



REPUBLIC OF KENYA



Wabururu ((Suing as the Administrator Ad Litem of the Estate of Francis Wabururu Njau - Deceased)) v Kagia & 2 others (Environment & Land Case 750 'A' of 2017) [2024] KEELC 4404 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 750 'A' OF 2017**

**JG KEMEI, J
MAY 28, 2024**

BETWEEN

**JAMES NJAU WABURURU PLAINTIFF
(SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF FRANCIS WABURURU NJAU - DECEASED)**

AND

**FLORENCE WAMBUI KAGIA 1ST DEFENDANT
MUIGAI PHARES THUMBI 2ND DEFENDANT
LAND REGISTRAR, KIAMBU 3RD DEFENDANT**

RULING

1. The 1st Applicant, *vide* the Notice of Motion dated the 12/2/2024 sought the following orders;
 - a. That this application be certified as urgent and the service thereof, be dispensed with in the first instance.
 - b. That the Court be pleased to issue an Order of stay of proceedings of the hearing scheduled for 14th February, 2024 pending inter-partes hearing of this application.
 - c. That the 1st Defendant/Applicant be granted leave to file Defence out of time and the annexed draft Defence be deemed duly filed upon payment of the requisite fees.
 - d. That the costs for this application be in the cause.
2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the Applicant namely Florence Wambua Kagia. She deponed that despite providing all the requisite documents required for her defence and instructions thereon, her previous Counsel failed to file her



- defence in the suit despite being given opportunities to do so by the Court prompting her to instruct her to instruct the firm of GNK & Associates LLP to come on record for her.
3. It is her case that she has a plausible defence with a high chance of success and it is in the interest of justice that she be heard in the matter. In addition, that she should not be punished for the mistake of her erstwhile lawyers but instead should be accorded a fair trial. On prejudice, the deponent states that the Respondent shall not suffer any undue prejudice and that on realization of the non-compliance by her advocates she took quick action to file the application under new Counsel and therefore there is no inordinate delay.
 4. That the Court has unfettered discretion to stay the hearing scheduled for the 14/2/24 to avoid a miscarriage of justice. That if the application is not granted she stands to be condemned unheard contrary to the tenets and dictates of natural justice.
 5. In opposing the application the Respondent termed the application frivolous vexations, bad in law and an abuse of the process of the Court and should be dismissed with costs for the following reasons; pleadings closed; the appellant failed to exercise her duty to follow up with her case to ensure that her agent was complying with Court orders and directions; pretrial took place three times all of which the Applicant though represented by Counsel failed to comply; matter is 7 years old in Court and further delay is justice delayed; the Applicant should bear the consequences of her indolence which should disentitle her of the relief being sought; application is but a delay tactic; application is brought in bad faith with the sole objective of delaying the prosecution of the suit.
 6. It was further contended that the draft defence does not raise any triable issues and should be dismissed. In the alternative, the Respondent states that should the Court be minded in granting the application, he prays for throw away costs in the sum of Kshs 50,000/- all inclusive.
 7. On the 15/5/24 the application was argued orally online. Ms Wambui holding brief for Mr Mburu acted for the 1st Respondent while the Applicant was represented by Mr Kurui. Mr Kirui reiterated the grounds in the application and sought for 30 days to file a defence out of time. He advanced the reason that the failure to comply was attributed to the previous Counsel of the Applicant which prompted her to change Counsel.
 8. Ms Wambui for the Respondent regurgitated the grounds of opposition posited in the Replying Affidavit and added that the application serves no other purposes other than delay the prosecution of the matter noting that despite the matter having been in Court for the last 7 years the Applicant and her Counsel failed to comply several times only to wake up from her slumber at the 11th hour and bring this application. That there are no cogent reasons advanced for non-compliance and that the Applicant has been caught up with latches and must bear the full consequences of her inaction. That in the alternative of allowing the application her client is praying for throw away costs in the sum of Kshs 50,000/- to cover the prejudice suffered in form of delays in prosecuting the matter.
 9. In a rejoinder Mr Kurui Counsel for the Applicant pleaded with the Court not to punish the Applicant for the mistake of her Counsel.
 10. The main issue for determination is whether the Application is merited
 11. There are two issues for the determination of the Court; firstly is whether the Applicant is entitled to an order of stay of proceedings of the hearing scheduled for 14/2/24 pending the hearing and deamination of the application. With respect this prayer is now spent given that the matter was taken out to allow the Court to hear and determine the instant application.



12. The second issue which remains alive is whether the Applicant is entitled to leave to file a defense out of time in line with the annexed draft defence.

13. Filing defense out of time is within the exercise of discretionary powers of a Court. The guidelines in exercise of such power is provided for in the case of *Shah v Mbogo & Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

14. In the celebrated case of *Shah v Mbogo & Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

15. Further in the case of *Richard Nchapai Leiyangu v IEBC & 2 Others* (2013) eKLR the Court stated that:-

“We agree with the noble principles which go further to establish that the Courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”

16. In this case the suit was filed on the 26/9/17 and I agree with the Respondent that pretrial sessions were held severally and no compliance was made by the Applicant. The Applicant has blamed her Counsel on record for non-compliance despite provision all the documents necessary for her defence. I have no reason to disbelieve the Applicant and in the circumstances of this case I am guided by the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 as per Duffus P. who stated as follows:

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

17. Is there a triable issue in the defence? I have perused the pleadings of the Plaintiff in form of the plaint on record and the issues revolve around ownership of the suit land. I have also perused the draft defence annexed to the application. I am guided by the decision of the Court of Appeal in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR where the Court defines a triable issue as;

“A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the Court during a full trial. The Black’s Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.”



18. Further in the case of *Sebei District Administration v Gasyali & Others* (1968) EA 300 Sheridan J remarked:

“The nature of the action should be considered. The defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the Court.”

19. On the question of prejudice on the part of the Respondent, there is no doubt that the instant application was the delay in taking out the matter that had been scheduled for hearing of the suit. That notwithstanding I am of the view that the prejudice is such that is capable of being compensated with costs, not too high as to make litigation expensive. In the circumstances of this case a sum of Kshs 30,000/- is reasonable to compensate the Respondent as throw away costs

20. In the end the application is allowed subject to;

- a. The 1st Defendant is granted leave to file her defence out of time.
- b. The annexed draft defence together with trial bundle is deemed as duly filed and the same to be served upon payment of the requisite Court fees within 7 days from the date of the Ruling.
- c. The Applicant is condemned to pay throw away costs in the sum of Kshs. 30,000/- to the Respondent within the next 7 days.
- d. In default of b and c above the orders hereby shall lapse.
- e. Parties to move with speed to have the matter heard expeditiously.
- f. Costs in cause.

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Wambui HB Mburu for Plaintiff

Gaya HB Kurui for 1st Defendant/Applicant

2nd and 3rd Defendants - Absent

Court Assistant – Phyllis

