



**Wanjiru v Safari & another (Environment & Land Petition 305 of 2016)
[2024] KEELC 13959 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 305 OF 2016
FM NJOROGE, J
DECEMBER 18, 2024**

BETWEEN

REHEMA WANJIRU PETITIONER

AND

GEORGE FONDO SAFARI & ANOTHER RESPONDENT

RULING

The Application

1. The application subject matter of this ruling is dated 14/3/24 and it seeks the following orders;
 - a. That Ms Ombachi Moriasi & Co advocates be granted leave to come on record for the 2nd defendant;
 - b. That the proceedings dated 27/9/2021 be set aside to enable the 2nd defendant to be given a chance to participate in the proceedings and the suit herein;
 - c. That the judgment and decree herein be set aside to give the 2nd defendant a chance to be heard on merit;
 - d. That the draft defence exhibited be deemed as duly filed upon payment of requisite filing fees;
 - e. That the costs of the application be provided for.
2. The application has grounds on which it is premised set out at its foot and they are elaborated in the applicant's supporting affidavit attached to the motion. They are that the applicant is the registered owner of land known as Kilifi/Vipingo/547; that
3. The objection was disposed of by way of written submissions. The plaintiff filed submissions dated 7/10/2024 and she has recently become aware of the judgment in this matter whose effect will be that she will lose 2 acres therefrom if executed; that she was not served with summons to enter appearance



or pleadings and more particularly the amended plaint which directly affects her and so she could not enter appearance of defence; she also never instructed any advocate in the matter contrary to what she calls an error in the proceedings.

The Response.

4. The plaintiff opposed the application by filing her sworn replying affidavit dated 12/4/2024 through Khatib & Co Advocates. In it she deponed that the 2nd defendant is a beneficiary of the estate of the late Safari Kazungu's estate in equal position to the 1st defendant and was therefore aware of the ongoing suit in that capacity. It is further stated that she could have joined in the suit as an interested party but chose not to; that subdivision that took place during the pendency of a court order barring interference with the suit land is null and void; that the applicant and the 1st defendant were represented by Muranje & Co. Advocates and so the estate knew of the case; that her draft defence is a mere denial and does not raise triable issues to qualify to be taken through a full trial.

Submissions

5. The applicant filed submissions dated 8/7/2024. The plaintiff filed submissions dated 11/11/2024. I have considered both sets of submissions.
6. The applicant reiterated the matters in her application. She relied on the case of James Wangalwa and Another Vs Agnes Naliaka Cheseto Bungoma HCMisc Appl 42 Of 2011 for the proposition that the loss she would suffer need not be quantified in monetary terms, adding that the suit property is of sentimental value to her. She also relied on RWW vs EKW 2019 eKLR for proposition that there is need to safeguard the subject matter. Citing Order 10 Rule 2, she urged that the judgment be set aside.
7. The plaintiff on the other hand cited Times U Sacco Cooperative Society Ltd Vs Njuki & another 2022 eKLR and submitted that the end defendant inherited the property from her late husband and she was a co-beneficiary with the 1st defendant in that estate and was aware of the suit but chose not to participate. Further that Muranje & Co Advocates filed documents for the defendants and so both defendants were represented. Citing Abraham v Safi Petroleum Ltd & 6 Others 2011 eKLR she urged that no good explanation was given as to why the applicant failed to file appearance or defence within the timelines required.

Determination.

8. The issues for determination in the application are as follows:
 - a. Whether the proceedings and judgment in the matter ought to be set aside to give the 2nd defendant a chance to be heard on merit;
 - b. Who ought to bear the costs of the application.
9. The suit herein was filed against George Fondo Safari as administrator of the Estate of Safari Kazungu Kalama who had owned Kilifi/Vipingo/547. The defendant denied capacity to be sued in an affidavit dated 7/2/2017. Muranje & Co advocates filed a memorandum of appearance for the defendant on 4/5/2017. In the ruling dated 20/12/2017, the court noted that the defendant was interfering with the suit land and had entered the suit land and fenced off a portion thereof. It was stated that due process would require the defendant to take some lawful action against the plaintiff if he considered her occupation of the land to be devoid of any right.
10. An amended plaint was filed on 14/10/2019 joining the present applicant to the suit. A notice of change of advocates dated 19/2/2020 was filed by incoming advocates for the defendants Richard O.



& Co Advocates in lieu of Muranje & Co. Advocates. A reply to defendant's statement of defence dated 28/5/2020 was also filed on 15/6/2020.

11. The judgment states that the matter came up for hearing on 27th September 2021 and that an affidavit of service had been filed showing the defendants were served with a hearing notice.
12. Only one set of proceedings is in existence of that date of 27/9/2021. Only one affidavit of service was filed on 27/9/2021. Only one hearing notice was attached to that affidavit of service and it indicated that hearing was to be on 27/9/2021. However, the hearing notice was addressed to the already retired advocates, Muranje & co Advocates and not Richard O. & Co Advocates the latter who had taken up the matter from the former before the date of the hearing notice. The body of the affidavit of service was also emphatic that it was Muranje & Co Advocates who had been served, and not Richard O. & Co Advocates.
13. Service of the defendants' former advocates was not proper service. The new advocates Richard) & Co advocates ought to have been served with a notice of hearing for 27/9/2021 but they were not. Further, the 1st defendant and not the 2nd defendant, is and wrongfully so going by the applicant's disclosures, described as administrator of the deceased's estate. It is doubtful that the suit proceeded against the right person as administrator. On the basis of the foregoing I am persuaded that there was no service on the 2nd defendant and I therefore allow the application dated 14/3/2024 and grant prayers no 5 and 6. Leave is also granted to the 2nd defendant to file and serve a defence in the suit. The defence, together with lists of documents, lists of witnesses, duly paginated bundle of documents, and witness statements shall be filed and served within 30 days hereof. Parties shall maintain the prevailing status quo on the ground pending the re-hearing and determination of the suit. The costs of the application shall be in the cause. This suit shall be mentioned on 28/1/2025 for issuance of a hearing date.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

