Thige v Chege (Environment and Land Case Civil Suit 1105 of 2014) [2023] KEELC 293 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 293 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 1105 OF 2014

JO MBOYA, J

JANUARY 26, 2023

BETWEEN

JANE KAGURE THIGE ..... PLAINTIFF

AND

JOSEPH MWAURA CHEGE ..... DEFENDANT

RULING

Introduction And Background

1. Vide notice of motion application dated the November 9, 2022 the defendant/applicant herein has sought the following reliefs;

    i. That this application be certified urgent and the same be heard *ex-parte* in the first instance.

    ii. That this honourable court be pleased to allow the firm of M/S Tony Martin Law LLP to come on record for the defendant in place of the firm of Okindo Ogutu & Co. Advocates.

    iii. That this honorable court be pleased to stay the execution of the decree of this court issued on May 31, 2018 pending the hearing and determination of this application.

    iv. That this honorable court be pleased to set aside, vary and/or review the proceedings and consequential orders made on June 10, 2015, entering interlocutory judgment against the defendant/applicant herein.

    v. That this court be pleased to set aside, vary and/or review the proceedings, decree and consequential orders made on May 21, 2018.

    vi. That this honorable court be pleased to set aside, vary and/or review the proceedings and consequential orders made by this honorable court on April 10, 2018.

vii. That upon granting prayers b, c, d and e hereinabove, this honorable court be pleased to allow the defendant to defend this suit unconditionally.

viii. That the cost of this application be provided for.

2. The instant application is premised and anchored on the various grounds, which have been alluded to or articulated thereunder

3. On the other hand, the instant application is supported by the affidavit of the defendant/ applicant, sworn on the November 9, 2022 and to which the applicant has annexed a total of six documents.

4. Suffice it to point out that upon being served with the instant application, the plaintiff/respondent duly filed an elaborate replying affidavit sworn on the November 21, 2022. For clarity, the plaintiff/ respondent has annexed thereto a total of 14 documents.

5. Subsequently, the advocates for the parties herein agreed to ventilate and canvass the subject application by way of written submissions. In this regard, both parties thereafter filed their respective written submissions.

Submissions By The Parties

a. Defendant's/applicant's submissions

6. The applicant herein filed written submission and same has raised, highlighted and canvassed four pertinent issues for consideration by the court.

7. Firstly, counsel for the defendant/applicant has submitted that the applicant was prevented from filing the requisite statement of defense on the basis of want of knowledge and mistake arising from the failure of its previous advocates.

8. In this regard, learned counsel for the applicant has submitted that the applicant herein had entrusted his previous counsel to defend his interests in the matter and to file all the requisite documents, *inter-alia*, statement of defense.

9. However, counsel has added that despite the instructions which were granted to the previous counsel, same failed and neglected to do so. On the other hand, counsel has further added that subsequently, the previous counsel, namely, Mr Obed, passed on prior to and or before the filing of the statement of defense.

10. In short, counsel has contended that the failure and or neglect to file the requisite statement of defense was neither deliberate nor intentional.

11. Secondly, in any event, learned counsel has submitted that the defendant/applicant had entered into and commenced negotiations with the plaintiff/respondent towards and in a bid to reach a settlement pertaining to and concerning the suit property.

12. To this end, counsel has added that the parties indeed reached and agreed on mutual terms and what remained outstanding was the formalization of the agreement.

13. Premised on the foregoing submissions, learned counsel has submitted that the defendant/applicant therefore believed that the plaintiff/respondent would not proceed with or prosecute the subject suit or at all.

14. Thirdly, learned counsel has submitted that the defendant/applicant proceeded to and constructed a four-bedroom mansionate on the property and which mansionate is now completed.

15. Furthermore, learned counsel added that upon the completion of the named mansionate, the defendant/applicant entered upon and commenced to occupy the suit property. In this regard, the counsel has contended that the defendant/ applicant resides in the premises with his family.

16. Consequently and in the premises, it has been contended that the execution and implementation of the impugned decree, shall therefore render the applicant a destitute.

17. Finally, counsel for the applicant has submitted that the applicant herein is entitled to a fair hearing, as enshrined *vide* article 50(1) of the *Constitution* 2010.

