



**Joseph v Nyambuoro (Environment & Land Case 424 of 2017)
[2023] KEELC 17413 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 424 OF 2017**

MN KULLOW, J

APRIL 27, 2023

BETWEEN

ROSE ATIENO JOSEPH PLAINTIFF

AND

FANUEL ONYANGO NYAMBUORO DEFENDANT

RULING

1. By Notice of Motion dated December 15, 2021, the applicant sought the following orders: -
 - a. Spent.
 - b. That the honourable court be pleased to stay further proceedings in this matter pending the hearing and determination of this Application.
 - c. That the honourable court be pleased to set aside the proceedings and subsequent orders issued on November 17, 2021 and all other consequential orders thereto.
 - d. That the honourable court be pleased to re-open the defence hearing to allow the defendant to adduce evidence in support of his case.
 - e. That the costs of this Application be in the cause.
2. The application is based on the 13 grounds thereof and the supporting affidavit sworn on even date and a further affidavit sworn on 28/11/2022, by Brian Omondi Otieno, an Advocate of the High Court of Kenya having conduct of the matter on behalf of the Applicant.
3. He avers that on the 17/11/2021, he was ready to proceed with the matter virtually and logged in using the virtual links provided on the cause list. He successfully logged in into the session but was kept in the lobby without admission into the meeting. He thus contends that the non-attendance on his part



was inadvertent and arose from the mistaken belief that proceedings of the court would be conducted virtually.

4. It is his claim that he had a legitimate expectation that the matter would be conducted virtually through the links provided in the cause list, based on the directions issued by the Honourable Chief Justice to prioritize justice delivery and conduct of court proceedings by the use of technology.
5. He now contends that the defendant's right to a fair trial is at risk of jeopardy yet he has an arguable defence which ought to be considered on merit. He urged the court to set aside the proceedings of 17/11/2021 and re-open the defence case to allow the suit to proceed on merit in the interest of justice.
6. The application was opposed. The plaintiff/ respondent filed a replying affidavit sworn on November 11, 2022 by Winny Ochwal, an Advocate of the High Court of Kenya, having conduct of the matter on behalf of the plaintiff/respondent. She averred that the matter has been fixed for defence hearing on several occasions and the same has always been adjourned at the instance of the applicant. She outlined the various dates fixed for the defence hearing upon the close of the plaintiff's case on 10/03/2020.
7. It is her claim that on 2 occasions; the matter was adjourned at the instance of the defence with certain conditions. The defence case was then fixed for hearing on 17/11/2021 by consent of both counsels and the court upon being satisfied that no sufficient reasons had been advanced for the defendant and/or his advocate's non-attendance, the defence case was closed.
8. She dismissed the defendant's counsel allegations of being mistaken that the court would conduct a virtual hearing on the 17/11/2021 whereas on previous occasions; 11/03/2021 and 17/06/2021, the matter was handled in open court whilst adhering to the Covid-19 protocol. She maintained that the applicant had failed to establish sufficient cause or basis to warrant the grant of the orders sought.
9. The Application was canvassed by way of written submissions. Both parties filed their rival submissions together with authorities which I have read and considered.

Analysis and Determination

10. This court is of the considered opinion that the issues arising for determination are as follows: -
 - a. Whether the applicant has made out a case for setting aside the proceedings of November 17, 2021 and all the consequential orders thereto.
11. The grounds for setting aside an ex-parte order/proceedings are now well settled and the court in exercising such discretionary powers is mandated to take into account the circumstances of each case and exercise the discretion judiciously. This position was stated by the court in *Mbogo v Shah* 1968 E.A 93 where it held as follows: -

“This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice”
12. As stated above, the discretionary orders for setting aside exparte orders ought not to be exercised in favor of an undeserving party, an Applicant is required to demonstrate sufficient cause and/or basis to warrant the grant of the said orders. The Applicant herein contends that when the matter was scheduled for defence hearing on the 17/11/2021, he was under the mistaken belief that the court would proceed with the call over of the matter virtually, on the basis of the directives issued by the



Chief Justice on the virtual proceedings of cases and that there was a link provided by the court on the day's cause list.

13. The Respondent on the other hand dismissed such averments as whimsical excuses aimed at further delaying the matter. It is her position that the previous conduct of the matter has always been done in open court while adhering to the various protocols in place at the time. She thus maintained that the defence counsel ought to have done due diligence and made steps in informing the court of the challenges faced in connecting virtually or to inquire the mode of proceeding with the matter. Further, she stated that it was incumbent upon the defendant to be present in court on the said date. It is her position that no sufficient cause had been demonstrated by the Applicant.
14. In defining what amounts to sufficient cause, Mativo J. in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR held that: -

“sufficient cause is thus cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.
15. I have critically considered the rival positions taken by both parties herein; I have also looked at the record and noted the conduct of the parties in prosecuting their respective claims. In determining the Application herein, the court must be satisfied that the applicant failed to appear in court for the hearing due to sufficient cause. The pertinent question that therefore follows is whether the reason advanced by the applicant of being of the mistaken belief that the matter would proceed virtually and waiting on the lobby for admission into the session constitutes a sufficient cause, an excusable mistake or the same was meant to deliberately delay the cause of justice.
16. Courts are guided by the provisions of article 159(2) (d) of *the Constitution* and section 1A and 1B of the *Civil Procedure Act* in administering justice, the focus being substantive justice. This being an Application in which the discretion of the court is sought and the case being a land matter, I will grant the applicant the benefit of doubt.
17. Further, it is in the interest of justice that a party shall not be condemned unheard. However, I have noted the conduct of the defendant and his counsel on record in prosecuting their case vis-a- vis the applicants equal right to have the dispute determined in an expeditious manner without unnecessary delays. On that account, I will proceed to exercise my discretion in favor of the Applicant but with very strict timelines and caution.

Conclusion

18. In the upshot, I accordingly find that the Application dated December 15, 2021 is merited and I proceed to allow the same on the following terms;
 - a. The *ex-parte* proceedings and orders issued on November 17, 2021 and all the consequential proceedings thereafter be and are hereby set aside and the Defence Case is re-opened.
 - b. The applicant herein is hereby directed to fix the matter for defence hearing within 14 days from the date of this Ruling on priority basis.
 - c. Failure to comply with order (b) above, Order (a) will be deemed vacated and the matter will be fixed for judgment.



d. The applicant is hereby ordered to pay the plaintiff/ respondent Throw-way costs of Kshs 15,000/ = before the hearing date.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF APRIL, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of:

Nonappearance for the Applicant

Nonappearance for the Respondent

Tom Maurice - Court Assistant

