



Maina v J.K. Horeria t/a Horeria & Company & another (Environment & Land Case 1928 of 2007) [2023] KEELC 16919 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1928 OF 2007
EK WABWOTO, J
MARCH 23, 2023**

BETWEEN

HUDSON KAMAU MAINA PLAINTIFF

AND

J.K. HORERIA T/A HORERIA & COMPANY 1ST DEFENDANT

OAKRIDGE INVESTMENTS LIMITED 2ND DEFENDANT

RULING

1. This court is called upon to set aside and vary its own orders issued on October 11, 2022 and January 26, 2023. The nature of the said orders were to the effect that on October 11, 2022 the matter had been set down for defence hearing, however on the said date, the Defendant was not present and this necessitated the Plaintiff to move this court to close the defence case for the reasons that the defence hearing date had been fixed by consent and in the presence of both parties. The court duly obliged and closed the defence case in the absence of the Defendants. The matter was subsequently for mention on January 26, 2023 to enable both parties including the defendant file their written submissions.
2. On January 26, 2023 the court reserved to delivery its judgment on March 23, 2023. The defendant was not present on the said date.
3. The Defendant's application for determination is dated January 26, 2023 and is supported by an Affidavit sworn by Michael Kimani Horeria Advocate on the even date. The application is premised on the following grounds: -
 - a. That the suit herein was heard exparte on the October 11, 2022 when the matter came up for further hearing of the Plaintiff's case.
 - b. That the Advocate on record on behalf of the Defendants did not attend court on the material date.



- c. That the failure to attend court was not intentional at all but unfortunate occurrence when the *ex parte* date was taken *inter partes*, the same inadvertently misdiarized and when the same was heard *ex parte*.
 - d. That the defendants will suffer great prejudice if the *ex parte* decree remains and is locked out of these proceedings as this matter will largely go undefended yet there is a sufficient reason to allow for the Defendants to be heard and upon the case for cross-examination of the Plaintiff on the rent arrears still outstanding which is humbly sought.
 - e. That it would be fair administrately to the Defendants and avoid injustice or hardship to them resulting from an accident, inadvertence or excusable mistake or error made by its advocate.
 - f. That no prejudice will be suffered by the Plaintiff arising from such enlargement of time nor the recall of its witnesses nor leave to defend being granted to the Defendants.
 - g. That for nonattendance of the advocate and/or the applicant on the October 11, 2022, the matter proceeded *ex parte*.
 - h. That it is in the interest of justice that this application be allowed.
4. Pursuant to directions issued by the court, it was directed that the application be canvassed by way of written submissions filed by the parties for consideration. The Defendants/Applicants filed written submissions dated February 2, 2023.
 5. Counsel for the Defendants/Applicants submitted that the non-attendance of October 11, 2022 was not intentional as the same was due to the error of misdiarizing the date. He stated that the date of October 11, 2022 was listed as November 11, 2022 and he made reference to annexure “MKH- 1” which was annexed to his supporting affidavit sworn on January 26, 2023.
 6. Counsel urged the court to set aside its proceedings for October 11, 2022 and January 26, 2023. Reliance was made to the case of *Sketty vBwana & 10 others* (Environment and Land Court Case 213 of 2019 (2023) KEELC 211 (KLR) (25 January 2023) Ruling wherein Matheka J. found in favour of the applicants to have the orders set aside and matter reinstated to give all parties an opportunity a fair hearing.
 7. At the time of preparation of this ruling, no response nor submissions had been filed by the Plaintiff in respect to the application.
 8. Having looked at the application and the oral submissions, the singular issue that comes up for determination is whether the Defendants have managed to convince this court to set aside its proceedings of October 11, 2022 and January 26, 2023.
 9. The decision of whether or not to allow an application for setting aside proceedings or an order of the court is within the wide discretion of the court. The discretion to be exercised judiciously as was stated in the case of *Shah vMbogo* (1979) EA 116. A basis for the exercise of the discretion has to be laid by the party inviting the court to exercise its discretion. In the present case, the question for the court to answer is whether the Defendants have satisfied the threshold by providing a rational basis for the court to set aside its proceedings and allowing re-opening of the defence case and counterclaim.
 10. In the case of *Samuel Kiti Lewa vHousing Finance Co of Kenya Ltd & Another* [2015] eKLR, Lady Justice Mary Kasango while considering a somewhat similar application where the plaintiff sought to



have his case reopened so that he could recant the evidence adduced by one of the defence witnesses, the judge in dismissing the application stated as follows:-

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence.”

