



**Wanjiku v Wainaina & 2 others (Environment & Land Case
498 of 2015) [2024] KEELC 13348 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 498 OF 2015
AA OMOLLO, J
NOVEMBER 21, 2024**

BETWEEN

ZACHARY THIRU WANJIKU PLAINTIFF

AND

**ALBERT NDICHU WAINAINA (BEING SUED ON HIS OWN BEHALF
AND ON BEHALF OF THE ESTATE OF TERESIA WANJIKU
WAINAINA) 1ST DEFENDANT**

GITHUNGURI RANCHING COMPANY LIMITED 2ND DEFENDANT

RUIRU DISRICT LAND REGISTRAR 3RD DEFENDANT

RULING

1. The 1st Defendant/Applicant filed the Notice of Motion dated 3rd June, 2024 and premised on Order 10 rule 11, Order 22 rule 22 and Section 3A of the *Civil Procedure Act*. The 1st Defendant/Applicant prays for ORDERS:
 1. Spent
 2. Spent
 3. Pending the hearing and determination of this application, there be a stay of execution of the judgment, decree and all processes against the 1st Defendant/Applicant and Warrant of attachment of movable property dated 7th November, 2023 against the 1st Defendant/Applicant nor any assets of the Defendant/Applicant should be attached by the Plaintiff/Respondent and or its agents M/S Betabase Auctioneers;
 4. Judgement entered on 3rd November, 2022 by Hon. Justice S. Okong'o against the Defendants be varied, varied and set aside;



5. The 1st Defendant/Applicant be granted unconditional leave to defend this suit and the case be re-opened to adduce evidence.
6. Costs of this application be awarded to the 1st Defendant/Applicant.
2. The application is founded on the grounds listed on its face and on the affidavit sworn in support thereof. The Applicant deposes that the effect of the judgment will result in his eviction from L.R No. Ruiru Kiu Block 2/3442. He states that his legal counsel never updated him on the hearing of the case. The Applicant asserted that they have lived on the suit property for over 30 years.
3. It is his case that his mother was allocated the suit property by the 2nd Defendant and who gave evidence to that effect during the hearing. He also averred that he was never served with a Notice of Entry of Judgment and that the auctioneer have threatened to cart away his goods. He urged that this court has powers to re-open the case and give him the opportunity to present his defence so that the case is determined on merits.
4. The Plaintiff/Respondent opposed the application by filing a replying affidavit sworn on 25th June, 2024. He deposed to having served the 1st Defendant with notice of judgment through his then advocate on record. That he was only woken up with the warrants of execution after the hide and seek he has played since this matter was filed in 2015.
5. The Plaintiff avers that while the suit was ongoing and even after its conclusion the 1st Defendant has continued to illegally subdivide and sell to 3rd parties the suit property herein and that it these persons that are using the applicant to bring this case forth in an attempt to defeat judgment delivered by the court. He added that the Applicant participated in the proceedings through his advocate who cross-examined the plaintiff and his witnesses.
6. That it's evident the applicant is twisting facts of this case to continue his illegal occupation of the suit-land which has been decreed to be property of the Plaintiff by this court and the execution commenced. That there are no reasons at all that have been adduced to compel this court to vacate the judgment on record by reopening this case long closed.
7. Both parties filed written submissions which I have had opportunity to read and consider. The principles for consideration for setting aside orders/judgment were enunciated in the case of Patel Vs EA Cargo Handling Services Ltd (1974) EA 75 which stated thus;

“There are no limits or restriction on the judge’s discretion except that if he does not vary the judgment he does as on such terms as may be just.... The main concern of the court is to do justice to the parties, and the court will impose conditions on itself to fetter the order discretion give to it by the rules.”
8. My role now is to determine whether the Defendant/Applicant has sufficient cause to merit the exercise of discretion in his favour. From the records, there is no dispute that the Applicant had a statement of defence on record. He was also represented during the hearing of the plaintiff’s first two witnesses. The advocate representing him cross-examined their witnesses in detail.
9. When the matter came up for further hearing, there was no representation and so PW 3 was heard and the Defendants’ case closed without adduction of evidence for non-attendance/want of prosecution. Although the 1st Defendant/Applicant avers that his advocate did not keep him with progress of the matter, he does not disclose when he visited that advocate’s office for updates.



10. It is trite the law that cases belong to parties not advocates and so the duty to know the status of his case rested squarely on the shoulders of the Applicants. Whether he is a pauper or not is no excuse for him not to have kept in touch with his advocate in this era where mobile communication has eased the cost of obtaining information. He does not state in both affidavits sworn in support of the application on the efforts he made to reach out to his previous counsel. Therefore, I find the Applicant guilty of indolence.
11. Be that it may, his arguments present that he has a reasonable defence to the claim as in the defence he is claiming that he has lived on the suit property for over 30 years and the allegation that they hold a parallel title. the plaintiff's submissions challenged the application under the heading of review of the judgment saying the Applicant has not met the grounds for review. Prayer 4 & 5 of the motion essentially sought for setting aside of the judgement and leave to defend the suit.
12. This court has powers under order 10 rule of the Civil Procedure Rules to set aside a judgment on terms that are just. In the instant case, on account that there is a defence on record that raises triable though the Applicant was indolent, I shall extend to him an opportunity to present his evidence. Consequently, I will allow the application in terms of prayer 4 - by setting aside the judgment entered on 3rd November, 2022 and prayer 5 – that the case is re-opened to enable the Applicant offer evidence in support of his defence.
13. The 1st condition attaching to the grant of the order setting aside the judgement, is that the matter will proceed to Defence hearing. The Defendants are denied the opportunity to re-call any witness who gave evidence in support of the plaintiff's case. The 2nd condition is premised on the fact that this application was brought at the execution stage. This means the plaintiff has incurred considerable costs and the order of setting aside is taking away fruits of judgment from his mouth. Thus, he is entitled to be compensated for the resulting inconveniences by way of thrown away costs. The same is awarded and assessed at Kshs.40,000/= payable within 30 days hereof. In default, he is at liberty to execute. Costs of this application to the Plaintiff/Respondent in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST NOVEMBER, 2024.

A. OMOLLO

JUDGE

