Mrabu v Mlagui; Hare & 5 others (Interested Party) (Environment & Land Case 134 of 2015) [2024] KEELC 14170 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14170 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 134 OF 2015

FM NJOROGE, J

DECEMBER 10, 2024

BETWEEN

DOMINIQUE LEWA MRABU .... PLAINTIFF

AND

AGNES SHAKO MLAGUI .... DEFENDANT

AND

BEATRICE MWAKA HARE AND 5 OTHERS .... INTERESTED PARTY

RULING

1. The application dated 23/6/2024 has been filed by the defendant. She seeks orders that judgment dated 22/11/2019 be set aside and the interested parties be joined to the suit, and both the defendant and the interested parties be allowed to file their defence in the matter.
2. The grounds for the application are to be seen on its face and in the supporting affidavit attached, sworn by the defendant. They are that Marende Birir Shimaka & Co Advocates and Mwarandu & Co Advocates both filed memoranda of appearance on different dates in this matter purporting to represent her but both firms failed to file documents on her behalf. However, the advocates cross examined the witnesses and Mwarandu filed submissions. that both firms did not have her instructions and she was never served with pleadings. Judgment was entered against her in 2019. That the court observed that the evidence of the plaintiffs was that the defendant had been on the land even before it was sold and that she was never heard to enable the court make a just determination. The defendant avers that she has been in occupation of the suit land for over 40 years which is the only home that she knows. However, in July 2021 the defendant's home was demolished by unknown persons without any court order being shown to her; she also filed a suit which was dismissed on the ground of being res-judicata this suit. an earlier application seeking to set aside the judgment had been filed on 20/11/2023

but was struck out on the basis of want of capacity on the part of the advocate to swear the affidavit on contentious facts in support of the application.

3. The 1st plaintiff filed a sworn affidavit dated 23/9/24 in opposition to the application. It was stated in that affidavit as follows: that the court bailiff obtained warrants and executed the judgment by evicting the defendant and demolishing her structures on the suit property and the execution was lawfully carried out; that the court pronounced itself with finality and is functus officio; that there is no case for resuscitation by way of setting aside the judgment; that the delay in lodging the present application is inordinate and inexcusable; that in any event it has been admitted that the applicant was represented by counsel during the proceedings; that a different suit was filed instead of setting aside; that the applicant lacks candour; that the attempt to join interested parties is incompetent as no active suit is pending.

Determination.

4. I have considered the application and the response. The main issue that arises is whether or not the judgment of this court dated 22/11/2019 ought to be set aside.

5. It is the soundness of the grounds on which the setting aside application is premised that will determine its success of failure. The principal ground is that the applicant was not heard. It is a very rare occurrence that an advocate may proceed to file a memorandum of appearance and proceed to appear at the hearing without instructions from a litigant. Even the applicant acknowledges that she was represented by advocates at the hearing. This court is not, and neither was the plaintiff at the time of the hearing or even now, privy to the existence or lack thereof, of a contractual relation between the defendant and the two firms of advocates who represented her at the hearing. To the ordinary eye the applicant had high powered and formidable representation of two law firms and was heard at the trial though defence was filed on her behalf. Unless the present applicant can prove that she has raised complaint with a professional body that deals with advocates' disciplinary issues, the only conclusion may be arrived at is that she instructed those counsel who appeared for her at the hearing. I have not seen any evidence of such complaint. Secondly unless the advocates have been joined to a suit raising a claim against them that they acted without instructions and occasioned the applicant loss, it is not possible to believe that she was truly unrepresented at the hearing. She can not turn around and deny that she was heard and this court must disbelieve her claim that she did not instruct those advocates. The inevitable conclusion is that the applicant was heard. In this court's view the only avenue open to her, having failed to file a defence was to lodge an appeal on legal issues which she did not do.

6. The second observation is that the applicant has taken so long to approach this court that even her eviction from the suit premises in execution of the judgment has been effected by the court bailiff. There is no doubt that the applicant has been evicted from the suit premises and the process that the plaintiff commenced for the purpose of delivering the land to his hands has borne the final fruits it was intended. Notwithstanding that the applicant's principal plea in her application is that she was not heard, the matter has been concluded.

7. In Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76, the court held:

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."

8. In any setting aside scenario, justice to the parties is of paramount consideration. In the case of Shah v Mbogo and Another [1967] EA 116 the court held as follows regarding setting aside:

> " The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice."

9. Though this court has a very wide discretion to set side judgment, the question arises as to whether it can set aside the judgment and still do justice to the two parties herein. Of the two parties the concern is mainly whether it would be justice to the plaintiff if the judgment obtained in a suit where the defendant was represented by two counsel is set aside on the basis of alleged lack of authority on the part of the counsel while no formal disciplinary processes have been commenced against those counsel. In this court's view, only the defendant would benefit and it would not be a just result for the plaintiff.

10. In view of the foregoing this court does not find that there would be any injustice or hardship arising from resulting from accident, inadvertence, or excusable mistake or errors that needs to be corrected with regard to the defendant in this case to warrant its exercise of discretion in her favour to set aside the judgment dated 22/11/2019. If that discretion can not be exercised, the prayer by the defendant in the same application for joinder of interested parties must fall.

11. The upshot of the foregoing is that the application dated 23/6/2024 lacks merit and the same is hereby dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 10TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI