Njuguna & another (Suing as the legal representative of the Estate of the Late Njuguna Mwaura Mbogo) v EK Banks Limited (Environment & Land Case 152 of 2018) [2023] KEELC 19259 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19259 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 152 OF 2018

A OMBWAYO, J

JULY 26, 2023

BETWEEN

ELIZABETH NYAMBURA NJUGUNA & FRANCIS KAMAU NJUGUNA ..... PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE NJUGUNA MWAURA MBOGO

AND

EK BANKS LIMITED ..... DEFENDANT

RULING

1 The application before me is dated March 2, 2004. It seeks orders that the ex-parte judgment dated February 19, 2003and the decree herein together with all the consequential orders be set aside or varied upon such terms as are just.

2 That the plaintiff herein be restrained by himself, his servants, or agents or otherwise whosoever from wasting, alienating transferring, selling, disposing off or dealing with the disputed parcel of land Grant No.I.R 18437 L.R No. 10581 (original No. 5296 and 6287 or interfering with the same in any way. That the suit property Registered as Grant No. I.R 18437 L.R No. 10581 (original No.5296 and 6287) be restored in the name of the 1st Defendant E.K Banks Limited pending the hearing and determination of the suit herein or until further orders by the Court. Cost of this application be borne by the plaintiff/ Respondent herein.

3 The application is based on grounds that the representative of the defendant have not been served with any documents whatsoever despite the fact that they have an office within the disputed parcel of land. That the plaintiff does not have a proper case before the court. The orders herein were obtained through concealment of materials facts from the court. The suit herein is framed on falsehood and deliberate misuse of the court process in order to obtain title fraudulently.

4 According to the applicant, the plaintiff is being used to defeat justice for the benefit of people or persons who are not party to the proceedings herein but they are actively involved. The filing of this suit in Nairobi Law Courts and not Nakuru was deliberate for selfish gain and eventually defeat the cause of justice as the disputed parcel of land is in Nakuru, the plaintiff resides in Nakuru, the defendants are from Nakuru and that there is a competent court at Nakuru.

5 The plaintiff has intentionally misled the court into issuing orders to a party who does not deserve them. The applicant claims that the plaintiff has deliberately concealed the existence of this suit. The plaintiff has never occupied the disputed parcel of land as alleged.

6 The application is supported by the affidavit of Shadrack Cherogony who claims to be the manager of the defendant. According to the deponent, the defendant is also known as Ampiva Estate (1970) Ltd, after a special resolution of members passed onApril 28, 1970. That Endao Co Limited purchased 100% shares from the defendant between the years 1977-1987 hence Endao Co. Ltd owns all the disputed land. The disputed land is fully developed and used for commercial farming.

7 The deponent states that he came to learn about this suit when they were called to attend a meeting in the District Commissioners Office at Nakuru on January 22, 2004 when the advocate for Jumaa farmers Company Limited informed the District Commissioner and all those people in attendance that the plaintiff has filed another suit and that he has acquired title.

8 The plaintiff opposed the application with a replying affidavit stating that it is not true that Shandrack Cherogony is the manager of the 1st defendant and therefore had no authority to swear the affidavit. In the replying affidavit, it is denied that Ampiva Estate (1970) purchased 100% shares of the 1st defendant.

9 In his submissions, in a nutshell, Mr Osundwa, learned counsel for the applicant in support of the application contends that the applicant has adduced sufficient evidence to warrant their failure to enter appearance and defence. The defendant argues that they were not duly served with summons. That the directions of the court were not issued before the hearing date. The defendant submits that there is no evidence showing service of summons and pleadings. The defence submits that the defendant has adduced sufficient evidence for the failure to enter appearance and file defence.

10 The applicant submits that Lady Justice Rawal found that service was not adequate. Moreover, that the defendant was a company and therefore there has to be evidence that the secretary, director or other principal of the company was served.

11 That the plaintiff did not undertake service in accordance with order V Rules 2 of the *Civil Procedure Rules* (Repealed). That the affidavit of service relied upon did not disclose service. That the plaintiff has not shown the summons that were returned after service.

