



**KCB Bank Limited (Formerly Kenya Commercial Bank Limited) v Kanyaru & 2 others;
Methodist Church In Kenya Registered Trustees & 2 others (Intended Defendant) (Environment
& Land Case 260 of 2017) [2024] KEELC 13499 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13499 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 260 OF 2017
LC KOMINGOI, J
NOVEMBER 21, 2024**

BETWEEN

KCB BANK LIMITED (FORMERLY KENYA COMMERCIAL BANK LIMITED) PLAINTIFF

AND

REV DR STEPHEN KANYARU 1ST DEFENDANT

REV ISAIAH DEYE 2ND DEFENDANT

REV SAMUEL GUANTA (SUED AS THE TRUSTEE OF THE METHODIST CHURCH OF KENYA) 3RD DEFENDANT

AND

METHODIST CHURCH IN KENYA REGISTERED TRUSTEES INTENDED DEFENDANT

THE PRESIDING BISHOP METHODIST CHURCH . INTENDED DEFENDANT

OFFICE OF THE ATTORNEY GENERAL (FOR KAJIADO COUNTY GOVERNMENT) INTENDED DEFENDANT

RULING

1. This is the Notice of Motion dated 5th January 2024 brought under; (Order 51 Rule 1, Order 22 Rule 51 and 52, Order 10 Rule 9, 10, 11 and Order 40 Rule 1 and all the other enabling provisions of the law).
2. It seeks orders;
 1. Spent



2. Spent
 3. Spent
 4. Spent
 5. An Order be and is hereby issued to set aside the Judgement entered in default of appearance issued on 2nd November, 2017 and leave be granted to the Intended Defendant to file a defence against the Respondent/Plaintiff's claim.
 6. Upon the grant of prayer 5 above, that the Court be pleased to order that the names of the 1st, 2nd and 3rd Defendants to be struck out and the 1st, and 3rd Defendants to be struck out and 1st, 2nd and 3rd Intended Defendant be added, service being effected by the Plaintiff/Respondent, on such terms as it may appear to be just.
 7. Upon issuance of Orders for setting aside and addition of parties, leave be granted for 1st and 2nd Applicant/Intended Defendants to file their draft defence together with the list of documents, list of witnesses and the witness statements within 14 days from the date of the order.
 8. The court be pleased to grant leave to the Advocate holding conduct of the suit for the Applicants/Intended Defendants to come into the courts Record for the Applicants in this suit.
 9. The court be pleased to issue orders that the OCS Kajado Police Station to enforce its orders.
 10. The costs of the application be in the cause.
3. The grounds are on the face of the application and are set out in paragraphs 1 to 24.
 4. The Application is supported by the affidavit of Bishop Isaya Deye, Presiding Bishop of the Methodist Church and Chairperson of the Board of Trustees, the 1st Intended Defendant, sworn on the 5th January 2024 and the Supporting Affidavit of Prof. Zablon Thamburi former Presiding Bishop of the Methodist church in Kenya sworn on the 5th January 2024.
 5. The Application is opposed. There is a Replying Affidavit sworn by Lilian Sogo, Head Counsel Litigation of the Plaintiff/Respondent, sworn on the 27th February 2024.
 6. On the 9th July 2024, the court with the consent of parties directed that the Notice of Motion be canvassed by way of written submissions.

The Defendants'/Applicants Submissions.

7. They are dated 22nd July 2024. Counsel has submitted that the Application has met the threshold for setting aside a Judgement dated 2nd November 2017 and decree issued on 19th December 2017. He has put forward the cases of Stek Cosmetics Limited Vs. Family Bank Limited & Another (2020) eKLR; Mrao Limited Vs. First American Bank of Kenya Limited & 2 others; Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others.
8. Counsel further submitted that the Applicants have demonstrated that the Plaintiff sued the wrong parties who lacked capacity to defend the suit even if they could have been served. That the allegation that there were negotiations could not be true as no single document with the seal of the Methodist Church was produced or filed in court.
9. It is further submitted that the Application has been made without undue delay.



