



**Lubano & 2 others v Machuka & 4 others (Environment & Land Case 34 of 2022) [2024] KEELC 4503 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4503 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 34 OF 2022**

**FM NJOROGE, J**

**JUNE 6, 2024**

**BETWEEN**

**GEOFFREY MASINDE LUBANO ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH WAKOLI WEKESA ..... 2<sup>ND</sup> PLAINTIFF  
KIZITO MABISI LUBANO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**JUDY WANJIRU MACHUKA ..... 1<sup>ST</sup> DEFENDANT  
DAUDI MACHUKA ..... 2<sup>ND</sup> DEFENDANT  
REHEMA MACHUKA ..... 3<sup>RD</sup> DEFENDANT  
MARGARET NGINA MUIRU ..... 4<sup>TH</sup> DEFENDANT  
LEONARD MACHUKA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. On the 8/3/2024, the 1<sup>st</sup> Defendant filed a Notice of Motion dated 7/3/2024 under Order 51 of the Civil Procedure Rules, Sections 1, 1A, 3, 3A, and 63 (e) of the Civil Procedure Act, and all other enabling provisions of the law. In it she sought the following orders;
  - a. Spent.
  - b. That the honourable court be pleased to issue an order arresting delivery of the judgment of this matter pending delivery on any other date.
  - c. That the honourable court be pleased to issue an order re-opening the Plaintiff's case for cross-examination by the defendants.



- d. That the honourable court be pleased to issue an order re-opening the defendants' case for purposes of examination and for cross-examination of the defendants and their witnesses.
  - e. That the honourable court be pleased to grant leave to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants to file their defence out of time and an order that the draft defence annexed herein be deemed as duly filed on payment of requisite court fees.
  - f. Any other relief the honourable court may deem fit to grant.
  - g. That the costs of this application be in the cause.
2. The 1<sup>st</sup> Defendant has based her application on the grounds attached thereto and on her supporting affidavit dated 6/3/2024 wherein she deposed that the hearing notice for 16/1/2024 was served upon the 1<sup>st</sup>-4<sup>th</sup> Defendants' advocates on 21/12/2023 when the said advocates' offices were closed for the December holidays; that the said advocates resumed for work on 15/1/2024 but did not immediately see the email of service. She deposed that from the time when the said advocates resumed work to the date of hearing, there was no sufficient notice or time to enable her prepare for hearing and to travel from Nairobi where she resides. The Plaintiffs' case was therefore heard and closed. Equally, since neither of the defendants nor their advocate was present, the defence case was also marked as closed.
  3. She added that her advocate became aware of what had transpired on 2/2/2024 when he was served with the Plaintiffs' closing submissions in the suit. The 1<sup>st</sup> Defendant deposed that she has a good defence to the Plaintiffs' claim and if the orders sought are not granted, she will be prejudiced and so suffer irreparable harm. She annexed a copy of a draft statement of defence.
  4. The Plaintiffs filed a replying affidavit sworn by David Biketi Wati on 19/3/2024 wherein counsel deposed that the applicant did not give any reason for failure to file a defence for over 15 months. He deposed that the suit was fixed for formal proof on 16/1/2024 and that no sufficient reason was given to warrant the orders sought.
  5. On 20/3/2024, the court directed the 1<sup>st</sup> Defendant to file a further affidavit within 7 days thereof and written submissions with 14 days thereafter. The Plaintiffs were also granted leave to file written submissions within 14 days upon service of the Defendant's submissions. The 1<sup>st</sup> Defendant filed a further affidavit which she swore on 10<sup>th</sup> May 2024 but failed to file written submissions.
  6. The Plaintiffs filed submissions dated 20/5/2024 wherein they identified three issues for determination. Firstly, whether the honourable court should issue an order re-opening the defendants' case and/or arresting delivery of the judgment of this matter; secondly, whether the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are entitled to be heard in merit; and thirdly, whether the intended interlocutory judgment should be set aside/whether the defendants are entitled to leave to file their defence out of time/or after pleadings are closed.
  7. In relation to the first issue, counsel submitted that the standard factors to be considered in such an application include a) whether there is new evidence, and if yes, whether the evidence is relevant to the material issue in the case b) whether there is potential prejudice to the other party perchance reopening is permitted c) the effect of permitting re-opening on the orderly and expeditious conduct of the trial d) any other exceptional circumstance that would justify setting aside intended judgment and re-opening of the case.
  8. He added that the powers to recall witnesses is provided under Section 146 (4) of the *Evidence Act* and Order 18 rule 10 of the *Civil Procedure Rules*, 2010. To counsel, the reasons given by the defendants



