



REPUBLIC OF KENYA



**Said v Juja Coffee Exporters Limited & another (Environment & Land
Case 68 of 2022) [2023] KEELC 18894 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 68 OF 2022**

**SM KIBUNJA, J
JULY 25, 2023**

BETWEEN

ISHA TAHIR SHEIKH SAID PLAINTIFF

AND

JUJA COFFEE EXPORTERS LIMITED 1ST DEFENDANT

BANK OF AFRICA LIMITED 2ND DEFENDANT

RULING

1. The plaintiff moved the court through the notice of motion dated the March 28, 2023 seeking for among others temporary injunction restraining the 2nd defendant either by themselves or any other person from selling by public auction or otherwise advertising for sale, transferring, alienating, presenting any instrument for registration at any registry or body, or in any other way disposing all that parcel of land known as Mombasa/Block XXV1/381, suit property, located at Kizingo, Mombasa County pending the hearing and determination of the intended appeal to the Court of Appeal or in the alternative there be a temporary prohibitory injunction restraining the 2nd defendant by themselves or others from taking any of the acts mentioned above in relation to the suit property pending the lodging, hearing and determination of an application for injunction before the Court of Appeal. Or for such other period as the court may deem fit. The application is premised on the eleven (11) grounds on its face and supported by the affidavit of Fatma Tahir Sheikh Said, first born daughter to the plaintiff and holder of a power of attorney, sworn on the March 28, 2023. It is the plaintiff's case that their application for injunction dated June 23, 2022 was found to be res judicata in the ruling delivered on the March 1, 2023. That the plaintiff was aggrieved by the said ruling and has filed a notice of appeal dated March 10, 2023 and lodged with the court on the March 15, 2023. That their application should be granted as their intended appeal is meritorious, and if the property is sold and transferred, the substratum of the intended appeal will be lost.



2. The application was placed before the duty judge on the March 28, 2023 and ex parte injunction order in terms of prayer 2 granted pending inter partes hearing.
3. The 2nd defendant opposed the application through the replying affidavit of Felix Muhati, senior recoveries officer, sworn on the April 18, 2023 inter alia deposing that the ex parte order issued on March 28, 2023 should be set aside in the interest of justice. That if the ex parte order is not set aside, it will result to great hardship on the 2nd defendant due to the increase of the loan from the accruing interest. That the plaintiff has not shown how the refusal to grant the injunction will result to the appeal being rendered nugatory in view of the previous decision of the Court of Appeal that the defendant cannot be restrained from selling the suit property.
4. On its part, the 2nd defendant filed the notice of motion dated the April 18, 2023 seeking for the ex parte order granted on the March 28, 2023 to be set aside. The application is based on the five (5) grounds on its face and supported by the affidavit of Felix Muhati, sworn on the April 18, 2023. The deponent stated inter alia that the 2nd Defendant had filed an application seeking, among other things, the recusal of the honorable Justice LL Naikuni. Subsequently, on July 29, 2022, Justice Naikuni recused himself from the case and referred it to this Honorable Court for further directions. That on September 28, 2022, this Court assumed jurisdiction over the matter and delivered a ruling on March 1, 2023, which is the subject of the intended appeal. That on the March 28, 2023, the application filed under a certificate of urgency was presented ex parte before judge Naikuni and despite having recused himself, the learned judge granted an ex parte order of injunction and scheduled the matter for hearing before the trial court on April 20, 2023. That in light of the foregoing, the ex parte orders granted on March 28, 2023 cannot stand, as the learned judge who issued the said orders had recused himself from the matter, and it was in the interests of justice that the ex parte orders granted on March 28, 2023 be set aside.
5. The application is opposed through the undated replying and further affidavit of Fatma Taher Sheikh Said in which she among others deposed that on March 1, 2023, Justice Kibunja delivered a ruling without making a determination on the issue of recusal of the Honorable Justice Naikuni. That the absence of explicit reasons for recusal made it incorrect to assume that judge Naikuni had recused himself. Nonetheless, she asserted that a duty judge can make orders under urgency, as was done in this case on March 28, 2023. The matter was also subsequently heard by Hon. Kibunja on April 20, 2023 during the inter parties' hearings, and ex parte orders were extended up to May 9, 2023 by the the right court. A Notice of Appeal was lodged against Hon. Kibunja's decision, and they were currently awaiting typed proceedings. It was further deposed that the fundamental issue in the suit on the ownership of the property in question and accuracy of financial figures presented by the bank would be determined by the Court of Appeal. She deposed that the application dated April 18, 2023 is without merit and should be dismissed with costs.
6. The court issued directions on the April 20, 2023 on filing and exchanging submissions on the two applications. The learned counsel for the Plaintiffs filed their submissions dated April 24, 2023 while that for the 2nd defendant filed theirs dated the May 5, 2023, that the court has considered. The counsel for the plaintiff submitted inter alia that Justice Naikuni, J, only handed over the matter to the trial court, and the judge did not recuse himself. It was argued that recusal of a judge is a serious matter that must be supported by reasons, as elaborated in the case of [*Barnabas Kipsongok Tenai v Republic \[2014\] eKLR*](#). That even if the court finds that the judge recused himself, it was submitted that his role on March 28, 2023 was to act as a duty court, which has the duty to handle all applications filed under a certificate of urgency and issue orders within its discretion. Setting aside the orders would also prejudice the appeal that has already been lodged at the Court of Appeal, and rendering it a mere academic exercise. That the application dated April 18, 2023 has not met the threshold required for the



honorable court to set aside the ex parte orders. The Plaintiffs pray that the application dated March 28, 2023 be allowed as prayed, and the application dated April 18, 2023 be dismissed with costs.

