Sammy (Suing as Personal Representative to the Estate of Sammy Maitha Muoki alias Sammy Maithya) v Kioko (Environment & Land Case 220 of 2015) [2023] KEELC 19085 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19085 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 220 OF 2015

A NYUKURI, J

JULY 24, 2023

BETWEEN

SYOMBUA SAMMY (SUING AS PERSONAL REPRESENTATIVE TO THE ESTATE OF SAMMY MAITHA MUOKI ALIAS SAMMY MAITHYA) .... PLAINTIFF

AND

NANCY KAVINYA KIOKO .... DEFENDANT

RULING

1. Before court is an application dated 4th March 2022 filed by the Defendant in this suit seeking the following orders;

    a. Spent.

    b. Spent.

    c. That the *ex parte* proceedings conducted in the absence of the Defendant/Applicant and all consequential orders thereto be set aside.

    d. That the court be pleased and is hereby pleased to re-open the Plaintiff's case for hearing *de novo* on a priority basis and grant the Defendant/Applicant unconditional leave to defend this suit.

    e. That the honourable court be pleased to stay further proceedings in this suit pending hearing and determination of Machakos ELC (OS) No.6 of 2022 (Previously filed as Machakos ELC No.193 of 2015).

    f. That costs of this Application be in the cause.

2. The application is based on grounds on the face of it and supported by the affidavit of Nancy Kavinya Kioko, the Applicant. She deposed that sometimes in the year 2018, she did instruct the firm of Kipkenda & Company Advocates to take over the conduct of the matter from her previous Advocates, Koki Mbulu & Company Advocates. She further stated that although the appointed firm did file a notice of change of advocates on 11th April 2018, the same was inadvertently not served upon counsel for the plaintiff and the previous counsel on record.

3. She further deposed that the previous advocates did not inform her of having been served with any hearing notice and that she only learnt that the suit had proceeded for hearing *ex parte*, upon being personally served with a mention notice dated 15th February 2022, upon which she expeditiously forwarded to her current advocates to attend court and file the instant Application. She averred that she had filed her Defence on time and that she stood to suffer irreparable harm if she is condemned unheard. She also deposed that the failure to attend the hearing was not deliberate and is excusable.

4. The deponent further averred that prior to filing of the instant suit, she had filed a suit for adverse possession over the same suit property, being Machakos ELC Case No.193 of 2015, which she withdrew on 26th February 2019 after noting some glaring anomalies which could not be cured by amendment. She deposed to have since filed a fresh suit, being Machakos ELC (OS) No.6 of 2022. She further stated that it would be unjust if this court proceeds to issue judgement herein during pendency of the other suit as the same could lead to two conflicting court decisions.

5. The Application is opposed. The Respondent swore a replying Affidavit dated 20th April 2022. She deposed that the Application was frivolous, the matter having been finalized and hearing having taken place on 14th February 2022 and pending judgment. She also averred that the Applicant had carted away her entire file from the firm of MS Koki Mbulu & Co. Advocates, but that the firm did not file an application to cease acting for the Applicant. She further deposed that the Applicant had ceased making any calls into the advocates chambers, hence they may not have had the means of relaying information of court proceedings to the Applicant.

6. The Respondent further deposed that the above notwithstanding, the court had on 10th December 2020, issued injunctive orders against the Applicant from interfering with the suit property, orders that were served upon the Applicant in person and that he did acknowledge receipt. They did attach a copy of the orders as received by the Applicant. She hence stated that as a diligent litigant, the Applicant ought to have brought the orders to the attention of their advocates as soon as they were received.

7. The Respondent further averred that the Applicant had hurriedly filed the said Machakos ELC Case No.193 of 2015 upon receipt of a demand notice from the Respondent in a bid to circumvent the filing of this suit, but that the same was dead on arrival, since it was filed against her late husband yet the Applicant acknowledged the existence of a representative to the estate of her late husband.

8. The Respondent concluded by asking the court to find that the Applicant is not sincere as she has not been willing to prosecute her defence and that it is the Respondent who stands to suffer prejudice should a suit filed in 2015 be stayed on account of a suit filed in 2022.

9. In response to the replying Affidavit, the Applicant filed a supplementary affidavit dated 18th May 2022. She denied carting away the entire file from her previous advocates or ever receiving the alleged injunctive orders dated 24th November 2020. She further deposed that Machakos ELC (OS) No.6 of 2022 is for all its intent not a new suit but seeks similar orders with Machakos ELC No.193 of 2015, wherein the Applicant sought recognition as the owner of the suit property that the Respondent wants to evict her from.