10. It is submitted that the 3rd Defendant was already dead by the time of the hearing of the suit. There was need to substitute the deceased, Defendant. The 1st Defendant was defrocked and it was not until 12th June 2023 when he was reinstated.
He has put forward the cases of James Wangalwa & Another Vs. Agnes Naliaka Cheseto (2012) eKLR; Silverstein Vs. Chesoni (2002) 1KLR 867.
Reliance is also placed on Order 42 rule 6(2) of the Civil Procedure Rules and Order 45 rule 3 of the Civil Procedure Rules.
11. It is submitted that the letter of Allotment to the Plaintiff, issued in the year 2006, was issued after the one to the Methodist Church in Kenya in 2005 and they developed the property.
That the Plaintiff has never occupied the suit property.
12. It is also submitted that the Applicants are challenging the validity of the title deed and how it was attained hence if the orders are not granted they will be condemned unheard. He has put forward the case of Masisi Mwita Vs. Damaris Wanjiku Njeri (2016) eKLR .
13. It is also submitted that the Applicants have demonstrated a prima facie case with a high probability of success. They pray that the Application be allowed with costs.

The Decree Holder's/Respondent's Submissions.

14. They are dated 9th September 2024. Counsel submitted that prayers No. 2, 3 and 4 of the Notice of Motion have been spent and overtaken by events as they were not granted by this Honourable Court in the interim stage.
15. It is also submitted that the Applicants are not entitled to an order of setting aside the Judgement hence it should not be granted.
16. It is the Decree Holder's submission that the Judgement entered on 2nd November 2017 entered was a regular default Judgement as the Defendants had been duly served.
He has put forward the case of John Muthee Ngunjiri Vs. Ali Ibrahim (2021) eKLR where the court cited with approval the case of James Kanyिता Nderitu & Another Vs. Marius Phillotas Chikas & Another (2016) eKLR .
17. It is submitted that the Applicants have failed to demonstrate the reasons for failure to enter appearance and file defence within the prescribed period.
The Defendants instructed M/s Njagi Wanjeru & Co. Advocates to represent them in this matter after the default Judgement was entered in the year 2017. It has been six years and 7 months after the Judgement dated 2nd November 2017 was entered.
The Defendants and Applicants are guilty of laches.
He has put forward the Case of Kyangavo Vs. Kenya Commercial Bank Limited & Another (2004) eKLR .
18. The Application has been brought after an inordinate delay.
19. It is also submitted that the Applicants have failed to annex a draft defence hence this Honourable Court is unable to determine whether the intended defence raises triable issues. He has put forward the cases of John Waruita Wakibia & another vs. Dalmas Pose Kileyia (2014) eKLR which cited with approval the case of Patel Vs. East Africa Cargo Handling Services Limited (1974) EA 75.



20. That in the absence of the draft defence, this Honourable Court can determine that the Applicants have no triable defence. They have failed to demonstrate that the intended defence raises triable issues.
21. It is also submitted that this Application is intended to frustrate the Plaintiff/Decree holder who has validly commenced the process of execution in a bid to enjoy the fruits of its Judgement. That the grant of the orders sought will extremely prejudice the bank which has been kept out of its property that has been encroached by the Defendants over the years.
22. It is also submitted that the Decree Holder/Respondent shall demonstrate that the Defendants were rightly sued as trustees of the Methodist Church in Kenya and therefore the issue of misjoinder and/or non-joinder of the parties does not arise.
23. It is also submitted that the Applicants have failed to demonstrate that they are necessary parties to these proceedings and that their presence will enable the court to effectively and completely adjudicate upon and settle all questions involved in this suit. He has put forward the case of James Bichage Kenyariri Vs Mayega & another KEHC 46178 (KLR).

