Gichuru v Maina & 3 others; Maina & another (Defendant) (Environment & Land Case 125 of 2017) [2023] KEELC 20431 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20431 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 125 OF 2017

A OMBWAYO, J

SEPTEMBER 28, 2023

BETWEEN

JOSEPH MUNGAI GICHURU ..... PLAINTIFF

AND

JOSEPH NJUGUNA MAINA ..... 1ST DEFENDANT

CHANDRAKANT LALJI SHAH ..... 2ND DEFENDANT

BUDHE LALJI PETHRAJ SHAH ..... 3RD DEFENDANT

NAKURU LAND REGISTRAR ..... 4TH DEFENDANT

AND

JAMES NJUGUNA MAINA ..... DEFENDANT

MAUREEN NJERI MUIRURI ..... DEFENDANT

RULING

1. Maureen Njeri Muiruri (hereinafter referred to as the 2nd defendant/applicant) prays for orders setting aside the proceedings and judgment herein and that the applicant be allowed to put in a defence and defend the suit on merit. The applicant states that the matter proceeded in her absence as she was not served. She became aware of the suit when served with a notice to show cause why she should not be committed to Civil jail. She laments that she is being condemned unheard. The applicant states that she became aware of this suit and judgment on July 6, 2023 when she was served with notice to show cause. She denies having been served with any taxation notice as alleged by Benjamin Randiga.

2. The replying affidavit was sworn by Chandrakant Lalji Shah (hereinafter referred to as the respondent) who acknowledges that there is a criminal case pending in court where the applicant has been pleading with the court to be given time to settle the matter. The respondent has annexed summons to enter

appearance received by the firm of Muiruri and Mwangi on August 22, 2018. Moreover, there is a defence and counter claim received on August 22, 2018 in this matter. I do find that there is sufficient evidence to demonstrate that the applicant was served with a summons to enter appearance, defence and counter claim by the respondent but went to sleep like the Alaskan Fox hence judgment was entered on February 7, 2019 and the decree issued on March 29, 2019. She was awakened by the Notice to Show cause but now it is too late because the matter is at the execution process. She seeks for orders setting aside the judgment. It was held by the Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173 that:

> " 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."

3. This court observes that the decision whether or not to set aside *ex parte* judgment is discretionary and that the discretion is intended so to be exercised to avoid injustice and 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.

4. The first question for determination is whether the judgment was procedurally entered. This court finds that judgment herein was procedurally entered.

5. This court finds favor with the position of the Supreme Court of India which stated in *Sangram Singh vs Election Tribunal, Koteh,* AIR 1955 SC 664, at 711 cited in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR that:

> " [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

6. That was the position adopted by the Court of Appeal in *Onjula Enterprises Ltd vs Sumaria* [1986] KLR 651, where it was held that:

> " The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another vs Greenlands Limited* [1916] 2 AC 15 at 38."

7. In my view, this position is supported by the holding of Ojwang, J (as he then was) in *Haile Selassie Avenue Development Co Limited v Josephat Muriithi & 10 others* [2004] eKLR where he held that:

> " The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure."

8. In *Wachira Karani vs Bildad Wachira* (2016) eKLR as was quoted in the case of *David Gicheru v Gicheha Farms Limited & another* [2020] eKLR the Court held that:-

> " The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter..."

9. I do find that the 2nd defendant was given an opportunity to be heard but failed to enter appearance and file defence and no good reasons have been given fort the failure. I do find that the application not merited and the same is dismissed with costs.

Ruling, dated signed and delivered virtually at Nakuru this September 28, 2023.

A O OMBWAYO

JUDGE

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