- are unsatisfactory and their failure to attend court was deliberate. Counsel relied on Wavinya Mutavi v Isaac Njoroge & another [2020] eKLR and Shah v Mbogo [1969] EA at 123
9. On the second issue, counsel submitted that Article 47 of the Constitution provides for rights to fair administrative action that is expeditious, efficient, lawful and procedurally fair while Article 50 provides for rights to a fair trial. For emphasis on the principle of fairness, counsel cited the case of Ridge v Baldinn [1964] AC 40 [1963] 2 ALL ER 66. He submitted that the defendants' failure to honor the procedural guidelines and timelines was an insult to Section 1A and 1B of the Civil Procedure Act and a waste of judicial and the Plaintiffs' time. To this end, counsel relied on the case of Port Services Ltd v Mobay Under Sea Tours Ltd and Firemains Fund Insurance Co. SSCA 18/201.
  10. To him, the defendants' intention was only to assist him fill gaps and loopholes as was held in the case of Susan Wavinya v Isaac Njoroge & another [supra].
  11. In relation to the final issue, counsel submitted that the main reason why judgment may be set aside is if summons is not served. In this case, so counsel argued, there is no doubt that the summons was served in accordance with Order 5 of the Civil Procedure Rules and the defendants entered appearance but deliberately failed to file any defence or witness statements.
  12. Counsel continued that the discretion to set aside judgment is unfettered and is exercisable judiciously only in the interest of justice as was explained in the case of Murtanza Hassan & another v Ahmed Slad Kulmiye [2020] eKLR; Patel v EA Cargo Handling Services Limited [1974] EA 75; Sebei District Administration v Gasyali [1968] EA 300, 301-302.
  13. To counsel, having failed to meet the requirements necessary for the grant of orders sought and having failed to give any concrete reasons for the court to exercise discretion in their favour, the notice of motion must fail.

#### **Determination**

14. The Plaintiffs instituted this suit by way of a plaint filed on 7/6/2022 seeking orders inter alia that a permanent injunction be issued restraining the defendants from dealing with the land parcels LR No. 1705/233/6 and Kilifi/Mtondia/499, 500 and 501 (the suit properties). Alongside the Plaintiffs was a notice of motion application for interlocutory orders. On 20/6/2022, the firm of K. Lughanje & Company Advocates entered appearance for the 1<sup>st</sup>- 4<sup>th</sup> defendants, and subsequently filed a replying affidavit to the notice of motion on 22/6/2022. Notably, the said defendants did not file any statement of defence and on 21/9/2023 when the Plaintiffs filed a request for judgment against the defendants.
15. Interlocutory judgment was entered by the Deputy Registrar against the 5<sup>th</sup> Defendant on 3/10/2023 and against the 1<sup>st</sup>-4<sup>th</sup> Defendants on 24/10/2023. On 20/11/2023, the Defendants were marked absent the court fixed the matter for formal proof on 16/1/2023 in the presence of the Plaintiffs' counsel. On 16/1/2023 when the matter was slated for formal proof, again, the defendants and their advocate failed to attend court and the hearing of the Plaintiffs' case proceeded to conclusion and a judgment date was fixed.
16. The proceedings also reveal that an affidavit of service was filed on 12/1/2024 sworn by David Biketi Wati, indicating that the 1<sup>st</sup>- 4<sup>th</sup> Defendants' counsel was served with the hearing notice electronically via the email address henrylughanje@yahoo.com on 21/12/2023.
17. The Defendants do not dispute the above facts. However, they explain that the notice was served after their advocates' office had closed for the December holidays and was not seen in good time until 2/2/2024 when they were served with the Plaintiffs' written submissions.



18. Section 146 (4) of the *Evidence Act* grants the court powers to recall a witness. It provides as follows:

“(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

19. Similarly, Order 18 Rule 10 of the *Civil Procedure Rules* grants the court powers to recall any witness who has been examined. It provides thus:

“The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”

20. The guiding principles in re-opening a case were set out in *Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo* [2019] eKLR as follows: -

“...the court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others* (2018) eKLR; *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR; and *Ladd v Mashall* (1954) 3 All ER 745.)”

21. I have considered the reason given by the Defendants. The question is whether this court is satisfied that it is sufficient to warrant this court to exercise discretion in their favour. In Malindi ELC Case No. 7 Of 2024 the court stated as follows:

“11. *In Gabriel Osimbo v Chrispinus Mandare*, [2020] eKLR the Court of Appeal stated as follows:

“Taking into account Rule 4 in computing the 30 days, it is evident that the appellant’s appeal which was filed on 7th February, 2011 was filed within time as it was affected by the High Court vacation and the period, 21st December, 2010 to 13th January, 2011 had to be excluded in computing the time. The learned Judge was therefore wrong in dismissing the appeal.”

12. Therefore, having regard to Order 50 Rule 4, a further period of 23 days have to be deducted from the total period of delay between 11/12/2023 and 6/2/2024, that period being 27 days in total. That results in a delay of only 4 days and it is not inordinate enough to militate against the grant of the twin orders of



leave and stay. This court will therefore refrain from penalizing the applicants for that brief delay by barring their appeal.”

22. In view of that above holding and having regard to the circumstances of the present case, this court is therefore of the opinion that the defendant’s reasons for not attending court are sufficient to warrant its discretion. However, the Defendants stated that they became aware of the hearing on 2/2/2024 when they were served with the Plaintiffs’ submissions, but they waited for until 8/3/2024 to move the court with the present application. Secondly, the Defendants failed to explain why a defence had not been filed as and when required, even after having entered appearance. The inordinate delay in moving court and default of defence on the defendant’s part have persuaded the court that they do not deserve its discretion.
23. Further, even after filing this application, the Defendants failed to file written submissions as directed by the court. In my view, counsel for the Defendants and the Defendants portrayed themselves as persons not keen to prosecute the application and suit in general, but are instrumental in delay and obstruction of the course of justice. It must be remembered that justice cuts both ways and the other parties to this suit are entitled to an end to litigation.
24. The outcome of the foregoing analysis is that the court finds that the application dated 7/3/2024 lacks merit and the same is hereby dismissed with costs.
25. The suit will be mentioned on 13/6/24 for issuance of a judgment date.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 6<sup>TH</sup> DAY OF JUNE 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