18. In any event, counsel has further submitted that it is incumbent upon the court to ensure that parties are afforded the necessary opportunity and facilities to have their cases heard and determined on merits.

19. In a nutshell, learned counsel for the applicant has therefore implored the honourable court to find and hold that the obtaining circumstances warrant the setting aside of the impugned decree and thereafter to have the dispute heard and determined on merits.

b. Respondent's Submissions

20. On her part, the plaintiff/respondent raised and highlighted three issues for due consideration and determination.

21. First and foremost, counsel for the plaintiff/respondent has submitted that the defendant/applicant was duly and lawfully served with summons to enter appearance and the plaint in respect of the instant matter.

22. Furthermore, counsel for the respondent has contended that upon being served with the summons to enter appearance and the requisite pleadings, the applicant herein acknowledged safe receipt of the summons.

23. Despite having been duly served with the summons and the requisite pleadings, counsel for the respondent has contended that the applicant herein did not deem it fit and appropriate to enter appearance and file the requisite pleadings or at all.

24. At any rate, counsel has added that arising from the failure by the defendant/applicant to enter appearance and file pleadings, his (plaintiff's/respondent's) advocates wrote to the applicant's counsel *vide* letter dated the April 1, 2015 imploring counsel for the applicant to advice the applicant to enter appearance and take necessary steps in defense of the subject matter.

25. Be that as it may, learned counsel has submitted that despite the efforts, including the reminder *vide* letter named in the preceding paragraph, the applicant herein neither acted nor complied.

26. In this regard, learned counsel has therefore contended that the conduct of the defendant/applicant was one that was meant to delay, obstruct or otherwise defeat the due process of the court.

27. Secondly, counsel for the respondent has submitted that upon the entry/delivery of judgment in respect of the instant matter, same duly extracted and caused a decree to be served upon the defendant/ applicant. In this regard, counsel has relied on the terms of the affidavit of service sworn on the May 21, 2018.

28. Having been duly served with the resultant decree, counsel for the respondent has submitted that it then behooved the applicant herein to act or take necessary steps, albeit with due promptitude.

29. Nevertheless, counsel has submitted that despite being aware of the judgment and decree, the applicant still failed to take necessary steps to vindicate his rights or interests, if at all.

30. In the circumstances, counsel has contended that the conduct of the applicant even after the delivery and service of the decree, still exhibits and demostrates a desire to defraud the cause of justice.

31. Thirdly, counsel for the respondent has submitted that the suit property lawfully belongs to and is registered in the name of the plaintiff/respondent. In this regard, it has been pointed out that the plaintiff/respondent therefore has exclusive and absolute rights thereto.

32. To the extent that the suit property belongs to and is registered in the name of the plaintiff/respondent, learned counsel has therefore submitted that the activities by and on behalf of the applicant are therefore illegitimate and unlawful.

33. Additionally, counsel for the respondent has also submitted that the defendant/applicant herein admits and acknowledges that the suit property belongs to the plaintiff/respondent. In this regard, counsel has invited the court to take cognizance of the letter dated June 2, 2022 by the defendant/ applicant.

34. In the premises, it has been contended that the defendant/applicant herein would have no *bona fide* and triable issue, to be canvassed before the court or at all.

35. In view of the foregoing submissions, counsel for the plaintiff/respondent has therefore implored the court to find and hold that the instant application constitutes an abuse of the due process of the court.

36. In addition, learned counsel has contended that the intended setting aside of the judgment, will be an act in vanity insofar as the the defendant/ applicant has acknowledged that the suit property belongs to the plaintiff and that he entered thereon, albeit without the consent of the named owner.

Issues For Determination

37. Having evaluated the application dated the November 9, 2022, together with the supporting affidavit thereto; and having taken into account the replying affidavit filed on behalf of the respondent; and upon consideration of the submissions filed on behalf of the parties, the following issues are pertinent and thus deserving of determination;

    i. Whether the defendant/applicant has placed before the honourable court any plausible and cogent explanation for the failure to file the requisite pleadings and defend the subject suit.

    ii. Whether the defendant/applicant has any bona fide and triable defense, capable of ventilation before the honourable court.

    iii. Whether the circumstances surrounding the subject matter warrant exercise of discretion in favor of the applicant.

