



**Njoroge v Maina (Environment & Land Case 239 of 2017)
[2023] KEELC 17564 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 239 OF 2017**

OA ANGOTE, J

MAY 18, 2023

BETWEEN

MARGARET NJOKI NJOROGE PLAINTIFF

AND

ERNEST MUNENE MAINA DEFENDANT

RULING

1. Vide a Notice of Motion dated February 16, 2022, the Plaintiff sought for the following reliefs:
 - a. That this application be heard ex parte in the first instance.
 - b. Setting aside the order of dismissal of the Plaintiff's suit on October 5, 2021.
 - c. That the Plaintiff be allowed to testify.
2. The application is based on the grounds on the face of it and the Supporting Affidavit sworn by the Plaintiff who deposed that the dismissal of the Plaintiff's suit was caused by failure and or negligence of her advocate and that she was not informed of the hearing date and her failure to attend on October 5, 2021 was due to circumstances beyond her control.
3. The Plaintiff deposed that she is desirous, willing and eager to present her side of the story to prove her case and counter the Defendant's counterclaim.
4. The Defendant opposed the application vide a Replying Affidavit. The Defendant deposed that as far as he knows, the Plaintiff is in the United States of America and could not have been in Nairobi on February 16, 2022 to sign the Supporting Affidavit sworn on February 16, 2022 and that consequently, the application ought to be struck out as being an abuse of the court process.
5. The Defendant deposed that the Plaintiff has changed advocates five times since they entered into an agreement in 2015; that the Plaintiff has never been ready to prosecute her case since 2017 and has



frustrated and delayed this suit and that it is untrue that her advocate failed to attend court on October 5, 2021.

6. It was deposed by the Defendant that the Plaintiff's advocate, Mr Arthur Ingutya, participated in the proceedings and cross-examined her at length; that the Plaintiff's advocate proceeded to file and serve submissions dated December 7, 2021 and that the said advocate was also present on December 8, 2021 to confirm the filing of submissions before the judgement date of March 17, 2022 was given.
7. The Plaintiff's former Advocate, Mr Arthur Ingutya, also filed an affidavit in response to the adverse allegations levelled against him by the Plaintiff. The said advocate deponed that he personally attended court on every date when this matter was scheduled, including at the hearing, when he cross-examined the Defendant; that he complied with the directions of this court and filed submissions on the Plaintiff's behalf and that he kept the Plaintiff properly informed as to the proceedings including all the scheduled dates.
8. According to the Plaintiff's former counsel, it is the Plaintiff who would propose dates that she would be able to travel to Kenya but on the hearing dates, she could not be found. Counsel deposed that he was not aware that the Plaintiff had recently been in Kenya and that he did his best to advance her cause in this matter.
9. According to counsel, he doubts if the affidavit sworn in support of the application was sworn by the Plaintiff and that the signature that he knows as belonging to the Plaintiff is very different from the one appearing on the Supporting Affidavit sworn on February 16, 2022. Counsel annexed on his affidavit correspondence which showed that the Plaintiff was kept informed of the proceedings.
10. The Plaintiff filed a Supplementary Affidavit sworn on February 22, 2023 in which she deponed that at no time was the Defendant privy to her movements within and outside the country and neither is he a handwriting or signature expert and that the Defendant has not been proven that the impugned signature is not hers.

Submissions

11. Counsel for the Plaintiff submitted that the Plaintiff has satisfied the conditions precedent to having the court grant her audience and testify in the case. Counsel relied on the definition of mistake as set out in *Belinda Muras & 6 Others v Amos Wainaina* [1978] eKLR as well as the cases of *Philip Chemwolo & Another v Augustine Kubede* [1982-88] KLR 103, *Shah v Mbogo & Another* [1967] 6 A. U7 and *Kilele Ventures Limited v Susan Wanjiru Muritu* [2019] eKLR.
12. Counsel submitted that the Plaintiff was ready and willing to have the matter heard having paid the legal fee in full and left it upon her former advocate to notify her when she would be needed to testify; that the Plaintiff was ready and willing to appear virtually and testify and that she came to learn of the mishap when on her own accord she sought to peruse the file, only to realize that the matter proceeded in her absence.
13. It was Counsel's submission that an application for reinstatement of a suit appeals to the discretion of the court, and that the court should caution itself not to exercise its discretion in a manner that will result in injustice. Counsel relied on the cases of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others* [2013] eKLR and *Alexander Vincent Mabonga (Suing as the legal representative of Joseph Wekesa Tulula (Deceased) v Hilda Wanjiru Tulula & Another* [2020] eKLR, amongst others.
14. Counsel for the Defendant submitted that the Supporting Affidavit sworn by the Plaintiff is incompetent as she has not proved that she was in Nairobi on February 16, 2022 to execute the same;



that the Plaintiff was aware of the hearing date, which has been confirmed by her previous advocate in his affidavit and that the Plaintiff has not denied receipt of the letters forwarded to her by her advocate.

15. The Defendant's Counsel submitted that the Plaintiff does not fall within the category of deserving litigants in whose favour this court should exercise discretion. Counsel relied on the case of *Shah v Mbogo & Another* [1967] EA 116 as cited in *Bilba Ngonyo Isaac v Kembu Farm Limited & Another* [2018] eKLR as well as *John Kabira Kioni v George Namasaka Sichangi t/a Sichangi Advocates* [2019] eKLR.

