



**Mwaniki v Nzomo (Environment & Land Case 70 of 2008)
[2024] KEELC 7161 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 70 OF 2008
A NYUKURI, J
OCTOBER 30, 2024**

BETWEEN

ANTHONY NDUNDA MWANIKI PLAINTIFF

AND

WAVINYA BERNARD NZOMO DEFENDANT

RULING

Introduction

1. Before court is a notice of motion application dated 16th February 2024 filed by the defendant seeking orders that the firm of Kyalo, Muia & Company Advocates be granted leave to come on record for the defendant and that the exparte judgment and consequential orders be set aside so that the defendant is allowed to defend herself. The defendant also sought costs.
2. The application is supported by the affidavit of the defendant/applicant sworn on 21st February 2024. The applicant's case is that she was previously represented by the firm of Musyoka Kimeu & Company Advocates but now intends to change advocates and have the firm of Kyalo, Muia & Company Advocates represent her. She blamed her previous advocates for failure to attend court and failure to inform her of the proceedings herein which resulted in her not participating in the proceedings or cross examining the plaintiff.
3. She further stated that she had been condemned unheard as she had been assaulted by the respondent and had been bedridden for a long time. She stated that she had a triable defence and was only made aware of the status of the matter when she was served with eviction orders from Eastern (K) Auctioneers. She stated that if the orders are not granted, she stood to suffer irreparable harm as she will be evicted from the suit property which is her only home.
4. The application was opposed. The plaintiff filed a replying affidavit sworn on 12th April 2024. He stated that the firm of Kyalo, Muia & Company Advocates was improperly on record for failure to obtain



leave of court to come on record. Further that judgment in this matter was delivered way back on 4th October 2019 and stay of execution lapsed on 4th November 2019. He contended that the applicant had not explained the delay of 5 years which shows laxity and indolence on her part.

5. He further stated that the judgment shows that the court took into account the defence. He stated that the applicant had refused to give the plaintiff vacant possession and was only jolted into action upon being served with eviction orders from Eastern (K) Auctioneers. He maintained that the applicant has always been informed of the progress of the suit but the information was always met with intimidation, animosity and death threats and that at one point the defendant physically assaulted the plaintiff.
6. Regarding the applicant's allegation that she was bedridden, the respondent averred that the said allegation was false and aimed at misleading this court. He stated that the application was overtaken by events as the defendant had already been evicted from the suit property. He stated that the parties had been in court for over 16 years, since May 2008 and that the defendant was employing delay tactics.
7. On the applicant's allegation that she has a triable defence, the respondent stated that no draft defence was attached to the application.

Analysis and determination

8. The court has carefully considered the application and the response. Two issues arise for determination, namely;
 - a. Whether the firm of Kyalo, Muia & Company Advocates should be allowed to come on record for the defendant.
 - b. Whether there is sufficient cause for setting aside the *ex parte* judgment herein.
9. Order 9 Rule 9 of the *Civil Procedure Act* grants this court jurisdiction to grant leave to a new advocate appointed by a party who was previously represented by another advocate until judgment was entered. A party is in law entitled to an advocate of his choice, which is a right aligned to the Constitutional right to fair hearing. In this case, there is no objection raised by the respondent on the applicant's request to have the firm of Kyalo, Muia & Company Advocates replace the firm of Musyoka Kimeu & Company Advocates who previously represented the applicant until after judgment was entered. In the premises, I find and hold that the applicant/defendant is entitled to orders that leave be granted to the firm of Kyalo, Muia & Company Advocates to come on record for her in this matter in the place of Musyoka Kimeu & Company Advocates and that prayer is hereby allowed.
10. On the prayer for setting aside *ex parte* judgment, Order 12 Rule 7 of the Civil Procedure Rules provide the jurisdiction of this court to set aside *ex parte* judgment as follows;

Where under this order, judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just.
11. Therefore, the power to set aside *ex parte* judgment is discretionary, and the court ought to exercise that discretion judiciously and not whimsically.
12. In this case, judgment was delivered on 4th October 2019. Subsequently, the plaintiff filed a notice of motion application dated 30th July 2020 seeking the eviction of the defendant from the suit property and provision of security during the eviction process by the OCS Mwala Police Station. That application was opposed by the defendant who filed a replying affidavit sworn on 31st May 2021 stating that she had not been given opportunity to be heard and if she was evicted, she would be condemned



unheard. In a ruling delivered on 30th July 2021, the court allowed the plaintiff's application dated 30th July 2020 thereby ordering the eviction of the defendant from the suit property.

13. The defendant did not take any step thereafter even after complaining that she had been condemned unheard, until 22nd February 2024 when she had been served with eviction orders by Eastern (K) Auctioneers, that is when she filed the instant application. Therefore, it had been over four years since entry of judgment and over two years since the court ordered her eviction after hearing both parties. Although the defendant alleges to have been bed ridden all this time, the P3 form and medical chits produced relate to the period between January and March 2019. There is no evidence that the defendant was bedridden between March 2019 and February 2024. In the premises, no explanation has been given for the inordinate delay of over four years since the date of delivery of judgment. In addition, the defendant's allegation that she has a triable defence is not demonstrated as she has not mentioned any legal or equitable interest that she has in regard to the suit property, and apart from alleging that she has been in occupation of the suit property she has not given any legal or equitable basis for her occupation and therefore the question of having a triable defence does not arise and or is not proved.
14. On the defendant's allegation that her advocate had not been informing her of the progress of the matter and not attending court, the same cannot be true because after judgment, the plaintiff filed application dated 30th July 2020 in response of which the defendant filed a replying affidavit. It is clear therefore that the defendant has been aware of the goings on in this matter.
15. In the premises, I am not convinced that the defendant deserves orders for setting aside the judgment herein. Save that the firm of Kyalo, Muia & Company Advocates has been granted leave to come on record in this matter for and on behalf of the defendant, the defendant's application dated 16th February 2024 is hereby dismissed with costs to the plaintiff.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 30TH DAY OF OCTOBER 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Mutua for plaintiff/respondent

No appearance for the applicant

Court assistant – Josephine

