



**Imbote v Okotse (Environment & Land Case 30 of 2012)  
[2023] KEELC 22451 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22451 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 30 OF 2012  
DO OHUNGO, J  
DECEMBER 19, 2023**

**BETWEEN**

**JACOB LUTOMIA IMBOTE ..... PLAINTIFF**

**AND**

**MORIS SHIVOKO OKOTSE ..... DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on 11<sup>th</sup> July 2018 by N A Matheka, J. as follows:

I find that the plaintiff has proved his case on a balance of probabilities and grant the following orders;

1. A permanent injunction restraining the defendant either by himself, or through his workers assigns and or representatives from entering, cultivating and or doing any development in his land parcel number South Kabras/shamberere/2012.
2. Costs of this suit be borne by the defendant.
2. Later, the defendant filed Notice of Motion dated 28<sup>th</sup> February 2023, which is the subject of this ruling. Through the application, he seeks setting aside of the judgment.
3. The application is supported by an affidavit sworn by the defendant. He deposed that upon being served with summons to enter appearance, he filed defence and counterclaim and participated in the hearing of the plaintiff's case up to its closure. That when defence hearing was scheduled, his advocate failed to attend court despite several requests resulting in his defence and counterclaim being dismissed. That he was misled into filing another case being Kakamega MCL&E No. 962 of 2018 which he later withdrew upon getting proper advice.



4. The plaintiff opposed the application through a replying affidavit in which he deposed that upon delivery of the judgment, his costs were taxed at KShs 95,340 and that the defendant had made part payment of the costs following a consent to that effect. He added that the application had been made in bad faith, after inordinate delay and that it is overtaken by events. That the defendant did not appeal against the judgment.
5. The application was canvassed through written submissions. The applicant argued that partly paying the decretal sum did not mean that he was accepting the judgment. That he was condemned unheard and that the plaintiff's contention about delay is a technicality which should yield to justice.
6. On the other hand, the plaintiff reiterated the issues raised in his replying affidavit and argued that the application is an abuse of the court's process. He therefore urged the court to dismiss the application with costs.
7. I have considered the application, the affidavits, and the submissions. When considering an application such as the present one, the court exercises discretion pursuant to the principles laid down in *Mbogoh & Another v. Shab* [1968] EA 93 and reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. The court has unfettered discretion and will consider such factors as the reason for the failure to attend court, the length of time that has elapsed since the order sought to be set aside was made, the respective prejudice each party is likely to suffer and whether overall it is in the interest of justice to grant setting aside. The court's discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.
8. A perusal of the record reveals that the defendant attended court in person on 14<sup>th</sup> June 2018 when judgment date was scheduled, and that the judgment was later delivered in his presence on 11<sup>th</sup> July 2018. Thereafter, he attended court on 13<sup>th</sup> September 2018 when the plaintiff's bill of costs was listed for taxation. The ruling on taxation was delivered in his presence on 4<sup>th</sup> October 2018. Subsequently, he appeared in court on 29<sup>th</sup> November 2018 when parties recorded a consent on payment of the decretal sum that arose in view of the taxation. He was later arrested and presented before the court on 25<sup>th</sup> February 2019 when he was committed to civil jail for 30 days. The import of all the foregoing is that the defendant was well aware of the judgment on the very 14<sup>th</sup> June 2018 that it was delivered and all subsequent developments. Having attended court in person on 14<sup>th</sup> June 2018 when judgment date was scheduled, he had all opportunity to apply for setting aside of proceedings prior to the matter being reserved for judgment.
9. The present application was filed on 16<sup>th</sup> March 2023, a whole four years and eight months after delivery of the judgment. Considering that the date of delivery of the judgment was scheduled in his presence and that the judgment was delivered in his presence, I find that the delay is inordinate. While the defendant is attempting to blame his advocates for alleged failure to attend court, he has himself to blame for failure to act despite knowing that judgment was imminent. The defendant having participated in taxation proceedings, recorded a payment consent, and even partly settled the decretal sum, he is now estopped from seeking to undo all that he has done. There will be real prejudice to the plaintiff if the present application were to be allowed.
10. In view of the foregoing discourse, I find no merit in Notice of Motion dated 28<sup>th</sup> February 2023 and I therefore dismiss it with costs to the plaintiff.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 19<sup>TH</sup> DAY OF DECEMBER 2023.**

**D. O. OHUNGO**



**JUDGE**