Analysis And Determination

Issue number 1

Whether the defendant/applicant has placed before the honourable court any plausible and cogent explanation for the failure to file the requisite pleadings and defend the subject suit.

38. The subject suit touches on and concerns trespass onto LR No Nairobi/118/368, belonging to and registered in the name of the plaintiff/respondent herein. In any event, it is imperative to state and underscore that the registration of the suit property in the name of the plaintiff/respondent is not disputed.

39. To the contrary, the registration of the suit property in the name of the plaintiff/respondent is admitted and acknowledged by the defendant/applicant. For clarity, such acknowledgement and admission is evident in the applicant's own letter dated the June 2, 2022.

40. Other than the foregoing, it is also important to point out that prior to the filing of the instant suit, the plaintiff and the defendant had attempted to negotiate an exchange of the suit property belonging to the plaintiff with LR No Nairobi/Block 118/380, the latter belonging to the defendant/applicant.

41. However, despite best efforts by the plaintiff/respondent to bring the agreement to fruition, the defendant/applicant herein appeared not to have been keen to conclude the said agreement.

42. Consequently and arising from the failure to conclude and settle the dispute, the plaintiff/respondent was thereafter constrained to and indeed filed the subject suit.

43. Suffice it to point out that upon the filing of the suit, the summons to enter appearance and plaint were duly served upon the defendant/applicant herein on the December 16, 2014.

44. Additionally, there is evidence that at the time of service of the summons to enter appearance, the defendant guided the process server to effect service on his nominated advocates. Consequently, the summons to enter appearance were escalated to the firm of M/s Rhumba Kinuthia & Co Advocates, on the advise and instructions of the defendant/ applicant.

45. Nevertheless and despite having been duly served, neither the defendant nor his nominated advocate, endeavored to enter appearance or file statement of defense.

46. As a result of the failure or neglect by the defendant/applicant to enter appearance or file statement of defense, counsel for the plaintiff/respondent was constrained to and indeed generated a letter dated the April 1, 2015 and which was addressed to the defendant's/applicant's nominated advocate.

47. For coherence, the letter dated the April 1, 2015, implored the defendant's/applicant's advocate to impress upon the applicant herein to enter appearance and defend the suit.

48. Additionally, the named letter also forwarned the defendant/applicant that in the event of default, or failure to enter appearance and file the necessary pleadings, the respondent would be constrained to apply for interlocutory judgment.

49. Suffice it to point out that neither the defendant/applicant nor his nominated advocate acted or at all. Consequently, the plaintiff/respondent proceeded to and obtained interlocutory judgment.

50. On the other hand, the matter was thereafter set down for hearing/formal proof and indeed same proceeded for hearing, culminating into the delivery of judgment on the May 21, 2018.

51. Be that as it may, upon the delivery of the judgment counsel for the plaintiff/respondent extracted the resultant decree and caused same to be served upon the applicant. For clarity, the decree was served on the May 22, 2018.

52. However, despite being served with the said decree, the applicant herein was neither disturbed nor interested in taking any actions or steps or at all.

53. Given the foregoing facts and evidence, which have been articulated in the preceding paragraph, what becomes evident is that the applicant herein has all along been aware and knowledgeable of the existence of the suit and the various proceedings therein.

54. Additionally, it is also evident that despite being aware of the various steps, including the existence of the decree, the defendant/applicant was neither bothered nor concerned to take any actions or otherwise.

55. In my humble view, the conduct of the defendant/applicant herein depicts a person who despite being aware of the various adverse orders, remained carefree and non-committal.

56. On the other hand, even though the applicant now pretends that same was not aware of the delivery and existence of the judgment until the October 30, 2022, there exists clear and credible evidence showing that same was privy to and aware of the judgment of the court as from the May 22, 2018.

57. To this extent, it is important to note that the contents of the affidavit of service, relating to service of the impugned decree has not been challenged or otherwise. Consequently, the presumption of service is resolved in favour of the process server, who effected service.