Analysis and Determination

16. Having considered the Plaintiff's application, the responses and the submissions filed by the parties, the following issues arise for the determination of this court:
 - a. Whether the Plaintiff's Supporting Affidavit is properly on record; and
 - b. Whether it should set aside the order of dismissal of the Plaintiff's suit on October 5, 2021.
17. The Defendant has challenged the validity of the Plaintiff's Affidavit sworn in support of the application, on the basis that the Plaintiff could not have sworn the affidavit in Nairobi and that the signature therein does not correspond with the Plaintiff's known signature in other documents.
18. It is trite that a party that alleges fraud needs to prove the same to a higher standard of proof than on a balance of probabilities. This was ably stated in *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR where the court stated that:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case *Central Bank of Kenya LTD v Trust Bank Ltd & 4 Others* [26] the Court of Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges.”
19. In this case, the Defendant and the Plaintiff's former advocate have averred that the Plaintiff was not in Kenya when she swore the Supporting Affidavit. However, no evidence of this assertion has been produced before this court. The Defendant also averred that the signature on the Supporting Affidavit does not correspond to the Plaintiff's known signature.
20. The Defendant should have sought an expert opinion on the impugned signature in comparison to the Plaintiff's known signature, to confirm whether it could have been written by the same person.
21. In the absence of evidence that the Plaintiff was not within the country at the time the affidavit was signed, and that the signature of the Supporting Affidavit was indeed made by another person, this court finds that the Supporting affidavit is properly on record. The second issue for determination is whether the orders of October 5, 2021 should be set aside.
22. This suit was scheduled for hearing on October 5, 2021, on which date Mr Njoroge advocate appeared for the Defendant while Mr Ingutya appeared for the Plaintiff. Mr Ingutya for the Plaintiff informed the court that he was not ready to proceed as his client was in the USA.



23. The then counsel for the Plaintiff further informed the court that he had tried to reach out to the Plaintiff but had been unsuccessful. Although the Plaintiff's counsel applied for adjournment, the court declined to allow the Plaintiff's application and in the absence of the Plaintiff, the court dismissed the Plaintiff's suit with costs for non-attendance and prosecution. It is these orders that the Plaintiff is seeking to set aside.
24. Order 12 Rule 7 of the [Civil Procedure Rules](#) grants this court the jurisdiction to set aside *ex-parte* judgement due to non-attendance during hearing as follows:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
25. The authority of a court to set aside an *ex-parte* judgement is discretionary in nature. This was affirmed by the Court of Appeal in [Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede](#) [1982-1988] KAR, where the Court held:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.”
26. The exercise of this discretion is to avoid hardship resulting from an accident, or excusable mistake or error. It is not intended to aid a person who deliberately seeks to obstruct justice. (see *Shah v Mbogo and Another* [1967] EA 116.)
27. Despite knowing that this suit was coming up for hearing on October 5, 2021, the Plaintiff failed to attend court. It is not disputed that her advocate was present on the hearing date and proceeded to seek adjournment, which this court declined, and proceeded to dismiss her suit.
28. The court's discretion could only be exercised in favour of the Plaintiff if good reasons were given why the Plaintiff was unable to attend court when the matter came up for hearing; that she promptly filed this application and that the parties are unlikely to suffer prejudice.
29. The reasons fronted by the Plaintiff for the failure to attend court are that her former advocate, Mr Ingutya, failed to inform her the date that the suit was coming up for hearing. This assertion has been disproved by Mr Ingutya who presented evidence of emails sent to the Plaintiff informing her that the suit was coming up for hearing on October 5, 2021.
30. On the basis of the documents before this court, this court is satisfied that Mr Ingutya fulfilled his professional mandate in representing the interests of the Plaintiff. Mr Ingutya was present in court on October 5, 2021 even without instructions from his client, and even after the Plaintiff's suit was dismissed, he proceeded to defend the Plaintiff's suit in the Counterclaim by cross examining the Plaintiff's witnesses.
31. The propounded reasons for the Plaintiff's failure to attend court has been shown by Mr Ingutya not to be true. The Plaintiff was not a victim of mistake or error by his advocate as alleged.
32. On whether the Plaintiff has promptly filed this application, the Plaintiff filed this application on February 16, 2022, seeking to set aside the orders of this court issued on October 5, 2021. Considering that the Plaintiff was promptly made aware of these orders on November 4, 2021 as well as the possibility of filing an application of this nature, the delay of four months in seeking to have these orders set aside is inordinate.



33. As pleaded by the Defendant, it is not lost to this court that this application was filed three weeks to the date when this matter was scheduled for judgment on March 17, 2022. Granting this application would indeed cause prejudice to the Defendant because the hearing having been concluded, all that was remaining was the delivery of the Judgment. That being the case, it is the finding of this court that the application is an abuse of the court and was not filed in good faith.
34. Having found that the Plaintiff has not given a reasonable reason for her failure to appear in court when the matter came up for hearing, it is the finding of this court that the application dated February 16, 2022 is unmeritorious.
35. For those reasons, the application dated February 16, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mutua for Njoroge for Defendant

Mr. Kariuki holding brief for Swaka for Plaintiff

Court Assistant - Tracy