Counsel also submitted that the Defendants were duly served with summons to enter appearance on 27th June 2012. The allegations by the Applicants that they were never served does not hold water as service was accepted and acknowledged.
24. The Defendants having been properly sued instructed the firm of Ms. Njagi Wanjeru & Co. Advocates to represent them in this matter and the issue of non –joinder, mis-joinder of parties does not arise.
25. It is also submitted that during the time of exchanging correspondences and holding meetings on an out of court settlement on the matter neither the Defendants nor the Applicants raised the issue that they were wrongly sued in the matter or that the wrong parties were joined as defendants to the suit.
26. Reliance is placed upon order 1 Rule 9 of the Civil Procedure Rules, 2010 and the cases of Zephir Holdings Limited Vs. Mimosa Plantations Limited & 2 others; William Kiprono Towett & 1597 others Vs. Farmland Aviation Limited & 2 others (2016) eKLR.
27. It is also submitted that this Honourable Court is functus officio and cannot entertain the issue of non-joinder/mis-joinder of parties as in the preset application as it has pronounced itself on the matter vide its Judgement delivered on 2nd November 2017. He has put forward the case of Kenya Industrial Estates Limited Vs. Anne Chepsiror & 6 Others (2019) eKLR where the court cited with approval the case of *Central Kenya Limited Vs. Trust Bank CA NO. 222 OF 1998*.
28. Counsel also submitted that the alleged non-joinder of the Applicants in this suit and mis-joinder of the Defendants cannot defeat the suit herein. He prays that the Application be dismissed.
29. I have considered the Notice of Motion, the affidavits in support, the response thereto, the rival submissions and the authorities cited. The issues for determination are;
 - i. Whether the court should set aside the default Judgement entered on 2nd November 2017.
 - ii. Whether the Defendants were properly sued by the Plaintiff/Decree Holder.
 - iii. Are the Applicants entitled to the orders sought?
 - iv. Who should bear costs of this Application?
30. It is the Applicants case that they have established a prima facie case with a probability of success. That if the Judgment is executed, it will be unfair, unjust and in contravention of the laws and virtues of natural justice and fair trial.



31. The Plaintiff/Decree Holder on the other hand states that the Defendants in the suit were properly served through its then trustees with summons to enter appearance on 27th June 2012. It is its case that the Judgement herein was entered properly.

In the case of John Muthee Ngunjiri Vs. Ali Ibrahim (2021) eKLR the court cited with approval the case of James Kanyiita Nderitu & another Vs. Marius Phillotas Chikas & Another (2016) eKLR where the court summarized the criteria upon which the courts exercise discretion of Jurisdiction as follows;

“In regular default judgement, the defendant will have been duly served with summons to enter appearance or to file a defence, resulting in default judgement. Such a defendant is entitled under Order 10 Rules 11 of the Civil Procedure Rules to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance of defence, as the case may be, the length of time that has elapsed since the default judgment was entered whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole, it is in the interest of justice to set aside the default judgement among others.”

32. I agree with the submission of the Plaintiff/Decree holder that the Defendants and the Applicants have failed to demonstrate the reasons for failure to enter appearance and/or file defence. The Applicants have brought this Application after an inordinate delay. The Judgement was delivered on 2nd November 2017. I find that the delay is inexcusable.

33. The Applicants have also failed to annex a draft defence for the court to have a glance as whether it raises triable issues.

I rely on the case of John Waruita Wakibia & Another Vs Dalmas Pose Kileyia (2014) eKLR where the court cited with approval the case of Patel Vs. East African Cargo Handling Services Limited (1974) EA 75 where the Court of Appeal as per Duffus, V.P stated as follows;

“I agree that where it is a regular Judgement as is the case here the court will not usually set aside the Judgement unless it is satisfied there is a defence on merits. In this respect defence on merits, does not mean in my view, a defence that must succeed it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

34. Order 1 rule 9 of the Civil Procedure Rule, 2010 provides that;

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it.”

I agree with the Plaintiff/Defendant’s Submissions that the issue of mis-joinder /non-joinder of the parties has been overtaken by events.

35. It ought to have been brought by way of defence but the Defendants squandered this opportunity.

I rely on the case of Kenya Industrial Estates Limited Vs. Anne Chepsiror & 6 others (2019) eKLR.

36. In conclusion I find no merit in this Application and the same is dismissed with costs to the Plaintiff/Decree holder.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF NOVEMBER 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Mathenge for the Plaintiff/Respondent.

Mr. C. Kimathi for the Defendants/Applicants.

Court Assistant – Mutisya.

