Badawi v Kenya School of Law (Constitutional Petition E033 of 2021) [2022] KEHC 124 (KLR) (21 February 2022) (Ruling)

Neutral citation: [2022] KEHC 124 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E033 OF 2021

JM MATIVO, J

FEBRUARY 21, 2022

BETWEEN

SABRINA JELANI BADAWI .... PETITIONER

AND

KENYA SCHOOL OF LAW .... RESPONDENT

RULING

1. This ruling determines Respondent's application dated 20th January 2022 expressed under the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 seeking to set aside the judgment of this court delivered on 23rd November 2021, the decree and all consequential orders. The applicant prays that the costs of the application be in the cause. Prayers (1) and (2) of the application are spent.
2. The grounds in support of the application as I glean them from the application and the supporting affidavit are:- the applicant had made good faith efforts to enter appearance and defend but it learnt that in Mombasa documents are not filed through the e-filing system but through e-mails; that it prepared and sent to the court registry a Notice of Appointment and a Replying affidavit dated 17th October 2021 via email seeking assessment of fees copied to the Petitioner's counsel.
3. It states that it encountered challenges in transmitting the e-mail which became a hindrance to the timely compliance with this courts directions and after numerous follow-ups, it was furnished with a new e-mail address and it promptly filed its documents on 15th November 2021. It avers that it was a victim of circumstances beyond its control and it ought to be accorded a fair hearing. Lastly, it states it is in the interests of justice and fairness that the court sets the judgment aside.
4. The application is opposed. On record is the Petitioner's Respondent's Replying affidavit dated 3rd February 2020. The substance of the opposition is that the Respondent/applicant was served with the Petition and the Mention Notice dated 25th June 2021 on 22nd June 2021 as evidenced by the affidavit of service dated 20th September 2021, but despite being served, the Respondent did not reply to the

Petition. She also states that on 20th September 2021, the applicant's advocate M/S Pauline Mbuthu attended court and acknowledged having been served. She further states that on 20th September 2021 at the request of the applicant's advocate the court granted the applicant 14 days to serve their response, and the granted the Petitioner to file a supplementary affidavit together with submissions within 7 days and upon service, the Respondent was to file theirs within 7 days and fixed the mater for hearing on 3rd November 2021.

5. The Petitioner states that on 3rd November 2022, the matter came up for highlighting of submissions but the applicant did not attend. It is the Petitioner's case that the Respondent despite being served failed to appear in court nor did it communicate the alleged predicament to the Petitioner's advocate. Further, that on 12th November 2021, the Respondent was served with judgment Notice but they never raised any issue. The Petitioner states that the application is an afterthought and there is no just cause to warrant the exercise of this court's jurisdiction to set aside the judgment. Lastly, if the application is allowed, the Petitioner will be prejudiced.

6. In her submissions, the applicant's counsel essentially rehashed the grounds in support of the application and the supporting affidavit and argued that the failure to file a reply was not intentional. She submitted that she was unable to log in when the matter came up for submissions and urged the court to use its wide discretion to set aside the judgment and afford the applicant a hearing. She argued that there is a triable issue to be determined, namely, the interpretation of the Second Schedule of the Kenya School of Law Act and that it is in the interests of justice that the application be allowed.

7. The Petitioners/Respondent's counsel relied on the Replying affidavit and recalled that the applicant's counsel attended court for directions when the court directed her to file a reply and the matter was fixed for hearing, but again she failed to attend hearing. She argued that the reasons given are not excusable but are aimed at denying the Petitioner the fruits of the judgment. She argued that the courts discretion is not to be used to deny a party justice. She submitted that the applicant has not shown that it will suffer if the judgment is not set aside, but instead, it is the Petitioner who will suffer because she is yet to be admitted to the Kenya School of Law. She argued that the application lacks merit and urged the court to dismiss it.

8. For starters, I find it useful to mention that the applicant has invoked provisions of the Civil Procedure Rules, 2010 yet before this court is a constitutional Petition. Constitutional Petitions are governed by The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*[1] (the Rules) promulgated pursuant to Article 22 (3) of the *Constitution*. This is expressly provided under Rule 3 (1) which provides that "these rules shall apply to all proceedings made under Article 22 of the Constitution."

9. Rule 16 which bears the short title failure to respond within stipulated time provides as follows: -

16.

(1) If the respondent does not respond within the time stipulated in rule 15, the Court may hear and determine the petition in the respondent's absence.

(2) The Court may set aside an order made under sub-rule (1) on its own motion or upon the application of the respondent or a party affected by the order

10. It's not clear why the above rules which govern constitutional Petitions escaped the applicant's attention. Nevertheless, I will not hoist procedure over substance, so, I will address the application on merit.

