



Muthama v Shadrack (Sued in her Capacity as the Administratrix of the Estate of Shadrack Wambua Kivai) (Environment & Land Case E86 of 2021) [2023] KEELC 22060 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E86 OF 2021
A NYUKURI, J
DECEMBER 6, 2023**

BETWEEN

ANTHONY MWAKA MUTHAMA PLAINTIFF

AND

LYDIA MWIKALI SHADRACK (SUED IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF SHADRACK WAMBUA KIVAI) RESPONDENT

RULING

1. Before court is a notice of motion filed on 17th March 2023 filed by the 1st Defendant seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That leave be granted to the defendant/applicant to prosecute her statement of defence and counterclaim and further setting aside the orders of this court of 24.1. 2023 dismissing the defendant applicant's counterclaim, and any further orders, further to reinstating all pleadings filed by the defendant/applicant by this court.
 - d. That the honourable court be pleased to recall the plaintiff/respondent's witness for cross examination
 - e. That costs of this application be in the cause.
2. The application is anchored on the supporting affidavit sworn on 16th March 2023 by Steven Nzaku, counsel for the applicant and Lydia Mwikali the applicant. The applicant's case is that this matter proceeded to be heard ex parte due to lack of legal representation on the part of the applicant.



Counsel stated that there was an inadvertent mistake that led to this matter to proceed *ex parte* on 24th January 2023 due to miscommunication, lack of sufficient instructions and disagreements between the advocate and his client and the client's intention to be represented by the firm of Mulandi, Kisabit & Associates a position communicated to court by the applicant's counsel. That when the court declined to adjourn the matter, the firm of Nzaku and Nzaku was put at crossroads for want of instructions and risked sanctions, if the firm represented the applicant by force.

3. He stated that the counsel's prayer to be granted time to file application to cease acting was not intended to delay the expeditious determination of this matter and that it was the first time the applicant was seeking adjournment. He stated that the applicant had been ready to proceed with the matter on 4th October 2022 when the same was adjourned on account of the illness and bereavement of the plaintiff's counsel. He stated that this matter involved issues of fraud in regard to the suit property worth 200 Million shillings and that he stands to suffer irreparable loss.
4. Lydia Mwikali Shadrack deponed that there was a dispute and confusion on representation occasioned by her children but that they have now agreed to retain the firm of Nzaku and Nzaku Advocates.
5. The application is opposed. Antony Mwaka Muthama the plaintiff swore a replying affidavit dated 20th March 2023 opposing the application. He deposed that the hearing of 24th January had been fixed by consent of both parties but that the defence counsel neglected to attend court after the court declined to grant an adjournment. He stated that the failure to attend court on 24th January 2023 was deliberate and calculated to scuttle the hearing and delay the finalization of this matter. He stated that although the defence counsel stated that he intended to cease acting, he never moved the court accordingly which demonstrates that he is gambling with the judicial process. He stated that equity aids the vigilant and not the indolent. He stated that his case was heard and closed on 24th January 2023, and that there is no justification for the delay in filing the instant application. He stated that there is no material placed before this court to show that the defendant had withdrawn instructions from her counsel and no evidence has been presented to show that the firm of Mulandi, Kisabit & Associates had been approached by the defendant to take over conduct of this suit from Nzaku & Nzaku advocates. He stated that the allegation by the applicant on the value of the suit property is meant to amend the pleadings filed. He maintained that the applicant had failed to give cogent reasons for the court to grant orders sought.
6. In a rejoinder, Mr. Steven Nzaku filed a supplementary affidavit sworn on 20th April 2023. He stated that the court should not deny the applicant a chance to prosecute his defence.
7. The application was canvassed by way of written submissions and on record are submissions filed by the applicant on 20th April 2023.

Applicant's submissions.

8. Counsel for the applicant submitted that the suit property is in the applicant's name having acquired it through succession. Counsel relied on several decisions to argue that where the applicant is prevented by sufficient cause from appearing in court, *ex parte* proceedings ought to be set aside. Counsel placed reliance on Article 159 (2) (d) of the Constitution of Kenya 2010 and argued that the respondent wanted to benefit from technicalities., and that if the matter proceeds the applicant stands to suffer irreparable injury.

Analysis and determination.

9. The court has considered the application, response and submissions. The issue that arise for determination is whether the applicant deserves the orders sought.



10. Order 12 Rule 7 provides for the jurisdiction of the court to set aside ex parte proceedings as follows;
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. Similarly Order 51 Rule 15 of the *Civil Procedure Rules* provides for the power of the court to set aside an order made ex parte.
12. Principles for setting aside ex parte orders are well settled. As orders for setting aside ex parte proceedings are discretionary, it is upon the applicant for such orders to demonstrate sufficient cause for failure to attend court. In the case of *Shah v Mbogo* (1968) EA the court held that the power to set aside ex parte orders is to avoid hardship or injustice but not to help a party who deliberately intends to delay or obstruct the course of justice. In this case, the applicant who is an elderly lady, said to be 89 years old has stated that there was confusion on the issue of representation as her children intended to instruct the firm of Mulandi, Kisabit & Associates advocates which resulted in non-attendance. Having perused the record, I note that there is nothing therein to suggest that the applicant has had the intention of delaying or obstructing the cause of justice since the only other adjournment that was granted was on 4th October 2022 when the matter was adjourned on account of bereavement and indisposition of the plaintiff's counsel. In the premises, I find and hold that the applicant has demonstrated sufficient cause that hindered her attendance in court on 24th January 2023.
13. The upshot is that I find and hold that the application filed on 17th March 2023 is merited and the prayers sought therein are allowed as prayed.
14. Costs of this application are awarded to the plaintiff.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF DECEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Ngolya for plaintiff/respondent

Ms. Nambande holding brief for Mr. Nzaku for the defendant/applicant

Court Assistant - Josephine