10. It was the Respondent's averment that should the court find the Machakos No.6 of 2022 meritorious, the entire process will be rendered an academic exercise if proceedings in the instant suit are not stayed. She confirmed that she was ready to comply with all conditions that the court may deem fit to impose, for issuance of the said orders.

11. Patrick Wachira Kibuka Advocate from the firm of Kipkenda & Co. Advocates who are on record for the Applicant, also swore an affidavit dated 18th May 2022, confirming that it was their inadvertence in failing to serve the Notice of Change of Advocates upon the Respondent's advocates and that the same should not be visited upon the Applicant.

12. The court ordered that the Application be canvassed by way of written submissions. On record are the Applicant's submissions filed on 23rd May 2022 and the Respondent's submissions filed on 1st July 2022

Applicant's submissions

13. Counsel for the Applicant submitted that the application raised two issues for determination by the court namely;

    a. Whether the Applicant has demonstrated sufficient cause for staying and setting aside the *ex-parte* proceedings conducted in her absence and all consequential orders.

    b. Whether consequently, the instant suit and Machakos ELC (OS) No.6 of 2022 should be consolidated to avoid possibility of an absurdity on the court's decision.

14. On whether the Applicant had demonstrated sufficient cause, they argued that the circumstances leading to the hearing of the matter in the absence of the Applicant were beyond her control as they centrally focus on lack of service of the change of Advocates hence the mistake should not be visited upon her. She cited the decision in the case of *Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others* in Misc. Application No.699 of 2007, for the proposition that mistakes of counsel should not be visited on the clients, and that administration of justice requires that the substance of all disputes ought to be investigated on their merits and that errors should not necessarily bar a litigant from the pursuit of his rights.

15. In praying that the court exercises its discretion in favour of the Applicant so as not to lock her out of the proceedings, counsel placed reliance on the case of *Patel v EA Cargo Handling Services Ltd* [1934] EA at 76 C and E, for the proposition that there are no limits or restrictions as to the discretion of a judge, as long as the same is exercised on just terms. Counsel further cited the decision in the case of *Shah v Mbogo* [1967] EA 116 at 123B, to argue that the discretion of a Judge is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, excusable mistake or error but not designed to assist the person who has deliberately sought to obstruct or delay the course of justice. Counsel argued that in the present case, upon personal service of a mention notice on 28th February 2022, the Applicant did attend court through her representatives.

16. Further, counsel placed reliance on the case of *Clayton Valuers Limited v Joe M.Nzioka t/a Nzioka & Company Advocates & 2 others* [2017] eKLR, for the proposition that if a defendant is able to raise a *prima facie* triable issue, he is entitled in law to unconditional leave to defend. It was the contention of the Applicant that she had demonstrated a *prima facie* case by filing a separate lawsuit claiming ownership of the suit property by dint of adverse possession, which is the basis of her defence in this suit. It was also her argument that from the facts of the suit, there are disputed facts that give rise to triable issues.

17. Counsel further submitted that the Respondent stood to suffer no prejudice if the orders sought are granted, as any loss can be compensated by thrown away costs. In support of this, they cited the case of *Oriental Commercial Bank Limited v Pradeep Ian Makhecha (as Administrator to the estate of the late Hasmukh Pranjivan Makhecha t/a Makhecha & Co. Advocates) & another* [2019] eKLR where the court held that it would not be proper to deny the Defendant an opportunity to be heard where the Respondent can be compensated by costs.

18. On whether the instant suit should be consolidated with Machakos ELC No. 6 of 2022, counsel cited the case of *Armed Forces Old Comrades Association Registered Trustees v Registered Trustees of Agape Fellowship Centre* [2014] eKLR and submitted that allowing this suit to proceed would entertain the danger of two courts reaching diverse decisions on the same issue.

Submissions by the Respondent

19. Counsel for the Respondent submitted that the application raised two issues for determination by the court;

    a. Whether the *ex-parte* proceedings should be set aside and the case heard *de novo*?

    b. Whether this court should order stay of proceedings herein?

20. On the question of setting aside of the *ex-parte* proceedings, counsel for the Respondent argued that the Respondent did serve all the court documents to the Applicant's erstwhile Advocates, namely, Koki Mbulu & Co. Advocates as shown by the Affidavits of service on record. They cited the case of *CMC Holdings Ltd v Nzioki* [2004] 1KLR 173 where the court was of the view that discretion must be exercised judiciously and upon reasons.

