



**Githinji v Mwadori (Environment & Land Case E051 of 2022)  
[2024] KEELC 6214 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E051 OF 2022  
EK MAKORI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**DAISY WAIRIMU GITHINJI ..... PLAINTIFF**

**AND**

**SAFARI WANJE MWADORI ..... DEFENDANT**

**RULING**

1. This Court, on the 6<sup>th</sup> of July 2023, delivered an ex parte judgment in favour of the Plaintiff/ Respondent against the Defendant/Applicant in this manner:

“The claim stands unopposed. The Plaintiff has proved she got the land in question by way of purchase. There is nothing on record to the contrary.

I will enter judgment for the plaintiff and issue the following orders:

- i. Mandatory orders directed at the Defendant, his agents, employees, relatives, assignees, and/or any other person authorized by him to quit/ vacate and/or hand over vacant possession of property No. Kilifi/Kibarani/987.
- ii. Failure to voluntarily vacate as provided in (i) above, the Defendant within 90 days hereof, and in the spirit of Section 152E of the Land Laws (Amendment) Act, 2016, The Defendant to be forcibly evicted from Land Parcel No. Kilifi/ Kibarani/987 and all structures erected on the suit property be demolished.
- iii. The OCS Kilifi Police Station to provide security during eviction to maintain Law and order.
- iv. A declaration does and is hereby issued that the Defendant is a trespasser and continues to trespass on the suit property.



- v. That pursuant to Article 40 of *the Constitution* the Plaintiff is entitled to compensation for violation of right to property but that the same is abandoned by the Plaintiff in her testimony.
  - vi. That the Plaintiff will also be entitled to the costs of the suit.
  - vii. The Defendant is to be served forthwith with the orders herein for compliance.
2. The Plaintiff/Respondent took out execution proceedings and was in the process of evicting the Applicant, who filed the current application dated 12<sup>th</sup> February 2024 seeking, among other prayers, the setting aside of the ex parte judgment, the decree emanating therefrom, consequential orders, and that all the proceedings be set aside and the suit to be heard de novo.
  3. In the sworn affidavit deposed on 12<sup>th</sup> February 2024, the Applicant avers that he was served with the pleadings and summons in this matter sometime in September 2022. Consequently, he instructed the firm of Richard O. & Co Advocates to enter appearance and defend him in the suit.
  4. The advocate assured him that all was well and that he had entered an appearance and filed a defense. He produced receipts to show that he paid the said firm's legal fees in installments. He later learned that the advocate did not file an appearance or defence on his behalf, an ex parte judgment had been obtained against him, and eviction orders had been issued.
  5. He has now approached the Court to have the judgment set aside and be allowed to defend it. He has a triable defence and has also filed a counter-claim pleading adverse possession, stating that he has been on the suit property since 1959, was born on this land, and knew no other home. That mistakes by counsel should not be visited on him.
  6. In the replying affidavit by the respondent, deposed on 7<sup>th</sup> May 2024, and the grounds in opposition dated 5<sup>th</sup> March 2024, the Respondent avers that the Applicant was duly served with the summons to appear on 2<sup>nd</sup> September 2022 and a return of service thereto filed on 7<sup>th</sup> September 2022. Interlocutory judgment was entered on 21<sup>st</sup> September 2022. The matter proceeded to formal proof, and judgment was delivered on 6<sup>th</sup> July 2023.
  7. The Applicant has shown no effort to follow his matter with the advocate.
  8. That the Respondent had issued an eviction Notice. The Applicant failed to exercise his rights to challenge the notice as provided under Section 152 of the *Land Act*.
  9. On 26<sup>th</sup> September 2023, the area OCPD and OCS visited the suit property in readiness to evict the Applicant. Negotiations ensued, and the Applicant allowed the Respondent to establish an access road. As the negotiations continued, the Applicant attacked the advocate for the Respondent, Mr. Olonde, and currently, there is an attempted murder charge standing against him over the assault on counsel.
  10. The Respondent believes that the Applicant has been indolent and should not be allowed to defend this matter since the judgment in place is regular. Therefore, the entire application should be dismissed with costs.
  11. From the materials placed before me, the issues that I frame for the decision of this Court are whether the Court should set aside the ex parte judgment in place and the consequential orders, whether the Defendant should be allowed to defend, and who should bear the costs of the current application.
  12. The Applicant filed submissions and cited several authorities to guide the Court in resolving the issues. I did not see submissions from the Respondent.