1 Legal Notice No. 127 of 2013.

11. Setting aside an ex parte judgement is essentially a matter of judicial discretion. In *Esther Wamaitha Njihia & two others v Safaricom Ltd*[2] the court elucidated the considerations to guide the court in applications of this nature as follows:-

> "the discretion is free and the main concern of the courts is to do justice to the parties before it (see *Patel v E.A. Cargo Handling Services Ltd*.[3]) the discretion is intended 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v Mbogo*[4]). The nature of the action should be considered, the defence if any should also be considered; and so, should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration v Gasyali*[5]). It also goes without saying that the reason for failure to attend should be considered."

12. Also relevant is *Ongom v Owota*[6] which held that the court must be satisfied either the defendant was not properly served with summons or that the defendant failed to appear in court at the hearing due to sufficient cause. The court defined what constitutes sufficient cause as follows: -

> " Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.
>
> Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions."

13. The Court of Appeal of Tanzania in *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others*[7] defined sufficient cause as follows: -

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."

[2] HCCC No. 62 of 2011, Nairobi

[3] {1974} E.A. 75.

[4] {1969} E.A.116.

[5] {1968} E. A 300.

[6] {2009} E.A. 356.

[7] Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

14. *Duffus VP in Patel v East Africa Cargo Handling Services*[8] stated-

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

15. The key question here is whether the applicant has satisfied the considerations for setting aside ex parte judgments as enumerated in the above cited decisions. Put differently, has the applicant demonstrated ''sufficient cause" to trigger the exercise of the courts discretion in its favour? There is no dispute that the applicant was served with the Petition and Mention Notice. In fact, the applicants counsel was in court when direction were given by the court and the court prescribed very clear time frames for filing the reply to the Petition and for filing submissions. The applicant did not comply with the court's directions.

16. Court directions serve s salutary purpose of enabling the court to determine matters expeditiously. The applicant's failure to comply with the court's directions on filing pleadings and submissions is a clear affront to Rule 6 of the Rules which provides: -

    (6) A party to proceedings commenced under these rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

    (a) participate in the processes of the Court; and

    (b) comply with the directions and orders of the Court.

17. Much as the applicant purports to blame the e-mail challenges for failing to file its papers one wonders why the filing was not effected the following day or thereafter before the scheduled date which was taken in the presence of the applicant's counsel. The applicant's counsel not only failed to comply with court's directions, but also failed to attend court. The attempt to blame technology failure is totally unconvincing and, in any event, one wonders why counsel never attended court for the mention despite the date having been taken in her presence of why she never attended hearing despite being having been served.

18. The other ground advanced by the applicant is that the case raises an arguable point of law which involves the interpretation of the Second Schedule to the advocates Act. This argument is attractive. But it smacks of dishonesty and extreme bad faith because the same provisions have been construed by our superior courts not in one, not in two, not in three but in numerous decisions in which the applicant has been a party and has actively participated. Among the key decisions which have explicated the said provisions include *Adrian Kamotho Njenga v Kenya School of Law*[9] which held that:-

    41. This is so because paragraph 1(a) does not prescribe any university entry requirements for the simple reason that entry requirements for LLB programmes in local universities are known and no one can be admitted to undertake this degree without meeting the basic KCSE grades required for this course. Furthermore, paragraph 1(a) contains the disjunctive ward "or" at the

[8] Supra

[9] {2017} e KLR.

end of the paragraph just before the beginning of paragraph 1(b). That means qualifications under paragraph 1(a) are distinct from those under paragraph 1(b). That can only mean one thing- that the two sub-paragraphs apply to two different and distinct categories of applicants.

42. This interpretation is supported by the Supreme Court's interpretation of section 83 of the Election Act, 2012, a provision with the disjunctive word "or". The Supreme Court stated that "the use of the word "or" clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting Section 83 of our Elections Act, this distinction is borne in mind."- (see Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another, petition No 1 of 2017)

43. This interpretation is further buttressed by the fact that prior to the 2014 amendment, the Second Schedule contained paragraph 2, which made pre Bar examination optional. The removal of paragraph 2 and, in place thereof, the introduction of clause (iii) in paragraph 1(b), with the conjunctive word "and"at the end of paragraph 1(b)(ii) and just before the beginning of clause 1(b) (iii), means pre Bar examination is now mandatory for category 1(b) applicants as opposed to those in paragraph 1(a). Any other interpretation of paragraph 1(a) that would make pre Bar examination compulsory for applicants falling under paragraph 1(a) would result into an absurdity because the word "or" cannot, by stretch any of imagination, be read to mean "and".

44. ...However as stated above, a plain reading of paragraph 1(a) and 1(b) is clear that these are two distinct qualification requirements and the legislature must have intended them to be so.

48. ...In the absence of any other provision, I therefore find and hold that applicants under paragraph 1(a) that is; those who obtained LLB degrees from universities in Kenya, having attained required grades to pursue LLB degree locally, do not have to sit and pass pre-Bar examination as a pre-condition to their joining ATP at the respondent school.

