



**Afyare Enterprises Company Ltd v Mugambi & 2 others; Mugambi (Interested Party)
(Environment & Land Case 1626 of 2016) [2023] KEELC 17892 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1626 OF 2016**

EK WABWOTO, J

MAY 25, 2023

BETWEEN

AFYARE ENTERPRISES COMPANY LTD PLAINTIFF

AND

GIDEON KIREMIAH MUGAMBI 1ST RESPONDENT

MAX GAS AND LOGISTICS LIMITED 2ND RESPONDENT

THE CHIEF LANDS REGISTRAR, NAIROBI 3RD RESPONDENT

AND

GLADYS KALUYU MUGAMBI INTERESTED PARTY

RULING

1. This court is called upon to set aside and vary its own orders issued on October 4, 2022 and October 13, 2022. A brief background of the proceedings herein is that, on July 26, 2022, the matter came up for a mention where only the Plaintiff's and the interested party's advocates attended court and a hearing date was set for October 4, 2022. The Plaintiff's advocate claims to have misdiarized the hearing date as October 24, 2022.
2. The Plaintiff's application for determination is dated October 21, 2022 and is supported by an Affidavit sworn by Hassan Abdi Warsame and Nicholas Sumba on the even date. The application is premised on the following grounds: -
 - a. That the matter came up for a ruling in court on May 31, 2022 subsequent to which a further mention date was fixed for July 26, 2022 to confirm compliance with the provisions of Order 11 of the *Civil Procedure Code* while a hearing date was simultaneously fixed for October 4, 2022 which was wrongly heard as October 24, 2022.



- b. The Plaintiff's advocate only got to know the matter had been heard on October 18, 2022 when he received a mobile message upon which he rushed to court on October 19, 2022 to peruse the file.
 - c. The Plaintiff's advocate owns up to the mistake and prays that its negligence should not be visited upon the client.
 - d. The application has been brought timeously without any delay.
3. The 1st respondent filed a replying affidavit sworn by Gideon Kiremah Mugambi dated February 24, 2023 in which it was averred that the Court had already determined the suit on merit. Additionally, it was submitted that since the Court of Appeal (Civil Appeal No 245 of 2018) had decided the key issues, it would serve no purpose to reinstate the suit.
4. The 2nd respondent filed a replying affidavit sworn by Abshir Hachi Afrah dated March 3, 2023 in which it was averred that once a court issues dates it is accessible in the e-filing system and all parties receive text message prompts. It was emphasized that on July 26, 2022, the Judiciary sent a message confirming a hearing date for October 4, 2022. Secondly, it was submitted that since the Court of Appeal judgment declared the 2nd Defendant as bona fide purchaser of the suit premises, the current suit was now overtaken by events thus reinstatement of the suit was nonsensical.
5. At the time of preparation of this ruling, no response nor submissions had been filed by the Plaintiff in respect to the application.
6. Having looked at the application and considered the submissions made by counsel for the parties, the singular issue that comes up for determination is whether the Plaintiff has managed to convince this court to set aside its proceedings of October 4, 2022 and October 13, 2022.
7. 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 vs Mbogo* (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 this instance, the question for the court to answer is whether the Plaintiff has 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.
8. In the instant case, the Plaintiff has stated that the reasons for non-attendance at the hearing was due to misdiarization. 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 Plaintiff seeks to set aside were definitely post the launch/commencement of court's e-filing system. Moreover, I find it implausible to think that whereas the 2nd Respondent received text messages, the Plaintiff's advocate on the day suffered a streak of bad luck in which messages were not sent or perhaps not received.
9. Counsel for the Plaintiff 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 Plaintiff, the Court is cognizant that some key issues in the suit have been litigated exhaustively by the Court of Appeal. The law must be practiced without fear or



favor for either party. Each of the parties was afforded the opportunity to present their case. Ringera, J (as he then was) in the case of *Omwoyo vs African Highlands & Produce Co Ltd* [2002] 1 KLR:

“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.”

10. Ultimately, this Court is bound by the decisions of the higher courts and must also ensure its orders are operable. In the instant case, the Plaintiff has failed to meet the threshold for setting aside the proceedings. Therefore, the application dated October 21, 2022 is unmerited and the same is dismissed with costs.

11. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH MAY 2023.

E.K. WABWOTO

JUDGE

In the presence of;-

Mr. Sumba for the Plaintiff.

Mr. Gichuru D. N For the 1st Defendant.

Ms. Cherono h/b for Mr. Bulle for the 2nd Defendant.

N/A for other parties.

Court Assistant – Caroline Nafuna.

