



Ngaine (Suing as the Legal Representative of the Estate of John Mbeti Muriithi - Deceased) v Kamau & 5 others (Environment and Land Case Civil Suit E339 of 2022 & Environment & Land Case E284 of 2022 (Consolidated)) [2024] KEELC 3378 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E339 OF 2022 &
ENVIRONMENT & LAND CASE E284 OF 2022 (CONSOLIDATED)**

**LN MBUGUA, J
APRIL 18, 2024**

BETWEEN

STELLA MARIS KAREGI NGAINE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN MBETI MURIITHI - DECEASED) PLAINTIFF

AND

**JENIFFER WANGARI KAMAU 1ST DEFENDANT
LUKE KIPCHUMBA METTO 2ND DEFENDANT
ERIC AGBEKO 3RD DEFENDANT
LAND REGISTRAR, NAIROBI 4TH DEFENDANT
CHIEF LAND REGISTRAR, NAIROBI 5TH DEFENDANT
ATTONEY GENERAL 6TH DEFENDANT**

RULING

1. The 2nd and 3rd Defendants’ Notice of Motion dated 29.11.2023 is for determination. They seek orders that this court reviews its ruling delivered on 11.10.2023 and extend the time for them to file their defence. They also seek an order that their draft defence be deemed as duly filed upon payment of the requisite fees and orders that costs be provided for.
2. The application is premised on grounds on its face and on the 3rd Defendant’s supporting affidavit sworn on 29.11.2023. He avers that on 11.10.2023, this Honourable court pronounced itself to the effect that the current suit would proceed undefended as against the 2nd and 3rd Defendant. The



- pronouncement was made on the basis of the 2nd and 3rd Defendants' inadvertent failure to file their defence on time.
3. He avers that in the event that the orders are not set aside, the 2nd and 3rd Defendants' constitutional right to be heard will be greatly violated and they will suffer irreversible harm and damage that cannot be compensated by an award of damages.
 4. The application is opposed by the Plaintiff vide the Notice of Preliminary Objection dated 12.1.2024 and the replying affidavit of even date. She contends that the Law firm of Wachira Gachoka & Co. Advocates is not properly on record as it has not filed a memorandum of Appearance within the stipulated time and neither has it sought leave to come on record on behalf of the 2nd and 3rd Defendants.
 5. The Plaintiff further avers that on 3.7.2023, this court directed that parties who had not filed their defenses should file the same by 17.7.2023, failure to which the Plaintiff's claim would proceed undefended, adding that the applicants never complied with the court's directions.
 6. She contends that the 2nd and 3rd Defendants have not satisfied grounds for review and they have shown to be indolent as the application is filed a month after the orders of 11.10.2023.
 7. In response to the Plaintiff's replying affidavit, the 3rd Defendant filed a further affidavit sworn on 22.1.2024. He avers that the Plaintiff has neither extracted summons to Enter Appearance herein nor served the 2nd and 3rd Defendants with the same, contrary to Order 5 Rule 1 (6) of the Civil Procedure Rules of which it is sufficient to review the orders of 11.10.2023.
 8. He avers that though a Memorandum of Appearance had been prepared by Wachira Gachoka & co Advocates, they inadvertently failed to file the same thus their mistake should not be visited upon the 2nd and 3rd Defendants.
 9. He also contends that since the hearing of the matter is scheduled for 14.5.2024, the Plaintiff will have ample time to draft any responses that he deems fit to file.
 10. The application was canvassed by way of written submissions. The 2nd and 3rd Defendants' submissions are dated 21.1.2024 where they argue that under Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules, sufficient cause is a ground for review, and failure by the Plaintiff to serve the 2nd and 3rd Defendants with summons to enter appearance amounts to sufficient cause that would warrant review.
 11. In support of their submissions, the 2nd and 3rd Defendants rely on the cases of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR and Tana Trading Limited v National Cereals and Produce Board [2014] eKLR.
 12. The Plaintiff's submissions are dated 22.1.2024 where they aver that under this court's Practice Directions of 15.7.2014, failure to comply with directions of the court attracts sanctions and in this case, the court decided to proceed with the suit without waiting for the late party. The case of Moses Kimaiyo Kipsang v Geoffrey Kiprotich Kirui & 2 others [2022] eKLR is relied upon. Adding that the conditions to warrant a review have not been met.
 13. I have duly considered all the rival arguments. Review is permissible under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Under Order 45 Rule 1 of the Civil Procedure Rules, the grounds upon which a court can grant a review are set out as follows; Discovery of new and important matter or evidence which was not within the Applicant's knowledge, mistake or error apparent on the face of the record, or for any other sufficient reason.



14. The 2nd and 3rd Defendants seek review on account of sufficient reason, being that they were not served with summons to enter appearance herein. The record indicates that Plaintiff took out summons addressed to all the Defendants. They are however undated, unsigned and were filed in the CTS system on 18.10.2022.
15. Further, as per the Affidavit of service sworn on 5.12.2022 by Nicholas M. Kimwele, only the pleadings, a court order and the Notice of Motion Application were served upon the Defendants; but not summons to enter appearance.
16. Summons to Enter Appearance is a judicial document calling a party to submit to the jurisdiction of the Court; See *Mobile Kitale Service Station v. Mobile Oil K. LTD & Anor* [2004] eKLR. In *Lee Mwathi Kimani v National Social Security Fund & another* [2014] eKLR it was held that: -

“.... Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the Defendant, the defendant has no valid invitation to defend the suit”

17. I opine that the 2nd and 3rd Defendants have established sufficient grounds to warrant review of this court's orders of 11.10.2023. For the sake of the sanctity of the records, I direct that service of summons be served, and thereafter, the 2nd and 3rd defendants, and any other party who has not filed a defence shall be at liberty to formally enter appearance and file their defences. The court will give timelines in regard to these directions. In essence, the application dated 29.11.2023 is allowed to the extent that the applicants shall be given an opportunity to defend the suit. Each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Musesya and Mutegi for Plaintiffs in E339/2022 and for Defendants in 284/2022

Mugo for 1st Plaintiff in E339 of 2022 and for Plaintiff in 284 of 2022

Omuyama holding brief for Wachira for 2nd and 3rd Defendants in E339 of 2022

Court assistant: Eddel

