Waithanji v Chief Land Registrar Ministry of Lands & another (Environment & Land Case 501 of 2017) [2024] KEELC 13406 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13406 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 501 OF 2017

LN MBUGUA, J

NOVEMBER 22, 2024

BETWEEN

ELIAS BARAGU WAITHANJI ..... PLAINTIFF

AND

THE CHIEF LAND REGISTRAR MINISTRY OF LANDS ..... 1ST DEFENDANT

JOSEPH MWANGI MAINA ..... 2ND DEFENDANT

RULING

1. Before me is the 2nd defendants Notice of Motion Application dated 15.7.2024 seeking orders that the firm of Kamuti Waweru & Company be allowed to come on record for the 2nd defendant instead of M/S Ondieki Orangi Advocates, that the judgment delivered herein be set aside for the suit to be heard on merits, and that the warrants of arrest against the 2nd defendant to commit him to civil jail be lifted.

2. The application is premised on the grounds on the face of the application and a supporting affidavit dated 15.7.2024. The applicant contends that the judgment was erroneously and illegitimately entered against him as he was never made aware of the proceedings herein, terming the proceedings and the judgment as forgeries.

3. In his submissions, the applicant reiterates that the judgment was entered exparte against him on 15.12.2021, and his advocate never communicated to him about the same. He only learnt about the matter when he was served with a warrant of arrest on 6.6.2024. Citing the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No. 1 of 2017, the applicant avers that the rules of natural justice require that he should not be driven away from the seat of justice.

4. The plaintiff opposes the application *vide* his Replying Affidavit dated 28.8.2024 where he contends that the judgment was a regular one as the applicant had been served with all the court processes, adding that there has been an inordinate delay in filing this application. He also states that the applicant has not raised any triable issues to warrant an order of overturning the judgment.

5. In his submissions, the plaintiff reiterates that the applicant has waited for two years to bring forth this application, adding that the applicant had actively participated in these proceedings. The plaintiff relies on the case of *James Kanyita Nderitu vs. Marios Philotas Ghika & Another* (2016) eKLR.

6. The plaintiff further contends that the warrants of arrest are proper as the applicant was given a notice to show cause leading to the warrants of arrest.

7. I have considered all the arguments raised herein. There is no controversy on the prayer for a new advocate to come on record. Thus the issues falling for determination are whether the judgment delivered on 15.12.2021 should be set aside for the applicant to tender his evidence.

8. The setting aside of a judgment is anchored on a court's unfettered discretion. The Court of Appeal in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR made reference to the Supreme Court of India decision in *Sangram Singh v. Election Tribunal, Koteh,* AIR 1955 SC 664, at 711 where it was held as follows:

> " There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

9. The applicant terms the judgment delivered on 15.12.2021 as an irregular, illegitimate and a forged judgment. Those are certainly very serious allegations requiring the applicant to demonstrate with cogent evidence as to how he arrived at that conclusion.

10. Even though the case number herein is indicated as *ELC 501 of 2017*, the history of the litigation is well captured at the beginning of the judgment where it is indicated that the case was filed in the High court 24 years ago in the year 2000! But this case was consolidated with even an older case 221 of 1999 which had been filed by the current applicant, meaning the dispute is even older than 25 years!

11. The records of the file and as captured in the judgment indicate that the applicant was actively present in the litigation arena throughout the lifespan of the suit, with the applicant's advocate participating in a rather detailed pretrial exercise on 16.9.2021, when the dates for hearing were fixed by consent on 15.10.2021 and 22.10.2021. Come the date of 15.10.2021 and both the applicant and his advocate were a no-show. That is when the case *ELC No. 221 of 1999*, where the applicant was the plaintiff was dismissed.

12. On the date when the plaintiff in case *ELC No. 501 of 2017* proceeded on 5.11.2021, the applicant herein was represented by his advocate, one Macronald. When the plaintiff took to the stand, the advocate for the applicant just walked out and the court recorded this conduct in the following words; "At this point, the court notes that Advocate Macronald has just left the court room". And when the judgment was delivered on 15.12.2021, the same advocate was present and he even prayed for leave to appeal.

13. Since the applicant had filed his case 221 of 1999 25 years ago, what then did he do to have it prosecuted!. I find that the applicant has not given any tangible evidence as to why he did not appear in court to give evidence, and his explanation that he learnt about the proceedings in June 2024 is hollow, having been the one who initiated the proceedings in the older case of 1999!

14. The applicant tends to blame his advocate for his none appearance. However, in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR cited in *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, it was stated that;

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

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 as follows on the right to be heard:

> " 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, See *Nginyanga Kavole v Mailu Gideon* (2019) eKLR. The instant case appears to be one of mere inaction which is not excusable. Thus this is a situation whereby the plaintiff has driven herself from the seat of justice."

16. Similarly, this too is a situation where by the applicant drove himself from the seat of justice, yet he was in the litigation arena for a period of over two decades.

17. While severing a Gordian Knot which had choked a case for decades, the court in the case of *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & Another* [2019] eKLR (Judge Mbugua) stated as follows;

> " In exercising its judicial authority this court has a duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our constitution is "the expeditious delivery of justice" –see Article 159 (2) (b) of the *Constitution* of Kenya, which in effect codifies the 17th century maxim "Justice delayed is justice denied". This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide.
>
> The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its blue print "Sustaining Judiciary Transformation - (SJT 2017 - 2021)" where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases which had clogged the justice system for many years.".

18. In the case at hand, the cases dates back 24 and 25 years ago, and the applicant wants the said cases to be reopened which flies against the principles set out in the above mentioned case. All in all, I find that the Application dated 15.7.2024 is not merited, the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Kinyua for Plaintiff Respondent

Waweru for 2nd Defendant

Court Assistant: Vena