19. Also, in *Republic v Kenya School of Law ex parte Victor Mbeve Musinga*[10] the court reviewed decided cases on the principles of statutory construction and accentuated the use of dictionaries as aids in appreciating accepted meanings of words such as the word "or' and concluded that the Paragraph 1 of the said schedule creates two distinct categories. This line of reasoning finds backing in the Supreme Court of Kenya decision in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another*.[11]

20. An attempt by the applicant herein in *Republic v Kenya School of Law ex parte Victor Mbeve Musinga*[12] to rely on *Peter Gaithaiga Munyeki v Kenya School of Law*[13] was faulted by the court in the above decision on grounds that the said decision ignored the Supreme Court decision referred to above in which the Apex Court construed the meaning of the word "or" in a statutory provision. Simply put, the said decision went against Article 163(7) of the Constitution and therefore it is bad law. By now it is manifestly clear that the provisions cited by the applicant in this case have been the subject of numerous court decisions. Even in the judgment now sought to be set aside, the court spared time, ink and paper and interpreted the same provisions following previous decisions on the same provisions. Despite the many decisions on the same subject, the applicant now pretends that the same provisions have never

10 {2019} e KLR.

11 Petition No 1 of 2017.

12 {2019} e KLR.

13 {2017} e KLR

been interpreted. Accordingly, the argument that the applicant has an arguable case premised on the alleged "arguable points of law" fails. As authorities suggest, an ex parte judgment can only be set aside if there is a sufficient cause.

21. A judgment or order may be set aside if given, entered or made irregularly, illegally or against good faith. The focus here is on the judgment or order that is attacked and the question is whether it was "given, entered or made irregularly, illegally or against good faith." The power is to be exercised "with great caution" in view of the public interest in the finality of legal proceedings. The power may be exercised where, through no fault on the applicant's part, the applicant has not been heard on a matter decided by the court. The jurisdiction is not a back door for re-arguing the case. It is not to be used for the purpose of re-agitating arguments already considered by the court or because a party has failed to present the argument in all its aspects or as well as it might have been put. The power to reopen will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard.

22. The following principles are extracted from the judgment of *Hope JA in Adams v Kennick Trading (International) Ltd* [14]:-

    a. the court has to look at the whole of the relevant circumstances and decide whether or not sufficient cause has been shown;

    b. the existence of a bona fide ground of defence and an adequate explanation for the default are the most relevant matters to consider;

    c. the defendant must swear to facts which, if established at the trial, will afford a defence: Simpson v Alexander (1926) SR (NSW) 296 at 301;

    d. if the judge concludes that the applicant is lying about the alleged defence and is thus dishonest in raising it, the defence is not "bona fide;"

    e. the applicant does not necessarily fail for want of an adequate explanation for the default. It depends on the circumstances. "[I]f merits are shown, the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication": *Evans v Bartlam [1937] AC 473* at 489;

    f. the absence of an explanation for the default, particularly if it is coupled with prejudice to the plaintiff, may justify the denial of relief, but only when considered with other relevant circumstances.

23. The importance of a defence on the merits relative to countervailing considerations has been emphasized. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that the parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. Any limitation upon that opportunity will generally be justified only by the necessity to avoid prejudice to the interests of some other party, occasioned by misconduct, in the case, of the party upon whom the limitation is sought to be imposed. On the other hand, the explanation for default may be sufficient.

24. The court has unfettered discretionary power of the court to set aside an undefended judgment. That orders have taken effect or a decree has been issued does not extinguish these powers. It is unwise to attempt to lay down rules of universal application in the exercise of that broad discretion which necessarily involves the court in making a broad evaluative judgment. It is necessary to consider (a)

[14] (1986) 4 NSWLR 503 at 506–507.

whether any useful purpose would be served by setting aside the judgment, and (b) how it came about that the applicant became bound by a judgment regularly obtained. (c) The party in default needs to explain the reason for the default and the nature of the proposed defence. Those matters inform the exercise of discretion. An applicant must show by evidence that he or she has a reasonably arguable defence on the merits.

25. The rule empowers the court to set aside an ex parte judgment or order where a party with notice has failed to attend due to accident, mistake, inadvertent error or omission. Mere absence, of itself, is insufficient to justify setting aside an order. There must be some added factor that makes it unjust for the order to stand. A high degree of candour is required, including disclosure of facts adverse to the moving party. Breach of that obligation will almost invariably result in the refusal of the application.

26. Evaluated from the lens of the tests discussed above, it is manifestly clear that the applicant's application dated 20th January 2022 is manifestly ill founded, unmerited and brought for the sole purpose of depriving the Petitioner the fruits of a properly obtained judgment and therefore it falls for dismissal. I dismiss it with costs to the Petitioner.

Right of appeal

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 21ST DAY OF FEBRUARY 2022.

JOHN M. MATIVO

JUDGE