12 The applicant submits that the jurisdiction of the court to set aside judgment is discretional, hence, wide and unfettered. It is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not intended to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

13 The applicant submits further that the defence raises triable issues as the defendant is the proprietor of the suit land and has been in occupation of the suit property and has developed the same for commercial farming. He has been paying rent and electricity and meter bills. The land has attracted many squatters including the plaintiff. The plaintiff has been evicted from the property on several occasions through a court order.

14 The defendant submits that Mr. Shandrack Cherogony had authority to swear the supporting affidavit on behalf of the defendant because he is the manager of the defendant and that the plaintiff confirmed to that effect. The defendant submits that failure to file the resolution by the board to initiate a suit is not fatal as the same can be filed during the hearing of the suit. The defendant submits that the suit property should be restored to the defendant

The gravamen of the

15 I have carefully considered the application rival submissions and do find the following issues ripe for consideration: -

1. Whether Shadrack Cherogony has the authority to file the application.
2. Whether there was service.
3. Whether an order for an injunction should issue.
4. Whether the suit land should be restored to the defendant.

16 On the 1st issue thus whether Shadrack Cherogony has the authority to file the application. I do find that no authority was ever produced by Mr. Shadrack Cherogony given by the defendant to enable him file the application. It is in trite law that the company is different from its directors. The defendant E.K Banks Limited is a different entity from Shadrack Cherogony and therefore it was necessary that he files the authority given by the company to commence the application. This court wonders why Mr Shadrack Cherogony has never produced the authority to file the application on behalf of the defendant more than 20 years when the application was filed. Mr Shadrack Cherogony has never deposed that he has the authority and that he would produce it later.

17 This issue has been canvassed in various cases including Petition No. 600 of 2013 *East African Portland Cement Ltd v The Capital Markets Authority & 5 Ors* in which the Ugandan case of *Bugerere Coffee Growers Ltd v Seraduka & anor.* (1970) EA 147 had been referred to and in which it had been held in dismissing the suit:

When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings in this case. The court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action."

18 The defendant went on to further refer to the case of *East African Safari Air Ltd v Anthony Kegode & anor* in which Emukule J. had detailed:

When an Advocate is however instructed to file a suit, particularly against current or sitting directors or immediate former directors of the company, special care is required on the part of the Advocate or his firm that necessary authorisations by way of clear resolutions of the Board had been taken to institute the suit."

19 The defendant's/ applicant's counsel, in his submissions before Court, spent considerable paper and ink arguing that Shadrack Cherogony was the manager of the company and therefore had the authority of the company to swear the supporting affidavit. In my view, Mr Shadrack Cherogony failed explain satisfactorily his authority to swear the affidavit, instruct the advocate and to file the application. There is no authority by way of Resolution of the company's members or its Board of Directors as to the institution of application.

20 In the 2014 *East African Portland Cement Ltd* case Mumbi Ngugi J. summed up what she considered that the law provided with regard to suits filed without the authority of the company. The learned Judge detailed as follows:

> 33. In *Affordable Homes Africa Limited v Ian Henderson & 2 others* HCCC No. 524 of 2004, Njagi J observed that as an artificial body, a company can take decisions only through the agency of its organs, the Board of Directors and the shareholders and that where a company's powers of management are, by the articles, vested in the Board of Directors, the general meeting cannot interfere in the exercise of those powers (see the decision of the court in *Automatic Self-Cleansing Filter Syndicate v Cuninghame* [1906] Ch.34, CA.); that it was therefore necessary to examine a particular company's articles of association to ascertain wherein lies the power to manage the company's affairs, for therein also lies the power to sanction the commencement of court actions in the name of the company. The court (Njagi J) observed that it was common ground that there was no authority from the board of Directors to institute the suit, and consequently, he held as follows:
>
> 'The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff'.
>
> I believe a similar situation obtains in the present suit in respect of the application filed by the defendant by Shadrack Cherogony. The business of the company ought to be managed by the Directors who may do on behalf of the company all such acts and exercise all such powers as may be exercised by the company.
>
> Article 110 of the company's articles provides for the passing of resolutions of directors in writing, such resolutions to be as effective as those passed at meetings of the Board of directors. There was no resolution for the filing of this matter.