58. Secondly, it is important to underscore that the elaborate contents of the replying affidavit, which have enumerated the fact that the defendant/applicant was duly served and kept abreast of the terms of the judgment have not been controverted *vide* any supplementary affidavit.

59. In the absence of a suitable supplementary/further affidavit, to controvert the contents of the replying affidavit, the bottom line is that the positive averments contained in the body thereof are deemed to be admitted and conceded to.

60. To this end, it is appropriate to restate and reiterate the holding of the court in the case of *Mohammed & another v Haidara* [1972] EA 166 at page 167 paragraph F-H, Spry V.P considered the failure by a party to file any reply to allegations set out in evidence and expressed himself as follows:

> " The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied..."

61. Having not responded to the contents of the replying affidavit, it is therefore apparent that the faint excuses, contained and reflected in the body of the supporting affidavit are therefore unhelpful and in any event, same are dishonest.

62. In short, the defendant/applicant herein has neither offered nor tendered any credible explanation to explain the evident failure or neglect to file the requisite pleadings and take the necessary steps (sic) towards vindicating his rights in the subject matter.

Issue Number 2

Whether the defendant/applicant has any bona fide and triable defense, capable of ventilation before the honourable court.

63. The defendant/applicant herein has contended that same has a *bona fide* and triable defense, which should be canvassed and ventilated during a plenary hearing, subject to setting aside the impugned judgment.

64. However, despite contending that same has a triable defense, the defendant/applicant admits and acknowledges that the suit property belongs to and is registered in the name of the plaintiff/ respondent.

65. In addition, the defendant/applicant has also acknowledged and conceded that despite the fact that the suit property belongs to and is registered in the name of the plaintiff/respondent, same has however constructed and build a mansionate thereof.

66. Furthermore, the defendant/applicant has *vide* his own letter the June 2, 2022 admitted that indeed same constructed the impugned building on the suit property, albeit on account of innocent mistake. For clarity, the defendant/ applicant does not contend that his entry onto and the impugned activities on the suit property, were authorized by the plaintiff/ respondent.

67. In my humble view, the defendant/applicant acknowledges that the suit property belongs to the plaintiff/respondent. in this regard, it therefore means that the plaintiff/respondent is vested with exclusive and absolute right to and in respect of the suit property.

68. Be that as it may, the contents of the defendant/applicant own letter the June 2, 2022, further confirms that the defendant has no legitimate title and claim to the suit property, other than trespass thereon.

69. To be able to understand the extent and scope of the plaintiff's right to and in respect of the suit property, it is imperative to take cognizance of the provisions section 24 and 25 of the *Land Registration Act*.

70. For convenience, the said provisions of section 24 and 25 of the *Land Registration Act*, 2012, are reproduced as hereunder.

Interest conferred by registration.

24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. Rights of a proprietor.

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

71. Given the import of the foregoing provisions, can the defendant/applicant contend that same has any triable defense, worthy of ventilation before the court.

72. Clearly and to my mind, the defendant/applicant (who has admitted the plaintiffs title to the suit property), has no bona fide and triable defense, capable of attracting a plenary hearing.

73. I beg to state that even though parties ought to be afforded an opportunity to be heard and to put their cases before the court, such opportunity ought not to be afforded for the sake of it and for cosmetic purposes.

74. For coherence, the court ought to sieve each and every claim, before allowing same to be ventilated before the court, more particularly, where a regular judgment has hitherto been entered in favor of the adverse party.

75. In this regard, it is appropriate to take cognizance of the holding of the Court of Appeal in the case of *Muchanga Investment Ltd v Safaris Unlimited (Africa) Limited & 2 others* [2009] where the court addressed the meaning and import of abuse of due process of the court as hereunder:

> " In our view, the often-quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.
>
> Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.

76. In the absence of a bona fide and triable issue, the setting aside of the impugned judgment and the resultant decree would therefore be an act of futility and vanity.

77. To my mind, the existence of a bona fide and triable issue is central and significant in considering whether to set aside a default judgment or otherwise. Clearly, it is the existence of such a defence that would warrant conducting a plenary hearing with a view to ascertaining the truth or veracity of either party's claim in the matter.