7. The learned counsel for the 2nd defendant submitted inter alia that the plaintiff has not met the threshold for an order of injunction pending the intended appeal to issue. That the threshold is as set out in the English case of *Eringford Properties Limited v Cheshire County Council [1974] 2 ALL ER 448* that has been reiterated by several Kenya court decisions including *Madbupaper International Limited v Kerr [1985] eKLR*, among others. That the power to grant an injunction pending an appeal is discretionary. That discretionary power should be exercised judicially and not whimsical or arbitrary, while being guided by the following principles;
 - a. The discretion will be exercised against an applicant whose appeal is frivolous.
 - b. The discretion should be refused where it would inflict greater hardship against the respondent than it would avoid.
 - c. The applicant must show that to refuse the injunction would render its appeal nugatory.
 - d. The court should be guided by the principles in *Giella versus Casman Brown & Company [1973] EA 358*.
8. The following are the issues for the determinations by the court;
 - a. Whether the plaintiff has met the threshold for the order of injunction to issue pending the determination of the pending appeal.
 - b. Who pays the costs in the two applications.
9. The court has carefully considered the grounds on the two applications, affidavit evidence, submissions by the learned counsel, superior courts decisions cited and come to the following conclusions;
 - a. That in seeking for the exparte orders of March 28, 2023 to be set aside, the 2nd defendant contends that Naikuni J, had on July 29, 2022, recused himself and referred the matter to this Honorable Court for further directions. However, the Plaintiff disputes the existence of any order by the judge recusing himself, asserting that the file was simply transferred to this court. Furthermore, the Plaintiff highlights that the orders were extended by this court on April 20, 2023 and that there is an ongoing appeal against the ruling of this court of March 1, 2023, and setting aside the ex parte orders would render the intended appeal futile. Order 12, Rule 7 of the *Civil Procedure Rules, 2010* provides the court with discretionary power to set aside or vary a judgment or order upon application, on such terms as may be just. The court exercises its discretion to avoid injustice or hardship resulting from an excusable mistake, accident, or inadvertence. The Court of Appeal, in the case of *CMC Holdings Ltd v Nzioki [2004] KLR 173*, emphasized the importance of exercising discretion judiciously in setting aside ex parte judgments or orders. The court stated thus;

' 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.'

The court has perused the affidavit evidence presented by both sides and the record and noted that there is no documentary evidence that indicates that Honorable Justice Naikuni had formally recused himself when referring the matter to this court on July 22, 2022.

- b. That when the application dated the March 28, 2023 was presented to Justice Naikuni as the duty judge on the March 28, 2023, there was nothing stopping him from considering the application and issuing the orders as he deemed just. The ex parte orders issued by the said judge were temporary in nature and were further extended by this court on April 20, 2023. The invitation by Counsel for 2nd Defendant to set aside the order issued by Justice Naikuni for reason that it was issued by a Judge who had recused himself therefore fails.
- c. On whether the plaintiff has met the threshold for injunction to issue pending the hearing and determination of the appeal pending before the Court of Appeal, the court has taken time to peruse not only the affidavit evidence by the parties filed in respect of the instant applications, but also this court's ruling of March 1, 2023. In that ruling, the court inter alia observed that the plaintiff had not established any special circumstances to allow her re-litigate on issues that



may well have been settled in the previously filed suits before the High Court and the appeals thereof. The court then proceeded to find the plaintiff's application dated the June 23, 2022 for injunction to be res judicata and dismissed it. With that background, and considering that the plaintiff has not presented any new facts from what was already known to the court when the ruling of March 1, 2023 was delivered, the court finds the plaintiff's application is without merit. That being the position, it follows that the injunction order granted on the March 28, 2023 and extended on the April 20, 2023 is to be vacated as the application upon which they were issued is without merit. That result will automatically settle the 2nd defendant's prayer in the notice of motion dated the 18th April 2023.

- d. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless for good cause the court directs otherwise. In the case of Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 others, the court cited two leading decisions on the subject and held, among other things, that;

' It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. Firstly, the award of costs is a matter in which the trial Judge is given discretion. However, this is a judicial discretion and must be exercised upon grounds on which a reasonable person could come to the conclusion arrived at. Secondly, the general rule is that costs should be awarded to the successful party, and this rule should not be departed from without the exercise of good grounds for doing so.'

In this matter, the court finds no reasons not to follow the principle that costs follow the event. The costs in both applications are awarded to the 2nd defendant.

10. In view of the forgoing, the court finds and orders as follows;
- a. That the plaintiff's application dated the March 28, 2023 has no merit and is hereby dismissed with costs.
 - b. That the 2nd defendant's notice of motion dated the April 18, 2023 has merit and is hereby allowed with costs.
 - c. The exparte temporary order of injunction issued on the March 28, 2023 and extended on the April 20, 2023 stands vacated forthwith.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JULY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

In The Presence Of;

Plaintiff : Mr. Waziri Advocate.

Defendants : Mr Ongeru for Wawire for 2nd Defendant.

Wilson – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

