Kenya Power & Lighting Co Ltd v Gachagua & 2 others (Being sued as officials of Jada "B" Jua Kali Association) & 4 others (Environment & Land Case 1453 of 2007) [2024] KEELC 13927 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13927 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1453 OF 2007

LN MBUGUA, J

DECEMBER 17, 2024

BETWEEN

KENYA POWER & LIGHTING CO LTD .... PLAINTIFF

AND

ISAAC GACHAGUA, HUSSEIN GODANA AND PETER B N NJIRU (BEING SUED AS OFFICIALS OF JADA "B" JUA KALI ASSOCIATION) .... 1ST DEFENDANT

GAMAU WAINAINA, DAVID GATHI AND RACHAEL NJERI (BEING SUED AS THE OFFICIALS OF JADA "A" JUA KALI ASSOCIATION) ...... 2ND DEFENDANT

PANEL GRACE CENTRE .... 3RD DEFENDANT

CHRISCO CHURCH .... 4TH DEFENDANT

NAIROBI CITY COUNCIL .... 5TH DEFENDANT

RULING

1. Judgment was delivered in this matter on 26.9.2024 in favour of the plaintiff. The 1st - 3rd defendants have filed an application dated 22.10.2024 seeking orders that the aforementioned judgment be stayed and set aside. They also seek orders that the firm of Kadenge advocates be allowed to come on record in place of Khaminwa and Khaminwa advocates.
2. The application is premised on grounds on the face of the application and the supporting affidavit of one Anthony Mwangi Mbuthia, the chairman of the 1st defendant. He avers that they learnt of the judgment via a newspaper advertisement of 16.10.2024. He contends that the plaintiff is not the owner of parcel L.R.11344.

3. In their submissions, the applicants contend that they have complied with the provisions of Order 9 rule 9 by notifying the previous advocates that they now have a new advocate. Citing the case of *Wachira Karani vs. Bildad Wachira* (2016) eKLR and *David Gicheru v. Gicheha Farms Limited & Another* [2020] eKLR, the applicants contend that the justice of this matter as well as the good sense call for this court to exercise discretion in their favour. They further contend that their defence filed by their previous advocates does raise triable issues. They attribute their failure to appear in court to lack of notification, and that such mistakes should not be vested upon them. To this end, they rely on the case of *Murai v Wainaina* (No.4) 1982 KLR 38 amongst other cases.

4. The application is opposed by the plaintiff via the Replying Affidavit of their advocate, one Dennis Maanzo. He contends that the applicants were well aware of this matter as they were represented by Khaminwa & Khaminwa advocates who were duly served with the requisite documents. He added that during the 20 years that the matter was in court, (the same having been filed initially in 2004 in the High Court), the applicants never demonstrated any interest in the matter. He avers that no sufficient reasons have been proffered to warrant the grant of the orders sought.

5. It was submitted for the plaintiff that the defendants were duly served with summons to enter appearance, that is why they appointed an advocate to represent them in the case. Relying on the case of *Busuru & Busuru Investments Limited v Waraba & Another (*Civil Application E094 of 2023) (2023) KECA 1371 (KLR) (17 November 2023), it was argued that equity does not aid the indolent, and that in the case at hand, the applicants have been indolent for a period of 20 years.

6. This is a case whereby the applicants opposed the suit vide an amended statement of defence filed on 2.8.2019, thus it is not a case where they were not served with summons to enter appearance. In *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR, the Court of Appeal stated that;

> " 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 or 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 judgment, among other. See Mbogo & Another v. Shah (Supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173)."

7. As rightly pointed out by the plaintiff, this case has been in court for a record 20 years and counting, having been filed in the High Court in the year 2004. In the case of *Lawrence Kinyua Mwai v Nyariginu Farmers Co Ltd & Another* [2019] eKLR, the court (Mbugua J) stated that;

> " 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".

8. The applicants have not given any plausible explanations as to the efforts they made in the lifespan of this suit to ensure that the matter was prosecuted speedily. They are now blaming their advocates post judgment. Where were they all this time.

9. In the case of *Mwangi Gachiengu & 2 Others – Vs - Mwaura Githuku & Another* – (2019) eKLR, it was held that;

> "It is trite law that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter. Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter..."

10. I also find that the defence of the applicants was that they had been allocated the land by the Nairobi City Council (now a County), but they never filed any supporting documents to that effect, as stipulated under Order 3 rule 2 of the *Civil Procedure Rules*.

11. All in all. I find that the application dated 22.10.2024 is not merited, the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17th DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:

Maanzo for Plaintiff

Kadenge for 1st and 3rd Defendants

Court Assistant: Vena