21. It was the Respondent's submission that not every mistake of counsel would entitle a party to indulgence by the court. To support her assertion, she cited the case of *Savings and Loan Ltd v Susan Wanjiru Muiritu*, Nairobi HCCC No.397 of 2002 wherein the court emphasized that a case belongs to the litigants and not their advocates. Further, counsel noted that although the Applicant blames their Advocate for their inadvertence, she did instruct them to withdraw the suit No.193 of 2015 on or about 26th February 2019. The Respondent hence argued that the Applicant similarly ought to have followed up on the instant suit at the time of issuing the said instructions. Counsel took the position that the Applicant cannot blame the mistake of their counsel, when it is clear that she was not diligent in enquiring on the progress of the instant suit.

22. In response to the prayer of commencing the proceedings de novo, the Respondent submitted that the Applicant had not provided sufficient reason to warrant the exercise of the court's discretion in allowing the prayer. They cited the case of *Stephen Boro Githia v Family Finance Building Society & 3 Others,* Civil Application No. 263 0f 2009 where the court in expounding on the overriding objective highlighted its main goal as to achieve resolution of disputes in a just, fair and expeditious manner. It was their argument that in the instant suit, the Respondent would be greatly prejudiced if the proceedings were to commence de novo since she is of old age. She argued that the Applicant had been indolent in the matter and since equity aids the vigilant, the Application ought to be dismissed. Counsel further argued that the overriding objective would not favour hearing of the matter de novo since justice delayed is justice denied, which would be contrary to Article 159 (2) (b) of the *Constitution*.

23. On whether stay of proceedings should issue, counsel was of the view that Machakos ELC No. 6 of 2022 (O.S) was an afterthought only meant to impute relevance to the instant suit. Counsel argued that the Applicant had slept on her rights for over three years after withdrawing the former suit, before filing the same suit afresh, just at the point of execution of orders from this court. She contended that as

per the holding in *Kenya Wildlife Service v James Mutembei* [2019] eKLR stay of proceedings should be sparingly granted and that its test is high and stringent.

24. She concluded by stating that the proceedings have advanced and the conduct of the Applicant does not add any merit to the Application. Counsel's view was that the Applicant had not met the threshold for grant of the orders sought and that the Application should be dismissed with costs to the Respondent.

Analysis and determination

25. I have carefully considered the application, the response there to and the rival submissions by the parties. Two issues arise for determination;

    a. Whether there is sufficient cause to set aside exparte proceedings herein; and

    b. Whether further proceedings in this suit ought to be stayed pending hearing and determination of Machakos ELC (OS) No. 6 of 2022.

26. The law on setting aside exparte decisions of the court is set out in Oder 12 Rule 7 of the *Civil Procedure Act* as follows;

    > Where under this order judgment has been entered or the suit has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just.

    Order 51 Rule 15 provides that the court may set aside an order made exparte.

27. The court has unfettered discretion to set aside exparte orders, but it must exercise its discretion judiciously and not whimsically or capriciously. In the case of *Shah v Mbogo* [1967] eKLR, the court held as follows;

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

28. Similarly, the Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011) observed that:

    > Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently

29. Essentially, in considering an application to set aside exparte proceedings the court will consider matters including reasons for non attendance, whether there was good faith on the part of the applicant, whether there was negligence and the circumstances of the case to enable it exercise its discretion judiciously.

30. In the instant suit, the Applicant deponed that in April 2018, she instructed the firm of Kipkenda & Company Advocates to take over the conduct of this matter on her behalf in the place of her former advocates Koki Mbuli & Company Advocates and that by inadvertence, the said firm failed to serve the Notice of Change of advocates on the outgoing advocates and the Plaintiff's advocates. That it is only on being served with a mention date for mention on 28th February 2022 that the Applicant learnt that this suit had proceeded provoking the instant application. The Applicant blames her advocate for his inaction for three years and ten months. An advocate from the firm of Kipkenda took responsibility

by stating that the failure to serve the Notice of change of advocates was their mistake and that the consequences thereof should not be visited on the Applicant.

31. The Respondent in his reply was quick to point out that the applicant was aware that proceedings herein were going on but remained indolent. That since it was the Applicant's duty to be diligent to bring the inadvertence to her advocate's attention, but she failed. He pointed out that when an injunction was issued by this court on 10th December 2020, the Applicant was personally served on the same day and that she acknowledged service. Further that the Applicant hurriedly filed Machakos ELC Case No. 193 of 2015 after receiving a demand letter from the Plaintiff's counsel and that her suit was meant to circumvent filing of this suit.

