Tuva v Mwangovya (Environment & Land Case 314 of 2017)
[2025] KEELC 3512 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3512 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 314 OF 2017

YM ANGIMA, J

APRIL 30, 2025

BETWEEN

SAMASON SULUBU TUVA ..... PLAINTIFF

AND

JOSEPH PAUL MWANGOVYA ..... DEFENDANT

RULING

A. Defendant's application

1. By a notice of motion dated 07.04.2025 bought pursuant to Order 10 Rule 11 of the *Civil Procedure Rules* and Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21) the defendant sought the following orders;

    a. spent

    b. An Order setting aside the proceedings of the Court on 6th February 2025 and the Consequential Directions and Orders of the said date.

    c. An Order for the re-opening of both the Plaintiff's and the Defendant's Case and allowing the cross-examination the Witnesses.

    d. An Order for the Originating Summons to be Converted into a plaint and the Defendant to be allowed to Convert her Replying Affidavit into a Statement of Defence and Documents.

    e. The costs of this Application be awarded to the Defendant/Applicant

2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Maurine Mwangovya on 07.04.2025. It was pleaded that on 06.02.2025 when the suit came up for hearing the defendant's advocate had no instructions to proceed with the suit hence he applied for an adjournment to file an application for leave to cease acting which application

was declined by the court. It was the defendant's case that the plaintiff shall not suffer any prejudice if the orders sought were granted and the suit re-opened for hearing.

B. Plaintiff's response

3. The plaintiff filed a replying affidavit sworn on 10.04.2025 in opposition to the application. It was stated that the defendant's application for adjournment was properly rejected on 06.02.2025 since no good reason had been given to warrant an adjournment. It was stated that the defendant's previous advocate was present in court during the hearing but he did not cross examine the plaintiff or his witnesses.

4. It was the plaintiff's case that the defendant was employing delaying tactics since she never even complied with pre-trial directions given earlier and her advocates had missed several mentions to confirm compliance. It was further stated that the hearing date of 06.02.2025 was taken way back in October 2024 in the presence of both advocates. As a consequence, the court was urged to dismiss the application for lack of merit.

C. Directions on submissions

5. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the defendant filed submissions dated 08.04.2025 whereas the plaintiff's submissions were not on record by the time of preparation of the ruling.

D. Issues for determination

6. The court has perused the notice of motion dated 07.04.2025, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the key issues which arise for determination herein;

    a. Whether the defendant has made out a case for setting aside the proceedings of 06.02.2025.

    b. Who shall bear the costs for the application

E. Analysis and determination

Whether the defendant has made out a case for setting aside the proceedings of 06.02.2025

7. The court has considered the material and submissions on record. The defendant submitted that she had a constitutional right to be heard under Articles 48 and 50 of the *constitution* and that the right had been violated by the court's refusal to adjourn the hearing on 06.02.2025 to enable her advocate file and prosecute an application for leave to cease acting for her.

8. It was the defendant's submission that an application by an advocate for leave to cease acting for a client was so fundamental that the court was obligated to drop everything else and deal with it as a matter of priority regardless of the circumstances of the case. It was further submitted that by declining to adjourn the suit on 06.02.2025 the court was, in effect, forcing the previous advocates to continue acting for the defendant.

9. The material on record shows that the hearing date of 06.02.2025 was taken by consent of the parties on 29.10.2024 before Hon. Justice Matheka. Come the hearing date the defendant's advocate sought an adjournment to enable him apply to cease acting for the defendant for lack of instructions. The

material on record also shows that the defendant was absent on the material date. The record shows that the court declined to adjourn the suit since it was not satisfied that a good reason to warrant an adjournment had been demonstrated.

10. The court takes the view that it is the duty of every litigant to give sufficient instructions to his advocates to facilitate the conduct of suits or other proceedings. In the chamber summons dated 06.02.2025 filed by the firm of J. P. Ngoya and Austine Advocates LLP (after the court had declined to adjourn the suit) the advocates listed the following grounds;

    a. That the defendant has since ceased communicating with her advocate on record.

    b. That all efforts to trace the defendant and obtain instructions from her have been to no avail.

11. The said application was supported by an affidavit sworn by Kevin Ngoya- advocate on even date. The court has noted that the defendant has not controverted the contents of the said affidavit. It was not denied that the defendant had failed to give instructions and had failed to communicate with her said advocates prior to the filing of the application for leave to cease acting.

12. The court has noted from the defendant's application dated 07.04.2025 that she did not give any explanation whatsoever for her failure to communicate with her then advocates and her failure to give them proper instructions. Instead the defendant devoted a substantial portion of the supporting affidavit on the history of the dispute dating back to 2012 which was of no relevance to the instant application.

13. The court agrees with the defendant that she has a right to be heard and a right to a fair hearing but that does not mean that she has a right to hold back the court from proceeding with a suit which is over 8 years old at her whim. The right to be heard does not mean that every litigant must be heard and that the court must adjourn every suit perpetually until all the parties agree to be heard. It simply means that every party ought to be given a fair opportunity of being heard. Where such an opportunity is availed but not utilized then the party in default should at least give a reasonable explanation for his inability to make use of the opportunity.

14. In this particular case, the defendant has not given any plausible explanation why she did not utilize the opportunity of being heard on 06.02.2025. She did not give any reason as to why she was absent on that date. She did not explain why she had failed to give sufficient instructions to her previous advocate or why she did not change legal representation before the hearing date. She had more than adequate time between 29.10.2024 and 06.02.2025 to appoint a new advocate of her choice.

15. The mere fact that the defendant had previously succeeded in an application for setting aside ex parte proceedings does not necessarily mean that she should be entitled to succeed on every subsequent occasion. Every application should be considered on its merit. Where there is no plausible explanation for default, then the court should be reluctant to grant any indulgence.

16. The court is of the view that there is even a greater reason to deny the defendant's application. The material on record shows that even though the suit proceeded for hearing on 06.02.2025 the defendant did not move the court expeditiously for relief. She waited for another 2 months before filing the instant application. The defendant did not even attempt to render any explanation for the additional delay of 2 months. The court is thus of the view that the defendant's application bears that hallmarks of delaying tactics. It is not an application which was made his good faith.

17. Finally, the court finds it strange that the defendant is seeking to overturn the court's refusal of an adjournment through an application for setting aside. If the defendant was truly aggrieved by the order refusing an adjournment she ought to have either appealed the decision or sought a review thereof.

The court is of the view that the refusal of an adjournment ought not to be to challenged under the provisions of Order 10 Rule 11 which deals with ex parte proceedings. If such application were allowed, then it would enable the defendant to obtain an adjournment through the back door whereas she had failed to obtain it on the hearing date.

Who shall bear costs of the application

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the plaintiff shall be awarded costs of the application.

F. Conclusion and disposal order

19. The upshot of the foregoing is that the court finds no merit in the defendant's application. As a consequence, the notice of motion dated 07.04.2025 is hereby dismissed in its entirety with costs to the plaintiff. It is so ordered.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 30TH DAY OF APRIL 2025.

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Mr. Owino for plaintiff

Mr. Mugambi for defendant

Gillian Court assistant