



**Nduruhu & another v Okeja & another (Environment and Land Case Civil Suit 235 of 2011) [2024] KEELC 6375 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6375 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 235 OF 2011  
LN MBUGUA, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**DAVID KIMANI NDURUHU ..... 1<sup>ST</sup> PLAINTIFF**

**ANTHONY JUMA WAGOKI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOACKIM WANDALE OJIAMBO OKEJA ..... 1<sup>ST</sup> DEFENDANT**

**TIM OKWARO T/A TIM OKWARO & CO. ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Judgment was entered for the Plaintiffs in this matter on 13.7.2023. Seven months later, the 1<sup>st</sup> Defendant filed the Notice of Motion application dated 20.2.2024 which is for determination. He seeks an order for stay of execution of the said judgment and a temporary injunction restraining the Plaintiffs from carrying away, moving, selling/auctioning his goods, that the judgment entered herein be set aside, as well as orders that the statement of defence on record be deemed to be properly on record and the matter be heard afresh. He also seeks costs.
2. The application is premised on grounds on its face and on the 1<sup>st</sup> defendant's supporting affidavit sworn on 20.2.2024. He avers that neither him nor his advocates were served with the hearing notice for the date the matter was heard, thus they were surprised to learn that the matter proceeded ex-parte. He contends that his defence raises triable issues relating to the agreement for sale which was breached by the Plaintiffs and it is imperative that he is given an opportunity to present such evidence.
3. He avers that Defendants were also not served with a notice of entry of judgment to allow them to take appropriate action. Adding that if stay is not granted, his family business will be totally destroyed and he will suffer irreparable damage.



4. The application is opposed by the Plaintiffs vide the 1<sup>st</sup> Plaintiff's replying affidavit where he avers that the matter came up for hearing before this court on 21.9.2021 when both parties appeared online and a time allocation for physical hearing at 12 noon was given, but the 1<sup>st</sup> Defendant failed to appear and the matter proceeded in default of appearance.
5. That subsequently, the 1<sup>st</sup> Defendant filed an application to set aside proceedings of the said date, which application was compromised and the 1<sup>st</sup> Defendant paid throw away costs. That the matter was then set down for hearing on 1.11.2022 but on that date, the 1<sup>st</sup> Defendant claimed to be sick thus the matter was adjourned for hearing to 5.6.2023 when neither the 1<sup>st</sup> Defendant nor his counsel appeared thus the matter proceeded in default of appearance.
6. That a judgment notice was served upon counsel for the 1<sup>st</sup> Defendant who appeared before court on 13.7.2023 and sought 30 days stay of execution which was granted, thus the judgment was not ex-parte.
7. The 1<sup>st</sup> Defendant's submissions are dated 20.6.2024 where he argues that he should not be condemned unheard as that would fly against the rules of natural justice. That he stands to suffer prejudice and irreparable loss if the judgment herein is not set aside as his properties are likely to be attached. He relied on the cases of *Samson Karino Ole Nampaso v Kaana Ka Arume Co. Ltd* [2016] eKLR, *Bank of Africa Kenya Limited v Put Sarajevo General Engineering co. Ltd & 2 Others* [2018] eKLR as well as *Belinda Murai & 6 Others v Amos Wainaina* [1978] KLR.
8. The Plaintiff's submissions are dated 24.6. 2024 where it is argued that the 1<sup>st</sup> Defendant has not demonstrated sufficient cause to warrant a stay order, pointing out that the application is made in bad faith after an inordinate delay and without disclosing the reason for the delay. It is submitted that the denovo hearing will only cause great prejudice to the Plaintiff as the case is old and the Defendants have not been keen in defending it. The case of *Khalid & 16 Others v Attorney General & 2 Others* (Application 32 of 2019) [2020] KESC 30(KLR) is relied upon.
9. It is also submitted that the Defendants have failed to demonstrate the triple requirements for grant of an injunction as stated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No.77 of 212 [2014] eKLR.
10. I have considered all the arguments raised herein. The issues falling for determination are; whether the judgment of 13.7.2023 should be set aside, whether a stay of execution of the said judgment is merited and whether an injunction in favour of the 1<sup>st</sup> Defendant should be issued.
11. On whether the judgment delivered on 13.7.2023 should be set aside, I find that the records of the court have aptly been narrated by the plaintiff. For emphasize, I will rehash the said records all over again.
12. The 1<sup>st</sup> Defendant was represented in the suit and his statement of defence dated 23.10.2019 is on record. On 21.9.2021, the parties appeared virtually and got a time allocation of 12pm for hearing. At 12 pm, the 1<sup>st</sup> Defendant and his counsel did not show up and the case proceeded in their absence and the matter was given a date for judgment on 15.12.2021.
13. The 1<sup>st</sup> Defendant promptly filed an application dated 21.9.2021 to set aside proceedings of 21.9.2021. The same was compromised on 8.11.2021 whereby the 1<sup>st</sup> Defendant paid the Plaintiff throw away costs of ksh. 10,000/=. Thereafter, on 19.9.2022, parties agreed by consent to have the matter heard on 1.11.2022. Come the date of 1.11.2022 and the 1<sup>st</sup> defendant's counsel stated that his client was apparently sick. By consent, the matter was postponed to 5.6.2023 to be heard virtually and it was marked as a last adjournment for the 1<sup>st</sup> defendant. Come the date of 5.6.2023 and neither the 1<sup>st</sup>



defendant nor his advocate was present. That is when the court scheduled the matter for judgment on 13.7.2023.

14. On the said date of 13.7.2023, counsel for the 1<sup>st</sup> defendant was present and even sought for a stay of execution of the judgment for 30 days which prayer was granted.
15. In the case of *Moschion v Mwangi* (Environment & Land Case 350 of 2018) [2023] KEELC 17144 (KLR) (27 April 2023) (Ruling) Neutral citation: [2023] KEELC 17144 (KLR), I stated that;  

“The right to be heard is sacrosanct and is embodied in the latin maxim “audi alteram partem”. However, a party is only entitled to reasonable opportunity to be heard.”
16. The discourse narrated herein clearly indicates that this is as situation whereby the 1<sup>st</sup> defendant drove himself away from the seat of justice as he was given ample opportunity to be heard, but he squandered that chance. It is therefore the finding of this court that the judgment given herein was procedural and no sufficient reasons have been advanced to have it set aside. It follows that the prayers for stay of execution and temporary injunction are spent. In conclusion, the application dated 20.2.2024 is found to be unmerited, the same is hereby dismissed with cost to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Njoroge holding brief for M/s Kanja for Plaintiff

Wangira Okoba for 1<sup>st</sup> defendant/Applicant

Court assistant: Joan