32. While the Applicant blames her advocate for failure to serve the Notice of Change of Advocates, I observe that she has not told the court why after instructing her advocate in April 2018, she never followed up for three years and ten months to find out what the advocate was doing in her case. She states that she instructed her current advocates on 26th February 2019 to withdraw her suit number Machakos ELC No. 193 of 2015, and yet failed to ensure the same advocate was executing her instructions in this matter. I agree with the Applicant's submissions that a mistake of counsel should not be visited on an innocent client. However, where the client is not innocent by virtue of either being indifferent to the counsel's mistake or out rightly indolent, then such client cannot hide behind their counsel. A case belongs to a party and not their advocate and blaming an advocate for their indolence cannot be of help to a party. There is a limit to the extent blame can be placed at the counsel's door, for it to be excusable. However, where a party takes more than three years, like in the instant case, without inquiring on what is going on in their suit, such indolence cannot be countenanced by Article 159 (2) (b) of the *Constitution* of Kenya that requires justice to be done without delay. This court is alive to the constitutional dictates requiring the court to ensure substantive rather than technical justice is done, but this court is also cognisance of the Constitutional perspective that delayed justice is injustice.

33. In that regard, I am persuaded by the court's decision in the case of *Savings and Loan Limited v Susan Wanjiru Muritu* (Milimani) HCCS No. 397 OF 2002, where it was held as follows;

> Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

34. In the instant case there is no evidence that the applicant followed up on her advocate to know whether the advocate had executed her instructions. The applicant has argued that she has a triable defence. She wants the case reopened and that she be given opportunity to defend the suit. Having looked at the history of this matter and noting that there are no witness statements or list of documents filed by the applicant to demonstrate that she is willing to prosecute her defence, even though this court gave her

several chances to comply with Order 11 of the *Civil Procedure Rules*, including orders made on 25th October 2016, 5th December 2016 and 6th February 2017, I do not think the conduct of the defendant calls for exercise of the court's discretion in granting the orders sought for setting aside exparte orders. I say so because the last time an appearance was made in court on behalf of the applicant was on 22nd May 2017, when a ruling date for the applicant's Preliminary objection was fixed. Even when the ruling for her preliminary objection was delivered on 2nd November 2017, she did not appear, yet she is seeking to have all exparte proceedings herein to be set aside.

35. Between 22nd May 2017 and 14th February 2022 both dates inclusive, this matter has come up, fourteen times, without the appearance of the Defendant/Applicant. The applicant has sought that the court sets aside proceedings conducted exparte. This court is enjoined by section 1A (2) of the *Civil Procedure Act* to seek to give effect to the overriding objective under the Act which objective is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Under Section 1A (3) of the *Civil Procedure Act*, a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act, and to that effect, to participate in the process of the Court and to comply with the directions and orders of the Court. Having considered the conduct of the applicant in her failure to participate in the proceedings of this court for about five years and failure to comply with court's directives in accordance with Order 11 of the *Civil Procedure Rules*, I am not convinced that there exists any justification to set aside the exparte proceedings in fourteen court sittings that happened over a period of five years, when there were no factors that incapacitated the applicant from appearing in court either by advocate or personally.

36. The discretion to set aside exparte proceedings must be exercised judiciously. In the case of *CMC Holdings Ltd v Nzioki* [2004] 1KLR 173 it was held as follows;

> 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 an ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others 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.

37. In the premises therefore, I find and hold that the Applicant does not deserve exercise of this court's discretion in setting aside exparte proceedings herein.

38. On the question of staying this suit, the basis given by the applicant is that she filed Machakos ELC No. 193 of 2015 which she withdrew on 26th February 2019 and that she filed Machakos ELC (OS) No. 6 of 2022 which ought to be heard first, which was a few days before the application herein was filed. This suit was filed in 2015, the reasons given why it should be stayed is because there is a likelihood of contradicting decisions. Suits once filed in court ought to proceed to hearing and no party should file their suit and turn the court into a case parking yard.

39. A case once filed ought to proceed only in very sparing circumstances will a stay of proceedings be allowed. Unless it is in the interest of justice to stay a suit, a suit ought not be stayed, as the essence of justice is expedition and not delay. Therefore, stay of proceedings can only be sparingly allowed in circumstances that show that it will not be in the interest of justice for a matter to be heard. In the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 the court held as follows;

> As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice …. The sole question is whether it is in the interest of justice to order a stay

of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

40. Similarly, in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR the court held that: -

> Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impugns on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.

41. The Applicant having filed his subsequent suit in March 2022 and seeking to stay the instant suit so that the suit filed latter be heard first, cannot be a basis for stay of proceedings. All I see is bad faith on the part of the applicant who instead of participating in this suit, chose to first file another suit, for the sole purpose of staying this suit that has been pending for about seven years.

42. In the premises, I find and hold that no material has been placed before this court to warrant an order staying this suit.

43. The upshot is that the application dated 4th March lacks merit and the same is hereby dismissed with costs to the Respondent.

44. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Nzei for the Plaintiff/Respondent

Mr. Wachira for Defendant

Abdisalam – Court Assistant