In the case the judge went on to observe thus: -

“...In my view if the plaintiff was allowed to re-open his case to so prove it (that a document produced by the defendant was different to the one he had) would amount to allowing the plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants.”

11. In the case of *Hannab Wairimu Ngethe v Francis Ng'ang'a & Another* [2016] eKLR, the court declined to allow a petitioner in a succession cause to reopen the case to adduce further evidence. The judge in the case inter alia stated: -

“This court has not been told that the petitioner has come upon or discovered some new and important evidence which after exercise of due diligence was not within his knowledge. It is noted that the petitioner has always had the advantage of counsel from the inception of this case.”

12. In the case, the court observed that in making the application the petitioner was attempting to have a second bite at the cherry and she held that would amount to allowing him to fill the gaps in his evidence after having heard the objector's case and that would be prejudicial to the objector.
13. In the instant case, the Defendants have stated that the reasons for non-attendance on October 11, 2022 was due to misdiarization. I have taken the liberty to peruse the record of the court and have noted that prior to October 11, 2022, this matter had come up for hearing on July 21, 2022 wherein the matter proceeded for hearing in the presence of both parties including Counsel for the Defendants. The Plaintiff after tendering his evidence closed his case. However, when the matter was due to proceed for defence hearing, the Defendants Counsel applied for an adjournment for the reasons that he wishes to seek pleadings in a 'previous case' before he can proceed. The Plaintiff's Counsel was taken aback and opposed the said adjournment however the court granted the same on condition that the said adjournment was to marked as a last adjournment and directed the defence hearing to proceed on 11th October 2022. The said order was clearly pronounced to all the parties by the court. Subsequently on October 11, 2022, the Defendants were absent and the court upon being moved by the Plaintiff proceeded to close the defence case and granted parties a whopping 60 days period to file and exchange written submissions for the matter to be mentioned later on January 26, 2023 for the purposes of reserving a judgment date.
14. The court notes that while the Defendants Counsel stated that he had misdiarized the hearing date of October 11, 2022 as November 11, 2022, the said Counsel never bothered to take any action on November 11, 2022 with a view of mitigating the said error. The said application was only filed on January 26, 2023. It is worth noting that in this era of e-filing that was officially launched by the Judiciary on July 1, 2020 the e-filing court systems usually sends parties automated notifications either emails or Short Message Services (SMS) notifying parties of upcoming court dates and any charges in the schedule. Parties have always been urged time without number to embrace the said technology. The proceedings that Counsel for the Defendant seeks to set aside were definitely post the launch/commencement of court's e-filing system.



15. Counsel for the defendants owned up to the mistake and urged the court not to visit the mistake on the litigants in the interest of justice and allow the application and have proceedings set aside and defence case re-opened. While I sympathize with the defendants, I fail to understand why the defence counsel did not bother to move the court from November 11, 2022 until January 26, 2023. Counsel had more than enough time to do so. There is no case of genuine mistake or error on the part of Counsel which perhaps would invite sympathy of the court. Defendants appears to have treated the matter with a lot of casualness to the extent that they only moved the court on January 26, 2023 when the court had reserved to deliver its judgment.
16. Justice cuts both ways, the plaintiff deserves justice as well as the defendants. Each of the parties was afforded the opportunity to present their case. Ringera, J (as he then was) in the case of *Omwoyo v African Highlands & Produce Co Ltd* [2002] 1 KLR while considering an application for transfer of a suit from a court that had no jurisdiction to one that had jurisdiction and where counsel had conceded it was his mistake stated as follows: -

“The plaintiffs advocate has made a passionate plea to this court that to dismiss the application would be tantamount to punishing the plaintiff for the mistakes of his advocate. That may very well be so. However, I am of the opinion that if a court has no jurisdiction to do something it cannot do so in what is said to be the interest of justice. The interests of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court.”
17. This matter has been pending in court for over 15 years. It is never the intention of courts to prolong cases for such lengthy duration. Courts of law are not parking bays for suits neither are they waiting lounges for irresolute parties who are not keen in prosecuting their matters.
18. In the end, the application dated January 26, 2023 is devoid of merit and the same is dismissed with no order as to costs since the Plaintiff did not bother to oppose it. The court will proceed to prepare its judgment for delivery on May 25, 2023 at 9.00am.
19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD MARCH 2023.

E.K. WABWOTO

JUDGE

In the presence of:-

Ms. Mugo h/b for Mr. Kangiri for the Plaintiff.

N/A for the Defendants.

Court Assistant – Caroline Nafuna.

