Lapedo v Cherrett (Environment & Land Case 258 of 2017) [2023] KEELC 18158 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18158 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 258 OF 2017

FM NJOROGE, J

JUNE 14, 2023

BETWEEN

CHRISTINE NARUMU LAPEDO .... PLAINTIFF

AND

MICHAELA CHERRETT .... DEFENDANT

RULING

1. This is the second ruling on the present application, the first one dated November 18, 2021 having been set aside on March 15, 2023 at the instance of the plaintiff by reason of want of service of the application on the plaintiff.

2. The applicant moved the court through the present Notice of Motion dated September 21, 2021 brought under Section 3,3A and 63(c) and (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 10 rule 11, Order 22 Rule 52, Order 45 and Order 51 rules 1 and 3 of the *Civil Procedure Rules 2010* seeking the following orders:

   1. ...Spent

   2. ...Spent

   3. ...Spent

   4. That this Honorable Court be pleased to issue temporary stay of execution of the judgment, decree and all consequential orders delivered on ,May 18, 2021 pending the inter-parte hearing and determination of this suit.

   5. That this Honorable Court be pleased to set aside the judgment and all consequential orders issued on May 18, 2021 in its entirety.

6. That this Honorable court be pleased to grant the defendant leave to file their defence and counterclaim in the instant suit.

7. That the cost of the application be provided for.

3. The application is supported by an affidavit dated September 21, 2021 sworn by Christine Narumu Lapedo where she deposed that she is the widow to the late Harold William Blunt alias "Harry Blunt" and that the suit property has been her matrimonial property; that the plaintiff/respondent herein is a daughter to Dr Peter Blunt who is a son to her deceased husband from his previous marriage contracted in Britain; that the defendant was not directly served with the pleadings but was only informed by relatives of the posting on the Standard Newspaper of the substituted service and proceeded to instruct her advocates Kale, Maina & Bundotich and ever since she has not been informed of the progress of the matter.

4. She went on to depose that she has a pre-existing medical condition and that covid-19 pandemic has rendered her a high risk individual hence unable to physically travel to the court registry to inquire about her case; that after being informed by a relative that the matter was finalized she followed up on the matter with her advocate who had not been attending court; that the default in this case was not the mistake of the defendant but that of the advocate and hence she should not bear the brunt of her advocates mistakes; that there is imminent threat of enforcement of execution of the said judgement, decree and consequential orders therein; that the plaintiff/respondent obtained judgment in deceit by referring to her as a caretaker when she knew that she was the widow and a legal representative to the estate of the late Harry Blunt(deceased); that execution of such orders against the defendant/applicant will leave the family of Harry Blunt(deceased) destitute as that was her matrimonial home; that she only moved out of the suit property when it became apparent that her life and that of her children were in danger pursuant to the alleged eviction notice. She further stated that she had registered a caution over suit property Nakuru Municipality Block No. 17/291 given her overriding matrimonial interest. She finally deposed that it is just and equitable for her to be allowed the opportunity to ventilate her case as she has a strong defence which raises triable issues.

Response

5. The response to the application was filed on December 1, 2022. In that affidavit the plaintiff accused the defendant of material non-disclosure and charged that summons were duly served upon the defendant by substituted means through a Standard Newspaper advertisement of March 15, 2018 pursuant to a court order issued on February 21, 2018 after efforts to trace her failed and she appointed the firm of Kale Maina Bundotich who filed notice of appointment on September 19, 2019. The plaintiff states that the said firm was notified of all processes in the suit including hearing, mention and applications but the defendant chose not to defend the suit; that the allegations that the said advocates never informed the defendant about the case is an afterthought and no evidence of her inquiries or any legal action against these advocates for default has been exhibited or reason offered as to why their services were discontinued and their failure to appearance and defence on her behalf are irrelevant; that in any event there is no evidence that the defendant instructed them to file defence; that the defendant's reliance on the covid-19 pandemic is also an afterthought as the said pandemic stalled court processes or normal life activities only in March 2029 (I believe this should read "2020"); the plaintiff further accuses the defendant of inexcusable and utter neglect and indolence; that no correspondence with the court seeking information on this case is exhibited; that the present advocate's averment that he was unaware of judgment is incorrect as the previous advocate was served with judgment and decree; that the court had given notice to the public that the judgment would be delivered virtually; that the hearing notice for February 22, 2021 was served by electronic mail on the plaintiff's former advocates;