78. Without belaboring the point, the centrality and importance of the existence of a *bona fide* and triable issue was underscored in the case of *Patel v E A Cargo Handling Services Ltd* (1974)EA, where the court held as hereunder;

> " 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. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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."

79. In a nutshell, I am afraid that no triable issue has been espoused or established by the applicant herein, either in the manner contended or at all. Consequently, the intended setting aside would only operate to afford the defendant/ applicant more latitude to infringe upon the plaintiff's proprietory rights over the named property.

Issue Number 3

Whether the circumstances surrounding the subject matter warrant exercise of discretion in favor of the applicant.

80. It is common knowledge and there is no dispute that the defendant/applicant herein was duly and lawfully served with summons to enter appearance and plaint in the subject matter.

81. There is also no gainsaying that despite having been duly served with the summons to enter appearance and the plaint, the defendant neither entered appearance nor filed any statement of defense.

82. Arising from the failure to take the requisite steps towards and in respect of defending the subject suit, the plaintiff's advocate was constrained to and indeed wrote to his (defendant's/applicant's) advocate to enter appearance and file the statement of defense.

83. Despite having been duly notified, neither the applicant nor the advocate made any efforts to defend the suit.

84. Secondly, defendant/applicant was duly served with the decree arising from the judgment rendered on the May 21, 2018. See the contents of the affidavit of service, whose terms were not impeached.

85. Nevertheless, despite having be so served, the applicant herein did not deem it fit and expedient to take any effective or remedial steps to impeach the default judgment.

86. To the contrary, the defendant/applicant waited for a whole 4 and ½ years and thereafter sprung up with the current application.

87. Despite taking the duration in excess of 4 years, the applicant herein did not endeavor to explain and place before the court any cogent and credible explanation for the lapse and default with due promptitude.

88. In the absence of any credible explanation, (which was addressed *vide* issue number 1 herein before) it becomes apparent that the failure to take the requisite steps was indeed informed by negligence, inaction and outright disregard of the due process of the court.

89. Given the foregoing, can it be said that the applicant herein is deserving of the discretion of the court. Suffice it to state and underscore that equity aids the vigilant and not the Indolent.

90. In my considered view, the conduct that is discernable from the totality of the facts and circumstances, surrounding the instant matter do not warrant exercise of discretion in favor of the applicant.

91. To vindicate the foregoing observation, I beg to adopt, restate and reiterate the holding of the Court of Appeal in the case of *Tana & Ardhi Rivers Development Authority v Jeremiah Kimigho Mwakio & others* (2015)eKLR, where the court stated and held as hereunder;

> It bears repeating that no explanation was ever given as to why the particulars to the defence failed to be filed. Yet it is common ground that the appellant was aware of the order to that effect. While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in *Mwangi v Kariuki* [1999] LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and

inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned.

92. In addition, it is also imperative to take cognizance of the holding of the court of appeal in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, where the court stated and observed as hereunder;

> "It is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

93. Premised on the foregoing, it is my humble view that pure inaction, lethargy, slovenliness and negligent conduct displayed by the applicant herein, cannot certainly be dignified with exercise of equitable discretion, in the manner sought.

94. Furthermore, the setting aside of the judgment and resultant decree herein, shall merely aid and facilitate the defendant's continued occupation and use of the plaintiff's property, without due regard to the plaintiff's rights under article 40 of the *Constitution*, 2010.

95. In view of the foregoing considerations, I find and hold that the conduct of the defendant, which has been ably captured and variously reproduced elsewhere herein before, is not deserving in the eyes of equity.

96. In this regard, it is imperative to recall the equitable doctrine; " he who comes to equity must come with clean hands"

Final Disposition:

97. Having addressed and resolved the issues that were enumerated in the body of the ruling, it is now evident and apparent that the application by and on behalf of applicant herein, is misconceived, legally untenable and bad in law.

98. Consequently and in the premises, the application dated the October 9, 2022, be and is hereby dismissed with costs to the plaintiff/respondent.

99. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26 TH DAY OF JANUARY 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Kuria for the Defendant/Applicant

N/A for the Plaintiff/Respondent