



**Langat v Tuimising & 2 others (Sued as Officials of Kosia Set
Kobor Self Help Group) (Environment & Land Case 243 of 2017)
[2023] KEELC 20013 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 243 OF 2017
CG MBOGO, J
SEPTEMBER 26, 2023**

BETWEEN

SAMUEL KIPKURGAT LANGAT PLAINTIFF

AND

CHELULE TUIMISING 1ST DEFENDANT

ABRAHAM KIPROTICH KALYA 2ND DEFENDANT

ZEPHANIAH YEGON 3RD DEFENDANT

SUED AS OFFICIALS OF KOSIA SET KOBOR SELF HELP GROUP

RULING

1. Before this court for determination is a notice of motion application dated May 24, 2023 filed by the defendants/applicants under a certificate of urgency and is expressed to be brought under sections 1A,1B and 3A of the [Civil Procedure Act](#), order 12 rule 7 and order 51 rule 1 of the [Civil Procedure Rules](#) seeking the following orders; -
 1. Spent
 2. Spent
 3. That this honourable court do set aside the ex-parte proceedings, directions and the subsequent orders made on May 18, 2023 and the matter be set down for hearing of the defence case only for the defendants/ applicants to produce their exhibits.
 4. That this honourable court be pleased to issue any further and/ or other orders as the court may deem fit to grant under the circumstances of the case
 5. That the costs of and incidental to this application be provided for.



2. The application is premised on the grounds on its face and more particularly in the affidavit annexed thereto sworn by Peterscott Mutua on even date. In his affidavit, the counsel deposed that the suit proceeded ex-parte on May 18, 2023 when the court gave orders that the defense case be closed and that parties do file submissions. That on the said date, the counsel allegedly arrived late ready to proceed but found that adverse orders had already been made. His reasons for late arrival in court was that he experienced some mechanical issues and further having been stopped by the police.
3. The application was opposed by the replying affidavit of the plaintiff/respondent sworn on July 4, 2023. The plaintiff/respondent deposed that this is another attempt by the defendants/applicants to delay finalization of the matter and that the prayers sought are untenable. Further, that the application has been filed by a stranger and should be expunged from the record. Also, that it is hilarious for the applicant to allege that they experienced mechanical challenges when not even a single call was made to the advocate and this cannot be an excuse to set the proceedings aside as the applicant and neither their advocates attended court on that date.
4. With the leave of the court, the defendants/applicants filed a further affidavit sworn on August 2, 2023 contemporaneous with the written submissions pursuant to the directions given by this court on June 27, 2023. The defendants/applicants in the further affidavit reiterated their averments in the application and supporting affidavit.
5. On September 18, 2023 the application was canvassed by way of written submissions. The defendants/applicants filed their written submissions dated August 10, 2023 and raised one issue for determination which is whether the application is merited.
6. On this issue, the defendants/applicants submitted that the court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. Also, that 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 to it by the rules. The defendants/applicants relied on the cases of *Kelili Ole Kuna versus Jonathan Ole Ngouwa* [2002] eKLR, *Philip Ongom Capt versus Catherine Nyero Owota*, Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003) and *PMM versus JNW* [2020] eKLR.
7. The defendants/applicants submitted that the counsel has explained his reason for late arrival in court, the same are sufficient reasons to warrant the setting aside of the orders made.
8. As at the time of writing this ruling, the plaintiff/respondent had not filed his written submissions. Be that as it may, I have considered the application, the replying affidavit, the further affidavit and the submissions by the applicant and the issue for determination is whether the application ought to be allowed.
9. The application is brought under order 12 rule 7 of the *Civil Procedure Rules* amongst other provisions. Under order 12 rule 2 of the *Civil Procedure Rules*, this court has discretion to proceed with a matter on the day of the hearing if, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is satisfied that notice of hearing was duly served.
10. The matter was coming up for hearing with the date having been given in court in the presence of both parties. Thus, the court proceeding ex-parte which was within the powers granted to it by the aforementioned rule. Where a matter has proceeded ex-parte, any party aggrieved by the orders can



apply for setting aside of the same. This is provided for under Order 12 Rule 7 of the Civil Procedure Rules which 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 or order upon such terms as may be just.”

11. It is clear that the power to set aside ex parte orders is discretionary. The rules on exercise of judicial discretion are well settled. One, is that the discretion is always exercised in order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake. Further, there are no limits or restrictions on the judge’s discretion 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 to it by the rules. See the case of *Shah -vs- Mbogo and Another* [1967] EA 116.
12. In the instant case, the reason advanced by counsel for failure to attend court can be excusable. The advocate who was attending the matter did swear an affidavit as to why he was late for the hearing. Further, upon the directions having been given the applicants/defendants moved without unreasonable delay to file the instant application.
13. I further note that the suit herein was at its tail-end and that the defendants/applicants had already testified and the only thing which was pending was production of the certified documents and which the court directed the same to be done. It was on the impugned date when the documents were to be produced and which documents had already been filed that the counsel did not attend court. I place reliance in the case of *Potters House Acacemy -vs- Leah Chemeli Kemer* [2022] eKLR, where it was observed; -
 - “4. The court should always lean towards letting parties ventilate their disputes. When a court finally renders its determination over any dispute submitted to it to resolve, either party ought to feel they had their day in court even if the decision might not favour them. An ex parte hearing therefore deprives a party of this right and should only be conducted in exceptional cases where it is plain and clear that the defendant was properly served but failed and or ignored to attend court. In an application to set aside an ex parte hearing the court ought to listen to what explanation or excuse the applicant has that prevented them from attending court. If found reasonable, the application ought to be allowed.
14. Arising from the above, I find the notice of motion application dated May 24, 2023 merited in terms of prayer 3. I thus make the following orders; -
 - i. That the ex-parte proceedings, directions and the subsequent orders made on May 18, 2023 be and are hereby set aside in their entirety.
 - ii. That the matter do proceed for defence hearing for the defendants to produce their exhibits only.
 - iii. That the costs of the application are awarded to the plaintiff/ respondent assessed in the sum of Kshs 15,000/-.
 - iv. Further mention on October 5, 2023 to take a date for defence hearing.

Its so ordered

DATED, SIGNED & DELIVERED VIA EMAIL this 26TH day of SEPTEMBER, 2023.

HON. MBOGO C.G.



JUDGE

