



**Mwania v Munyao & 3 others (Environment & Land Case
230 of 2017) [2023] KEELC 19082 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19082 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 230 OF 2017
CA OCHIENG, J
JULY 24, 2023**

BETWEEN

KAMENE MWANIA PLAINTIFF

AND

MICHAEL MUASA MUNYAO 1ST DEFENDANT

FRANCISCA SYOMBUA MUTUNGA 2ND DEFENDANT

JOSEPH MAINGI 3RD DEFENDANT

HOSEAH MUTHIWA 4TH DEFENDANT

RULING

1. What is before court for determination is the defendants' notice of motion application dated the December 15, 2022 where they sought for the following orders:
 1. Spent
 2. There be a temporary stay of execution pending the hearing and determination of the Application herein.
 3. The honourable courts do set aside the ex parte proceedings of March 15, 2022 and ex parte Judgment rendered on the November 3, 2022 and all consequential orders thereon.
 4. Costs abide in the cause.
2. The application is premised on the grounds on the face of it and the supporting affidavit of the 4th defendant Julius Usea Muthiwa, where he deposes that this matter proceeded ex parte on March 15, 2022 and Judgment was delivered on November 3, 2022. He claims their advocate never received the hearing and mention notices as the same were sent to a wrong address. Further, that he was not aware of the proceedings. He explains that since the month of November, 2021, their advocate moved offices



from Utalii House in Eastern Bypass Road and although the hearing notices indicate he was served at his former offices, he was never notified of the same. He insists that they have a good claim against the respondent who has never lived on the suit land but it is the defendants who have been residing thereon for the last 55 years. Further, they have buried their children and parents thereon. He reiterates that this case is best ventilated on merits. He contends that failure to attend court on the hearing and mention dates were due to circumstances beyond their control as they were not aware of the same. Further, that in the interest of justice, the ex parte proceedings and consequential Judgment ought to be set aside and the applicants allowed to prosecute the matter on merit. He states that the respondent will not suffer any prejudice if the orders sought are granted.

3. In opposing the instant application, the plaintiff/respondent filed a replying affidavit where she confirms filing the instant suit against the defendants on May 9, 2017 as they had trespassed on her land Kithyoko/Kithyoko/4517 hereinafter referred to as the 'suit land'. Further, that the defendants filed a statement of defence on July 12, 2017 but thereafter never attended court. She contends that the defendants were duly informed of the court proceedings through service of various mention notices via their advocate on record who never received the same under protest. She insists that the defendants are misleading the court that they were not aware of the hearing and Judgment dates slated on March 15, 2022 and November 3, 2022 respectively as the respective notices were duly served upon their advocate on record but they chose not to participate. She avers that the instant application does not disclose any concrete reason why the defendants nor their advocate on record failed to attend court on various occasions. She reiterates that the defendants have filed the instant application to frustrate her and continued to trespass into the suit land. She contends that she has studiously attended court. Further, that since she is an old woman and this matter being an old matter, litigation must come to an end. She reaffirms that she stands prejudiced as the defendants seek to deny her the fruits of the judgment.
4. No party filed submissions to canvass the instant application.

Analysis and Determination

5. Upon consideration of the instant notice of motion application including the respective affidavits, the only issue for determination is whether the court should set aside the ex parte proceedings of March 15, 2022 and ex parte judgment rendered on the November 3, 2022 as well as all consequential orders thereon.
6. The defendants have sought to set aside the proceedings of March 15, 2022 as well as the ex parte judgment delivered on November 3, 2022 claiming their advocate was not aware of the dates when the matter proceeded for hearing as well as when judgment was rendered. They contend that their advocate had moved offices and was never served. Further, that they have been on the suit land for over 55 years and buried their dead thereon. The plaintiff has opposed the instant application and insisted that the defendants' advocate was duly served with mention, hearing and judgment notices but failed to attend court. She avers that she will be prejudiced since the defendants seek to deny her the fruits of her judgment and continue to trespass on her land.
7. From perusal of the court record, I note the defendants only attended court twice during the pendency of the suit. From the annexures marked as 'KM 1 (a) – (e)', which includes mention, hearing and Judgment notices, it is clear the defendants' advocate was duly served severally as the said notices bear his office stamp. The defendants despite claiming that their advocate was not aware of the dates the matter proceeded in court, did not furnish court with an affidavit from the said advocate to confirm this or deny that the stamp on the aforementioned notices bearing messrs 'J T Nzioki Advocate, P . O. Box 5092 – 00100, Nairobi' did not belong to him. I note in the instant Application, the aforementioned



address is actually indicated therein. It is interesting to note that after filing the instant Application, the defendants' Advocate once more failed to attend court.

8. In the case of *Shah v Mbogo and Another* [1967] EA 116 it was held that:

"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

9. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

10. While in the case of *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 it was noted that:

"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 among other things an excusable mistake or error. It would not be proper use of such a discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."

11. It is trite that setting aside of proceedings and Judgment are discretionary. However, based on the facts before me including the perusal of the court record, I find that the defendants including their advocate intentionally and severally failed to attend court despite being duly served. Further, they now seek to deny the plaintiff the fruits of her Judgment. To my mind the defendants have failed to demonstrate sufficient cause why they severally failed to attend court for mention, hearing and Judgment and now seek to set aside the orders. Insofar as I have the discretion to set aside the impugned Judgment, however, at this juncture, I opine that the defendants including their advocate deliberately failed to attend court so as to delay the course of justice. To my mind, I am unable to deny the plaintiff who has been diligently attending court, the fruits of her judgment.

12. In the foregoing while associating myself with the decisions cited, I find the notice of motion application dated the December 15, 2022 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF JULY, 2023

CHRISTINE OCHIENG

JUDGE

