



**Shoka v Ndoro & another (Environment & Land Case 64 of 2008)
[2024] KEHC 13195 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 64 OF 2008
FM NJOROGE, J
OCTOBER 30, 2024**

BETWEEN

JONATHAN MSUKO SHOKA PLAINTIFF

AND

DAVID NYIRO NDORO 1ST DEFENDANT

SAMUEL GONA NDORO 2ND DEFENDANT

RULING

1. The application dated 22nd May, 2023 brought under Order 10 Rule 11 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act has been placed before this court for determination. It seeks the following orders:
 - a.Spent;
 - b. That the orders issued in this matter on 27th October, 2021 be set aside and the Plaintiff herein be granted leave to defend the application dated 5th August, 2021;
 - c. That the Plaintiff be granted leave to file a Replying affidavit in response to the application dated 5th August, 2021 in terms of the draft Replying affidavit herein annexed;
 - d. That the costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the supporting affidavit sworn by Jonathan Msuko Shoka on even date. He deponed that the suit was heard and judgment delivered on 10th December, 2010 at which time he was represented by the firm of Mwarandu & Company Advocates; that after judgment he took his file but his former advocate did not inform him that there was a pending application. He also deponed that he later learnt that an application was filed by the defendants seeking orders to subdivide and transfer the suit property Kilifi/Ngerenyi/621.



3. He asserted that he is the registered owner of the said land parcel which is the subject of this suit. According to him, there has never been a case filed seeking for cancellation of his title deed nor subdivision of the suit property. In addition, such prayers were not part of the present suit or the counterclaim. He stated that he stands to suffer great prejudice and irreparable loss if not granted a chance to defend himself. He further stated that he was not served with the said application and as such, he was unable to participate in the prosecution of the said application; that the Respondent will not be prejudiced in any way if the orders sought herein are granted as he will have a chance to defend his claim as well.
4. In response, the Respondent only filed submissions dated 15/8/2024. It was submitted that the defendants would be prejudiced by the grant of the orders sought as they would continue to wait for the fruits of their judgment; that the application dated 8/8/2021 seeks the Registrar do sign the mutation forms, transfer forms and/or any other documents so that the Defendants/ Respondents herein obtain title deeds for their respective subplots. It was also asserted that the Plaintiff's averments that the orders were not prayers in the main suit does not hold water because the defendants/applicants had executed the order/decreed pursuant to the land award in which the Kilifi Magistrate court entered judgment in Kilifi SRM land Disputes No. 4 of 2002 Samuel Gona Ngoro & 2 others vs Elijah Ngoro. Further, it was submitted, there is evidence that the application dated 5th August 2021 was served thus the Honourable court granted the prayers on 27th October, 2021.

Disposition.

5. I have considered the application dated 22nd May, 2023 and the affidavit against the same by the Respondent. I have further considered the submissions by the Respondent. The issue for determination is whether the Applicant is entitled to have the orders issued in this matter on 27th October, 2021 be set aside.
6. The record reflects that this is a matter that was filed in 2008 and judgment delivered on 10th December, 2010 when both the Plaintiff's suit and the counterclaim were dismissed. The applicant asserts that after judgment, he took his file but his former advocate did not inform him that there was a pending application. He also depones that he later learnt that an application was filed by the defendants seeking orders to subdivide and transfer the suit property Kilifi/Ngerenyi/621. The Respondents on the other hand contend that the application seeks to have the Registrar sign the mutation forms, transfer forms and/or any other documents so that the Defendant/ Respondent obtain title deeds for their respective subplots
7. I have also perused the application dated 5th August, 2021 which the applicant seeks to participate in and I note that the applicants now want the Plaintiff to sign/execute mutation forms, transfer and any other documents to enable Samuel David Ngoro, Joseph Kadenge Ngoro and David Ngoro to obtain title deeds for their respective portions of title Number Kilifi/ Ngerenyi/621. The applicant/ Respondent on the other hand suggests that he was locked out from participating in that application and in fact has annexed a draft response to the said application.
8. Order 51 Rule 15 of the Civil Procedure Rules is the provision which caters for situations where a court proceeds ex parte in an Application. It provides that "The court may set aside an order made ex parte." The powers of the Court to set aside ex parte proceedings and orders is thus unfettered but it must be exercised judicially. The vital consideration in setting aside applications is focused on which determination results in the maximum scale of justice for all the parties in the circumstances of each case. In the case of Patel v E.A. Cargo Handling Services Limited (1974) E.A. 75 the Court was of the



view that the discretion of the Court in setting aside ex parte judgments or rulings is very wide. It was stated therein that:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”

9. In the present application, the applicant seeks this court to participate in the application dated 5th August, 2021 and in my opinion I find that no prejudice will be suffered if the orders given on 27th October, 2021 are set aside. In the circumstances, this Court hereby allows the notice of motion dated 22/5/2024 and issues an order setting aside the proceedings of, and vacates orders made on, 27/10/2021. In addition, the plaintiff is hereby granted leave to file his replying affidavit in opposition to the motion dated 5/8/2021 within 14 days from the date of this ruling. If the defendants find it necessary, they shall file and serve a further affidavit within 14 days of service of the plaintiff’s response upon them and the submissions of the applicant shall be filed and served within that same period; the submissions of the plaintiff/respondent shall be filed and served within 14 days of service of the applicants’ submissions or in any event within 42 days from the date of this order. This matter shall be mentioned on 19/12/24 for issuance of a ruling date.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF OCTOBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