that owing to the foregoing the defendant was given an opportunity to be heard; that no explanation is given for default to file defence or court attendance; and the judgment and decree of the court is regular and proper and was obtained without deceit; the other grounds relied upon are that the defendant has failed to illustrate a bona fide defence and counterclaim; that in any event Harry Blunt was never a registered proprietor of the suit property which was not matrimonial property; that the suit property was purchased by the plaintiff from her father one Peter Blunt and she became registered as owner on July 18, 2005 and she later sold it in September 2021; that the property had never been sold to Harry Blunt and the land register does not reflect any such sale or transfer; that however Harry Blunt was allowed by Peter Blunt to stay in the house on the land and upon his demise Peter made an offer to sell the land to the defendant who declined hence the sale to the plaintiff; that the defendant's claim based on a sale agreement would in any event be barred by limitation; that in Harry's succession cause, the suit was not declared part of his estate or his free property; that the defendant failed to disclose that she had lodged a caveat alleging a purchaser's interest in the property which the plaintiff successfully removed, yet now she has changed tune and is in this suit claiming matrimonial rights in it; that she vacated the property on the demise of Harry Blunt leaving her caretaker on it who also later vacated after a complaint of trespass and forcible detainer was made to the police; that the property was thereafter in the plaintiff's possession until she sold it; that the defendant removed her chattels in August 2018 from the house after the filing of the suit and an application for orders that the suit had been settled / adjusted was filed by the plaintiff's advocates.

6. I have not seen any supplementary affidavit of the defendant responding to the plaintiff's allegations above.

Submissions

7. Upon perusal of the court record, I have found that the plaintiff filed submissions on May 25, 2023 while the defendant had filed hers earlier on May 9, 2023.

Determination

8. Just as before, after considering the application, the response and the submissions thereon, the only issue for determination is whether the court should set aside the judgement issued on May 18, 2021 and grant the defendant leave to file her defence and counterclaim.

9. The two parties in this suit are in consensus that the applicant was served by way of substituted service on March 6, 2018 and that she thereafter appointed the firm of Kale Maina & Bundotich to conduct the defence on her behalf. There is also an affidavit of service on record sworn by Muhuyu Mwaniki sworn on February 17, 2021 which satisfies this court that the defendant's counsel was served with the hearing notice of the date when the matter came up for hearing. The parties however differ on whether the defendant's advocates failed to inform her of the progress of the matter and whether they knew that judgement in the matter had been delivered on May 18, 2021.

10. In the re-hearing of the application, it is to be noted that the response by the plaintiff does not alter the ground much. It simply emphasizes just as the defendant had admitted that her advocate was served and dismisses the defendant's plea of setting aside made to this court on the basis of her advocate's mistake as frivolous. It is noteworthy that there is no supplementary affidavit by the defendant to counter the plaintiff's allegations so the fact that service was effected sticks. As in the earlier determination, this court must ask itself whether there are any factors that may make it extend its discretion to the defendant and set aside the judgment. Even in this re-hearing of the application, of great focus in the present application will therefore be the approach the court will take regarding the alleged conduct of the defendant's advocates Kale Maina & Bundotich, they having filed on July 8, 2019 a Notice of

Appointment of Advocates dated July 3, 2019. That is the most prominent ground in the defendant's application.

11. Courts have from time to time held that a litigant has the obligation to follow up on both the progress and the outcome of a suit. The plaintiff has herein cited cases such as *International Air Transport Association & Another v Roskar Travel Ltd & 3 others* 2022 KEHC 200 KLR and *Savings & Loan Ltd v Susan Wanjiru Muritu* Milimani HCCC No 397 of 2002 for this proposition. She also cites cases such as *Hitenkumar A. Rajar V Greenspan Limited & v others* 2015 eKLR in support of the proposition that an advocate is clothed with general authority to represent the client and whatever actions he undertakes bind the client. She further has cited *Omwoyo V African Produce Co Ltd* 2002 1KLR 2 for the proposition that time has come, as proposed by Ringera J in that case, for legal practitioners to shoulder the consequences of their negligent acts or omissions.

