



REPUBLIC OF KENYA



KENYA LAW
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**Kabaya & another v Gaitho & another (Environment & Land Case
89 of 2014) [2023] KEELC 19292 (KLR) (21 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 89 OF 2014**

**MAO ODENY, J
AUGUST 21, 2023**

BETWEEN

FRANCISIO MBURU KABAYA 1ST PLAINTIFF

PATRICK MWANGI MBURU 2ND PLAINTIFF

AND

PETER MBURU GAITHO 1ST DEFENDANT

SAMUEL KIRAGU NJIGI 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 16th October 2020 by the Plaintiffs seeking the following orders:
 - a. That this Honourable Court be pleased to review set aside and/or vary the order of the court dated 18th February 2020 dismissing the suit herein and all other consequential orders arising therefrom for non-attendance of the Plaintiffs and/or their advocates.
 - b. That this court be pleased to order for the taxation of Defendants' Bill of costs dated 11th May 2020 be stayed pending the hearing and determination of this application.
 - c. That this Honourable Court be pleased to reinstate the suit for purposes of hearing of the same on merit.
 - d. That upon granting of prayer 1, 2, and 3 above, this Honourable court be pleased to grant a date for hearing of the suit.
 - e. That costs of this application be provided for.
2. The Court gave direction on the hearing of the application but before the application was determined, Mr. Kiarie, counsel for the Plaintiffs informed the court on 20th May 2021 of the demise of the 1st



- Plaintiff and sought leave to substitute before parties could proceed further. The court granted Mr. Kiarie time to substitute the 1st Plaintiff.
3. Counsel for the Plaintiff filed an application for substitution dated 4th February 2022 whereby the Defendants responded with a notice of preliminary objection dated 21st February 2022. However, on 22nd March 2022 when the matter was mentioned in court, counsel for the Defendants was absent and the application for substitution was allowed. Thereafter, parties agreed to file submissions, which were duly filed.
 4. The application was supported by the grounds on the face of the motion and explained by the affidavits of Mr. Kiarie and the 2nd Plaintiff. According to Mr. Kiarie, the matter was listed to be heard on 5th December 2019 when he could not attend court due to the fact that he had been summoned to appear before the Deputy Registrar, Supreme Court. That he informed the Defendants' advocates and the court to that effect and subsequently instructed via email, the firm of Kilonzo and Aziz to hold his brief with the aim of getting an adjournment.
 5. Mr. Kiarie deposed that, the said firm of advocates failed to update him on what transpired in court until sometime in January 2020 when he followed up and instructed one Charles Kimbeja who informed him the suit was dismissed on 21st February 2020.
 6. Mr. Kiarie stated that he believed that the suit was dismissed on 5th December 2019. That he only knew the dated of dismissal of the suit upon receiving the response from the defendants on the actual dated of dismissal. Further that he had instructed the firm of Kilonzo and Aziz to hold his brief and not Mr. Nyongesa as seen on the proceedings.
 7. In response to the application, counsel for the Defendants, Ms. Marubu swore a replying affidavit on 19th January 2021 stating that there was no dispute as to the matters arising before the 5th December 2019. That on that particular date, as Mr. Kiarie instructed an advocate to hold his brief where another hearing date was taken by consent.
 8. Counsel urged the court to dismiss the application with costs as it is abuse of the court process.

Plaintiffs' submissions

9. Counsel for the Plaintiffs submitted that having reasonably demonstrated that the Plaintiffs' failure to attend court when the matter was dismissed was an inadvertent error on the advocate's part; the mistake should not be visited upon an innocent litigant.
10. Counsel relied on the cases of *Esther Wamaitba Njibia and 2 others -v- Safaricom Limited* [2014] eKLR; and *Agricultural Finance Corporation -v- George Ochieng Ojwando and 6 others* [2018] eKLR.
11. Counsel urged the court to find that the delay in filing this application was excusable due to the misinformation occasioned by the said Charles Kimbeja. He added that the powers of the court to set aside an ex-parte judgment under Order 12 rule 7 of the *Civil Procedure Rules*, was to do justice to all parties as it was held in the case of *Shah v Mbogo and Another* [1967] E.A 116.

Defendant's Submissions

12. Counsel for the Defendant largely recapped the facts and history of this matter as seen in the proceedings. She submitted that the delay in filing the present application was not adequately explained and that the court became functus officio on 18th February 2020. It was her submission that the application is an abuse of the court process intended to delay the course of justice.



Analysis and Determination

13. The guiding provisions with regards to setting aside of ex-parte Judgment/order is to be found in Order 12 Rule 7 and Order 51 Rule 15 of the Civil Procedure Rules which provide:-

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.

The court may set aside an order made ex parte.

14. There is also no doubt that the power to set aside ex-parte orders is discretionary and such discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. (See *Shah v Mbogo & Another* (1967) EA)

15. In the case of *Joseph Ndirangu Munene v Peter Macharia Muriu & another* [2021] eKLR, the Court explained; -

“Order 12 Rule 7 of the Civil Procedure Rules provides that 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. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in *Patel....vs....E.A Cargo Handling Services Ltd* (1974) EA 75, held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. 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.”

There is thus no doubt that in deciding whether to set aside an exparte order the Court is called upon to exercise its discretion. In exercising discretion the Court is further called upon to determine whether there is sufficient reasons that has been given to warrant it exercise the said discretion.

16. In the present case, the Plaintiffs’ contention was that their advocate was not notified of the hearing date when the matter was dismissed. The suit was to be heard on 5th December 2019 when the Plaintiffs’ counsel, Mr. Kiarie, instructed another advocate to hold his brief. On that particular date, the record indicates that one Mr. Nyongesa appeared for Mr.Kiarie and informed the court that Mr. Kiarie was before the Supreme Court and requested for another hearing date.
17. The court then adjourned the hearing to 18th February 2020. The information that Mr. Kiarie was before the Supreme Court, was information privy only to parties herein. Mr. Kiarie’s argument that he did not instruct Mr. Nyongesa does not in my view hold any water, since he had instructed an advocate to hold his brief he was obligated to find out what transpired in the case.
18. It could be that the said firm of Kilonzo and Aziz sent Mr. Nyongesa to hold brief, which he did., If Mr Kiarie contends that he had not instructed Mr Nyongesa to hold brief, then both Advocates were under obligation to swear affidavits to explain the what transpired.



19. It was upon Mr. Kiarie himself to follow up on the outcome of the proceedings of that date. If he had done so early enough, he would have learnt of the subsequent hearing date. In the case of Shah –v- Mbogo (supra) cited by the Plaintiffs, the Court stated that:-

“ this discretion to set aside an ex parte judgment 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of Justice.”

20. In applying the aforementioned principles, I find that the Plaintiffs’ failure to attend court was not because of an accident, inadvertence or excusable mistake or error. I therefore see no sufficient reasons to set aside the impugned orders.

21. Further, the delay in filing this application has not been sufficiently explained. The plaintiff and his counsel went on a deep slumber and woke up too late. Since the application for reinstatement of the suit is dismissed, the issue of stay of the taxation cannot be sustained.

22. The upshot is that the Notice of Motion dated 16th October 2020 is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21st DAY OF AUGUST, 2023.

M.A. ODENY

JUDGE

