



Maina (Suing as the Legal Representative of the Estate of Eliud Wanjohi Maina – Deceased) v Mwangi (Environment & Land Case E032 of 2021) [2023] KEELC 17429 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E032 OF 2021**

CK NZILI, J

MAY 17, 2023

BETWEEN

EARNEST WANJOHI MAINA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIUD WANJOHI MAINA – DECEASED) PLAINTIFF

AND

ALBERT GACHORE MWANGI DEFENDANT

RULING

1. The court by an application dated February 23, 2023 is asked to stay the proceedings, set aside the order made on February 9, 2023 dismissing the plaintiff's suit, to reinstate and hear it afresh.
2. The grounds of the application are contained on its face and the supporting affidavit of Earnest Wanjohi Maina which was sworn on February 24, 2023. It is averred that when the matter came up for hearing on February 9, 2023, the advocate on record had reportedly agreed to adjourn the matter. As a result, the plaintiff averred that he did not attend court only to be told later on that this court declined to adjourn and dismissed the matter for non-attendance. He urged the court to allow his application otherwise he stands to suffer grave loss, injustice, and prejudice. He has attached an email dated February 8, 2023 which was communicating the predicament of seeking an adjournment saying that there were changes in the advocate's offices. The email was not copied to the court.
3. The application was opposed by a replying affidavit sworn on March 10, 2023 by Albert Gachore Mwangi, the defendant. The reasons were that the application is not merited; no real reasons have been given to allow the application; he should not suffer for the failure of the plaintiff in not putting his house in order and that the reasons for not attending court were not given. Further, the respondent stated that the alleged email was only sent on February 8, 2023 at 4.31 P.m. and acknowledged receipt by his advocates at 8.13 am, on the day of the hearing.



4. Additionally, the respondent averred that though the court has the discretion to set aside such orders, the same should not be issued to a party out to obstruct, delay justice or who has deliberately sought whether by evasion or otherwise to derail court.
5. By written submissions dated March 13, 2023, the applicant relies on Order 12 Rule 7 of the Civil Procedure Rules, Patel vs E.A Cargo Handling Services Ltd (1974) E.A 75 and Shah vs Mbogo (1967) E.A 166, Philip Chemwolo & another vs Augustine Kubende (1986) eKLR, Belinda Murlinda Murai & others vs Amos Wainaina (1979) EA 679, Gedion Mose Onchwati vs Kenya Oil Co. & another (2017) eKLR Nuru Ruga Ali & another vs Commodity House Ltd & 3 others (2021) eKLR, HAM vs SOS (2021) eKLR, Reynolds Construction Company Ltd vs Festus M'Murithi M'Mboroki (2022) eKLR. Gladys Njeri vs Langata Development Company Ltd and others (2016) eKLR, Films Rover International Ltd vs Cannon Films Sales Ltd (1986) ALL ER 772.
6. To set aside or not to set aside is a discretionary power that the court has to exercise judicially and not whimsically, depending on the circumstances of each case.
7. In Patel vs E.A Cargo supra, the court said that there were no limits or restrictions in the exercise of a court's discretion to set aside and that it can be done on such terms as may be just. Further, in Shah vs Mbogo (supra), the court said that the discretion to set aside an ex parte order is intended to be exercised to avoid an injustice or hardship resulting from an accident, inadvertence, or an excusable mistake or error but not to assist a person who was out to delay or obstruct the court of justice. In Chemwolo vs Kubende (supra), the court observed that mistakes would continue to be made by advocates, be it a senior or a junior but a party should not suffer just because of a mistake of counsel.
8. Applying the foregoing case law to the instant case, the hearing date was fixed on November 23, 2022 by consent of the parties' advocates. This was upon compliance with Order II of the Civil Procedure Rules.
9. There was no communication to the respondent or court on the predicament of the plaintiff until 4.31 pm on the eve of the hearing. The acknowledgment of the email was sent by the defendant at 8.13 am on the morning of the hearing. No communication was given to the court before the hearing date. If the acknowledgment was made at 8.13 am, it cannot, therefore, be true that there had been adequate communication or notification about the non-attendance of the plaintiff. Further to this, the court allocated time for the hearing at 11.00 am, but the plaintiff could not be located by his counsel on record. He cannot, therefore, blame his lawyers for any mistakes at all. Again, the plaintiff has not explained where he was on that day. Court business is equally important as any other business. A party seeking discretionary orders must make full disclosure and give adequate reasons for non-attendance. The likely prejudice has not been explained, given that the plaintiff's advocate on record participated in the hearing. The court has not been told what prejudice is likely to be suffered since the capacity of the applicant in this suit is also under question.
10. On the stay of proceedings, the law is that the administration of justice and the duty of the court to expeditiously dispense justice has to be adhered to in line with Article 159 of the Constitution, Sections 1A, 1B & 3A of the Civil Procedure Act and Sections 3 & 13 of the Environment and Land Court Act. Articles 48 & 50 of the Constitution relate to equality before the law and the right to a fair hearing. The rights of the applicant and those of the respondent vis a vis the duty of the court must be balanced.
11. In the case of Christopher Malakis Ndolo Mutuku & another vs CFC Stanbic Bank Ltd (2015) eKLR, Global Tours & Travels Limited Nairobi HC, Winding up Cause No 43 of 2000 the court set out some of the considerations to be taken into account on stay of proceedings as;- whether it was in the interest



of justice to stay the proceedings, optimum utilization of judicial time, the delay, the prejudice likely to be suffered by the opposite party and lastly the overall impression on the circumstances of the case.

12. In this suit, the hearing took place on February 9, 2023. This application was filed on February 28, 2023. This is close to 2 weeks after the defense was closed. The matter had been fixed for March 13, 2023 to fix a judgment date. The application herein has interfered with the diary of the court. In compliance with the court's directions, written submissions have been filed by the defendant. None have been filed by the plaintiff. It is no longer business as usual for the parties to determine when and when not to come to court. The court has to control its diary and dispense justice according to law and not to the whims of parties who still think the court is a parking bay for their cases. Therefore, I see no reason why I should stay the delivery of the judgment, which essentially will interfere with the rights of the respondent and the overall operations of the court. The upshot, is I find no merits in the application dated February 23, 2023. The same is dismissed with costs. Judgment on September 20, 2023.

13 Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 17TH DAY OF MAY 2023**

HON. C.K. NZILI

ELC JUDGE

In presence of

C.A John Paul

Cheruiyot for plaintiff

Gachohi for Mulama for respondent