12. This court has also considered the case of *Rajesh Rughani –v- Fifty Investment Ltd. & Another* (2005) eKLR the Court of Appeal held that:

> " It is not enough simply to accuse the Advocate of failure to inform as if there is no duty on the client to pursue his matter. If the Advocate was simply guilty of inaction that is not an excusable mistake which the Court may consider with some sympathy."

13. The court has further considered the case of *Habo Agencies Limited -v-Wilfred Odhiambo Musingo* (2015) eKLR where the court stated as follows:

> " It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

14. However, I can not agree with the impression created by the plaintiff that litigant can possibly hire an advocate simply for the purpose of ensuring that a suit is neglected for that does not make sense. Whatever happened that was deleterious to the interest of the defendant must have vexed her and her coming to court barely 4 months after judgment was entered against her is proof that she was not comfortable with her advocate's conduct. Be that as it may, a discussion of default in compliance with the rules and the process may be of lesser significance in the current constitutional dispensation in that Article 159(2) (d) *Constitution* of Kenya 2010 espouses substantive justice over procedural technicalities. It would befit everyone in the present suit where the application for setting aside was not presented after inordinate delay to have the matter heard on its merits.

15. On other occasions courts have expressed sympathy for litigants let down by their advocates, for example, in *Phillip Chemwolo & Another v Augustine Kubende* [1986] eKLR; *Belinda Murai & Others -vs- Amos Wainaina*, [1981] eKLR. The defendant urges the court to note that there is no evidence produced that the material on which the defendant's draft defence was based was ever availed to her first advocate to enable him file a defence, which is the plaintiff's way of suggesting that the defendant herself is to blame for default of defence in this matter.

16. In the instant case the counsel blamed for the mistake is not present to explain the circumstances in which the matters alleged by the defendant happened and an investigation into the conduct of that counsel may go well beyond the parameters of the present application. What must be admitted is that the mistake of counsel is not unique. In the social scene, it is normally said that to err is human. This is no different from the legal scene. Mistakes of similar nature by advocates have occurred in the past and will continue to occur in future and that fact was observed in one of the cases I have cited herein

above. The plaintiff has not demonstrated that the mistake Kale Maina Bundotich & Co. Advocates made was any more egregious than those pardoned by courts in other cases cited. I think that courts having been established for the primary purpose of dispensing substantive justice it would be only just for a litigant who confesses to her own mistakes and the sins of her advocate and pleads for the court's discretion to be granted a hearing. In the present case, where I have stated that the occurrence of such a mistake as the defendant has encountered in the form of conduct of her advocate is a common mistake, I am inclined to overlook it and apply discretion to enable the defendant have her case heard on merits.

17. In dealing with the plaintiff's second limb of objection, that is, that no justifiable grounds have been demonstrated to warrant the vacating of the judgment and decree, this court notes several things. First there is a familial relationship between the parties which I must outline here briefly. The applicant exhibited a copy of the certificate of marriage between her and Harry Blunt. The defendant describes the plaintiff as a daughter to Dr Peter Blunt who is a son to the defendant's deceased husband, Mr. Harry Blunt. It is not denied by the plaintiff that Harry Blunt used to live on the premises and that the defendant was left on the premises when Harry Blunt died. Later according to the plaintiff the defendant left the premises and left her caretaker thereon who also moved away later after the plaintiff complained to the police of trespass and forcible detainer.

18. In this court's earlier ruling it had observed as follows while setting aside the judgment in the suit:

> " The family is the building block of the nation and as far as this court is concerned, disputes between members require to be settled in a satisfactory manner to enhance amity between members. The applicant describes the help she got from other relatives in finding out that there was a suit filed against her and this goes on to reveal how the interest in this matter may be spread over a far greater number of persons out there. However, to return to the issue of extenuating circumstances the defendant must be credited with at least filing the instant application within 4 months of the delivery of the judgment. The medical document she attaches to her application describes her as hypertensive and at her advanced age of 60 years this court may not doubt the veracity of the allegation that the discovery of a suit against her exacerbated her hypertensive status."

19. The immediately foregoing analysis is factual and based on documents filed which still stand to date. In the earlier ruling this court also stated as follows:

> " Also since courts are there for the principal purpose of providing substantive justice to the parties, the consideration as to whether there is some form of defence raising triable issues features in setting aside applications. In Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76, the court held:
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> "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 it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the 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."

