



**South Nyanza Sugar Company Limited v Ogola (Environment & Land Case  
305 of 2017) [2023] KEELC 22517 (KLR) (29 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22517 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 305 OF 2017  
MN KULLOW, J  
DECEMBER 29, 2023**

**BETWEEN**

**SOUTH NYANZA SUGAR COMPANY LIMITED ..... PLAINTIFF**

**AND**

**NICHOLAS OGUNA OGOLA ..... DEFENDANT**

**RULING**

1. By Notice of Motion dated 25<sup>th</sup> September, 2023, the Plaintiff/Applicant sought the following orders that: -
  - a. Spent.
  - b. There be a stay of all further proceedings in this suit, inclusive of the Judgment scheduled for 25<sup>th</sup> September, pending the hearing and determination of this motion inter partes.
  - c. The ex-parte proceedings and orders of 14<sup>th</sup> June, 2023 and all consequent proceedings and orders be set aside on such terms, if any, as the court would adjudge as just and reasonable.
  - d. On granting prayer 3 above, the Defendant's case be re-opened and be heard afresh, lawfully.
  - e. The costs of this application be provided for, in the cause.
2. The application is based on the 19 grounds thereof and the Supporting Affidavit sworn on even date, by Marvin O. Odero, an Advocate of the High Court of Kenya having conduct of the matter on behalf of the Applicant. The Application was opposed by the Replying Affidavit sworn by the Respondent on 11.10.2023; he maintained that the Application did not meet the required threshold to warrant the grant of the orders sought and urged the court to dismiss the same with costs.
3. The Application was canvassed by way of written submissions. Both parties filed their rival submissions together with authorities which I have read and considered.



## Analysis and Determination

4. After careful analysis, this court is of the considered opinion that the sole issue arising for determination is: -
  - a. Whether the Applicant has made out a case for setting aside the proceedings of 14.06.2023 and all the consequential orders thereto.
5. The grounds for setting aside ex-parte order and/or proceedings are now well settled and the court in exercising such discretionary powers is mandated to take into account the circumstances of each case and exercise its discretion judiciously. This position was explained by the court in *Mbogo v Shah* 1968 EA 93 where it was held as follows: -

“This discretion is intended so 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”
6. As stated above, the discretionary orders for setting aside exparte orders ought not to be exercised in favor of an undeserving party, an Applicant is required to demonstrate sufficient cause and/or basis to warrant the grant of the said orders. The Applicant herein contends that when the matter was scheduled for defense hearing on the 02/05/2023, they were informed that the court was not sitting and on the same date, they received a Hearing Notice through the court email address to the effect that the matter had been rescheduled for the defense hearing on 14<sup>th</sup> July, 2023, they annexed a copy of the said email extract.
7. The Applicant maintained that their failure to attend court on the 14/6/2023 was not deliberate or aimed at defeating, obstructing or delaying the fair hearing and determination of the case but that they had no prior notice or information that the matter had been rescheduled to the 14/6/23 and not the earlier date that had been communicated via email. He urged the court to find that the same is sufficient reason and grant the orders sought.
8. The Respondent on the other hand dismissed the averments by the Applicant as excuses aimed at delaying the matter. It is his contention that the Applicant was aware of the proceedings of the 14/6/23 as captured in the judiciary portal and cause list of the day, but failed or declined to attend court. It is further his claim that the Application does not meet the threshold to warrant the grant of the orders sought and that no explanation was tendered for the delay occasioned in filing the instant suit. He maintained that the defense hearing had been rescheduled to the 14/6/2023 and not July as indicated by the Applicant.
9. In defining what amounts to sufficient cause, Mativo J. in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR held that: -

“Sufficient cause is thus 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. It is not in dispute that the matter was cause listed and proceeded for hearing on the 14<sup>th</sup> June, 2023 as evidenced on the Respondent’s exhibit marked ‘NOO1 – 03’. What however appears to be in dispute



is whether the matter was rescheduled for defense hearing on the 14/7/2023 as alleged by the Applicant or on 14/6/2023 as alleged by the Respondent.

11. Both parties annexed copies of email extract sent by the court registry via the court email on the 2/5/23. On a comparison of the 2 email extracts, I do note that the Respondent's email extract appears to have been crossed over and the word July replaced/ overwritten with the word June. This clearly could not have been done from the original email sent by the court registry. Other than the email with the erasure/ crossed out, the Respondent has not adduced any evidence to the effect that the Applicant was duly notified in advance that the defense hearing would proceed on the 14/06/2023.
12. This court has taken the liberty to check with the court registry staff and it has been confirmed that the email sent out indeed read that the matter had been rescheduled for hearing on the 14<sup>th</sup> July, 2023. The diarization and fixing of the matter on the 14<sup>th</sup> June, 2023 therefore appears to have been an inadvertent error on the part of the court registry.
13. I have critically considered the rival positions taken by both parties herein. The pertinent question that therefore follows is whether the reason advanced by the Applicant of not having been notified of any other contrary date other than the earlier date communicated by way of email by the court registry, constitutes a sufficient cause, an excusable mistake or the same was meant to deliberately delay the cause of justice.
14. Courts are guided by the provisions of Article 159(2) (d) of the Constitution and Section 1A and 1B of the Civil Procedure Act in administering justice, the focus being substantive justice. It is clear from the email sent from the court registry that the defense hearing was scheduled for the 14<sup>th</sup> July, 2023 and not on 14<sup>th</sup> June, 2023, therefore, I accordingly find that the explanation tendered by the Applicant constitutes a sufficient cause.
15. In view of the foregoing, it is in the interest of justice that a party shall not be condemned unheard. There was a genuine mistake on the part of the court registry and on that account, I will proceed to exercise my discretion in favor of the Applicant by allowing the Application and granting the orders sought.

### **Conclusion**

16. In the upshot, I accordingly find that the Application dated 25<sup>th</sup> September, 2023 is merited and I proceed to allow the same on the following terms;
  - a. The ex-parte proceedings and orders issued on 14<sup>th</sup> June, 2023 and all the consequential proceedings thereafter be and are hereby set aside and the Defence Case is re-opened.
  - b. Parties are hereby directed to fix the matter for defense hearing within 21 days from the date of this Ruling on priority basis.
  - c. Failure to comply with order (b) above, Order (a) will be deemed vacated and the matter will be fixed for judgment.
  - d. Each party shall bear their own costs of the Application.

It is so ordered!

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29<sup>TH</sup> DAY OF DECEMBER, 2023.**

**MOHAMMED N. KULLOW**



**JUDGE**