13. It is admitted that the judgment in place was regular, the Applicant having admitted service. As correctly submitted by the Applicant, citing the decision in *Shanzu Investment Ltd v Commissioner of Lands* [1993] eKLR, the Court, in the circumstances, ought to be guided as follows:

“The Court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the judge except that if the judgment is varied must be done on terms that are just: *Patel v EA Cargo Handling Services Ltd*, (1974) EA 75, 76B, C (CA-K). The jurisdiction to vary judgment being a judicial discretion should be exercised judicially; and, as is often said, whether judicial discretion should be exercised or withheld in a party’s favour, depends, on a large measure, on the facts of each particular case. The test for the exercise of this discretion are these: - First, was there a defence on the merits? Secondly, would there be any prejudice? Thirdly, what was the explanation for any delay?”

14. This Court then ought to exercise its discretion judicially and balance the scales of justice in a manner that will not injure any of the parties. Each case should be handled on its own merits.

15. The reasons for failing to file a defence or enter an appearance have been shifted to the former advocate of the Applicant, Mr. Otara. He allegedly failed in his primary duty to act in his client’s best interest by failing to enter an appearance and file a defence on his client’s behalf. Usually, when caught up with execution, this has always been the excuse rendered by parties—it is my advocate to blame!

16. Several judicial authorities have discussed it. The Respondent cited in the grounds in opposition the decision in *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi HCC No.397 of 2002*, where Kimaru J. held as follows on pushing the blame to an erstwhile advocate:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.”

17. Odunga J. put it this way in *Josephine Lunde Matheka v Gladys Muli* [2018] eKLR:

“This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court’s discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See *Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.*”



18. The Applicant avers he has triable issues disclosed in the annexed defence and a counter-claim; the defence will disclose that he has been on the suit property since 1959. He will be pleading adverse possession. This suit was filed in the year 2022. The Applicant has not explained his efforts to follow up with his advocate on the progress of his case. The record will show that the Applicant was charged with forcible detainer in the Kilifi Magistrates Court Criminal Case No.143 of 2014. He was acquitted, and one of the disclosures was that he had filed a pending civil matter in the Superior Court. In his disclosure in paragraph 23 of the annexed defence and Counter-claim he states:

“The plaintiff avers that he filed land case No. 6 of 2014 (O.S) – Safari Wanje Mwandori v Lapyony Company Limited and only recently discovered that the same was dismissed for want of prosecution despite having paid his then advocate, Mr. Richard Otara, to pursue on his behalf.”

19. No explanation has been given as to what the Applicant has been up to since 2014 to follow up on that matter – he still blames Mr. Otara for his mishaps. It is the same matter that the Applicant will seek reinstated in the Counter-claim here.

20. The Respondent has demonstrated that the Applicant has been aware of the impending eviction but has done nothing. As expressed by Odunga J. - in the Josephine Lunde Matheka Case (supra) – discretion cannot be exercised based on the following:

“private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously.”

21. Based on the foregoing, the Applicant does not deserve the exercise of discretion of this Court in his favour. Not even mercy and benevolence from this Court can help. He is not a vigilant litigant. All the time has been granted to him to ventilate his grievances before this Court. He has failed to take the chance.

22. The upshot is that the Application dated 12<sup>th</sup> February 2024 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Ms. Onyango for the Applicant

Mr. Hussein, for the Respondent

Happy: Court Assistant