20. This court also earlier relied on the two cases: *Sammy Maina Versus Stephen Muriuki* Nairobi Civil Case No. 1079 of 1980 and *Richard Ncharpai Leiyagu vs IEBC & 2 others* 2013 eKLR is relevant. In the Sammy Maina case (*supra*) it was observed as follows:

> " As I have already stated in this suit there was a valid defence and nobody has suggested that the defence filed was a sham. What happened was that the applicant did not turn up on the day of the hearing. His advocate also failed to turn up. He (the applicant) says that he was not aware that the suit was to proceed and that he was relying on his advocate. Hence the applicant/ defendant should not be penalised due to his advocate's faults (see Shabir Din v Ram Parkash Anand (1955) 22 EACA 48)."

21. The court in the case of Richard Ncharpai Leiyagu vs IEBC & 2 others 2013 eKLR stated as follows: -

> " The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

22. The applicant has attached her draft defence to the motion. Her claim is that the suit land formed part of matrimonial property. This court had earlier found that the applicant states that the suit land was purchased with, among others, the proceeds of sale of her Malindi house and that these are allegations that can not be ignored and which raise triable issues that ought to be addressed by way of evidence in a substantive hearing of the suit in order for the truth to be ascertained. The matters raised by the plaintiff to suggest that the defendant lacks a probable defence delve deeply into the realm of evidence. I think that all this court needs in order to be satisfied that the matter should go for a retrial is that there is material, which I can not delve into in this ruling to avoid prejudicing the trial, that raises a triable issue. It suffices to note that the defendant filed on October 18, 2022 a long list of documents listing very many documents, including bank statements, in support of her allegations. It would be unfair to shut the door in her face and send her away unheard in view of what those documents may hold. Besides, pleadings in their earliest form have in the past been known to be imperfect as parties battle over whether the right to be heard on merits should be overridden by a litigant's mistakes, but later on by way of amendments they have transformed by amendment. The matters both parties raise in support of or against the defendant's defence are assertions in regard to which evidence is required in proof, but all the court needs for now is strong statements in the defence. This court finds that since the defence has strong statements which raise triable issues the judgment delivered in this matter ought to be set aside to enable the suit be set down for trial on its merits, and it needs not conduct a mini trial at the present juncture.

23. The last issue I will address is the defendant's reliance on the prevalence of the covid-19 pandemic as a reason for her debacle. The plaintiff has downplayed the Covid-19 pandemic's role saying that it affected only affected normal life activities only in March 2019 (and I believe she meant "2020"). In this I do not agree with the plaintiff and I am inclined to wonder whether she was really in this country between the years 2019-2021. Besides it has transpired that for the aged and the illiterate who were not well versed with the digital applications of the modern age, the need to stay away from human contact for fear of losing their lives to the pandemic in the name of pursuing this or that interest struck them hard. I would state here that persons benefited or suffered during the pandemic depending on the level of their susceptibility to underlying conditions and age as well as extent of digital knowledge. I must

dismiss the plaintiff's argument summarily in view of the then existing realities of which the court takes judicial notice.

24. There is therefore sufficient cause for the setting aside of the court's judgement delivered on May 18, 2021. Consequently, the defendant's application dated September 21, 2021 succeeds. I grant prayers Nos (5) and (6) of the application dated September 21, 2021. The defence of the defendant filed on November 26, 2021 shall henceforth be deemed as properly filed and served.

25. As observed in *Patel V East Africa Cargo Handling Services Ltd* 1974 the court has discretion to set aside a regular or irregular judgment on such terms as it may deem just. To set aside a regular judgment is a matter of discretion by the court while to set aside an irregular judgment suffering from want of service is a matter of right for an applicant. I have considered that the plaintiff is faultless in the circumstances of this application and so I find that the costs of the instant application to be taxed and the thrown away costs of the hearing which this court assesses in the sum of Kshs.20,000/= (twenty thousand only) shall, for that reason, be borne by the applicant in any event. Parties shall file their trial bundles duly paginated and indexed, the plaintiff going first within the first 30 days from today and the defendant within 30 days of service or in any event within 60 days of this order. The instant suit shall be mentioned on September 28, 2023 for the fixing of a hearing date.

Dated, Signed and **Delivered at Nakuru** via **electronic mail** on this **14th** day of **June, 2023.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

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