21 One might argue that the provisions of section 1A and 1B of the *Civil Procedure Act* and article 159 (2) (d) of the *Constitution* are designed to ensure that justice shall be administered without undue regard to procedural technicalities. However, it has been reiterated in several instances, as in *Joshua Werunga v Joyce Namuyak* (2013) eKLR (see also *Hunker Trading v Elf Oil (K) Ltd* Nai. Civil Appl. No. 6 of 2010) that the provisions of article 159(2)(d) should not be used by litigants as a panacea to all irregularities and procedural technicalities. The Courts have cautioned that the same should not be used to trash procedural provisions as the rules are the handmaidens of justice. It has however also been reiterated, as was the case in *Raila Odinga v IEBC & others* (2013) eKLR, that the court should not pay undue attention to procedural technicalities and requirements at the expense of substantive justice. It was reiterated in Joshua Werunga v Joyce Namunyak inter alia:

22 In the case of *Raila Odinga v I.E.B.C & others* (2013) eKLR, the Supreme Court said that article 159(2) (d) of the *Constitution* simply means that a court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court."

23 As regards the necessity for a company Resolution to back the institution of the suit, Odunga J. in his Judgement in the *Leo Investments case* (supra) referred to the holding of Hewett, J. in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd* HCCC No. 391 of 2000 as follows:

> It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors

are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

24 In this case, there has been no such ratification even after the applicant, through its advocates or otherwise, became aware of the issue raised by the plaintiff for over 20 years.

25 It is my view that the applicant has been lackadaisical to say the least.

26 The other question is the nexus between E.K Banks Limited and Ampiva Estate Limited this court finds that the said Shadrack Cherogony was cross examined on his affidavit supporting the application and he did not come out clearly on the nexus between the two companies. He did not provide a certifies of change of names issued by the Registrar of companies in the supporting affidavit as evidence that EK Banks was converted to Ampiva Estates Ltd. Moreover, he did not come out clearly on the relationship between Endao Company Limited, Ampiva Estates Limited and E.K Banks .

27 The said Shadrack Cherogony did not produce a C R 12 as proof that he was director of either E.K banks or Ampiva. In *George W M Omondi and another -vrs- National Bank of Kenya Ltd and 2 others* (2001) eKLR the judge observed :-

28 On the issue of service I do find that Justice Hayanga on February 19, 2003 observed that there was evidence of service and that hearing was to proceed on default. I do find that the court was satisfied with service and ordered that the hearing proceeds. The applicant has not requested that the process server be cross examined and therefore it is believed that the process server served the application as per the affidavit of service. Setting aside judgment entered exparte is a discretion of the court. The same ought to be exercised judiciously and not whimsically

29 As was held by the Court of Appeal in *CMC Holdings Ltd v Nzioki* [2004] KLR 173 :

> In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place ex parte and hence it would appear was true and not if true, the effect of the same on the ex parte judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the ex parte judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in

> an application for setting aside ex parte judgement, the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The court has wide discretion in such cases to set aside ex parte judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard ex parte and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the ex parte judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the ex parte judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

30 This application does not meet the test in the said case as the applicant has not demonstrated the authority to come to court through a resolution by the directors. It is not disclosed in the application the capacity of Shadrack Cherogony.

31 On injunction I do find that having found that the application have no authority to come to court and that service was properly done and therefore the applicant has not demonstrated a *prima facie* case with a likelihood of success as he lacks capacity and that since he has not shown any nexus with E.K Banks, he has failed to demonstrate that the EK bank will suffer irreparable loss that cannot be compensated with damages. Ultimately, I do find the application without merit and the same is dismissed with costs.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF JULY 2023.

A O OMBWAYO

JUDGE