or file his defence in the suit. Mr. Kiama urged that the draft defence annexed to the Defendant's application was an afterthought and was calculated to delay the conclusion of the case. He pointed out that the 1<sup>st</sup> Plaintiff's memory was fading because of the Defendant's conduct in the matter and that the Plaintiffs stood to be prejudiced. The 3<sup>rd</sup> Plaintiff went on to aver that the Defendant had gone into deep slumber as someone who had won the lottery and took a cruise ship for a well-deserved holiday and was only keen to delay the delivery of judgment in this case.
4. Patrick Kiama, also swore a supplementary affidavit in opposition to the Defendant's application. He averred that the Defendant was aware of the status and directions of the court in this matter based on the notices issued by the court on 3/8/2021, 19/8/2021 and the hearing notices dated 8/10/2021, 16/3/2022, 5/5/2022, 20/6/2022 and 20/9/2022. He also pointed out that the Defendant's son Simon Ndururi Ndegwa sought pleadings on behalf of his father vide the letter dated 1/9/2022 but no action was taken in the case for over two years. He added that the Defendant appointed Chweya and Associates and later Tony Martin Law LLP to represent him in the matter and that the latter law firm applied to cease acting for the Defendant citing lack of instructions. The Plaintiffs maintained that the Defendant had not explained his failure to file defence or sufficient cause for the court to exercise its discretion in his favour.
5. The court directed parties to file written submissions, which it has considered. The Defendant, vide the submissions filed on 15/2/2024, maintained that his advocates failed to take action in the matter which prompted him to come to the court registry where he was surprised to learn that his advocate had applied to cease acting for him. He gave his recurring health problems as the reason for failing to take action in the matter. He implored the court not to visit the mistakes of his advocate on him while urging that the omission on the part of his advocate was inadvertent. He invited the court to rely on Article 50 of the Constitution while urging the court not to drive him away from the seat of justice without hearing him.
6. The Plaintiff filed his submissions on 20/2/2024 and reiterated the averments in the affidavits sworn in opposition to the application which gave the background to this matter. The Plaintiffs argued that the Defendant's failure to file a defence and appear in court were deliberate delaying tactics. They also pointed out that the 1<sup>st</sup> Plaintiff who is of advanced age may face challenges in attending court proceedings regularly if the matter is not heard and determined expeditiously.
7. The issue for consideration is whether the court should set aside its proceedings of 8/11/2022 and allow the Defendant to defend his suit. From the record, it is apparent that the Defendant was aware of the institution of this suit as can be discerned from the letter dated 1/9/2021 which Simon Ndururi Ndegwa wrote to the Deputy Registrar seeking to peruse the court file on behalf of the Defendant. Despite Chweya and Associates and Tony Martin Law LLP filing notices of appointment of advocate and notice of change of advocate on 5/5/2022 and 30/5/2022 respectively, they did not file any defence. Tony Martin Law LLP applied to cease acting for the Defendant on 26/10/2023 on the ground given was that the Defendant had failed give the firm instructions to handle the matter.



8. The court agrees with the Plaintiffs that the Defendant has had the opportunity to file his defence and participate in the proceedings.
9. The court is inclined to allow the application on the following conditions that:
10.
  - i. the Defendant pays the Plaintiffs throw away costs of Kshs. 12,000/= within 30 days of the date of this ruling;
11.
  - ii. the Defendant files and serves his defence and complies with Order 11 of the Civil Procedure Rules within 14 days; and
12.
  - iii. the suit is set down for hearing within 45 days.

Delivered virtually at Nanyuki this 23<sup>rd</sup> day of April 2024.

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Martha Murugi for the Plaintiffs

Mr. Muchiri wa Gathoni for the Defendant

Ms. Stella Gakii- Court Assistant

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