Laboso v Milgo (Environment & Land Case 168 of 2017)
[2023] KEELC 21985 (KLR) (5 December 2023) (Ruling)

Neutral citation: [2023] KEELC 21985 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 168 OF 2017

CG MBOGO, J

DECEMBER 5, 2023

BETWEEN

PAUL LABOSO ..... PLAINTIFF

AND

ALICE MILGO ..... DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 6th September, 2023 and filed in court on 12th September, 2023 by the defendant/applicant. The said application is expressed to be brought under order 12 rule 7 of the *Civil Procedure Rules* and section 3 and 3A of the *Civil Procedure Act* seeking the following orders: -

    1. Spent.
    2. Spent
    3. That this court be pleased to set aside the ex-parte proceedings of the 12th October, 2022 leading to the ex-parte judgment of 21st February, 2023 and the said judgment, the consequent decree and any orders therein.
    4. That the defendant/applicant herein be allowed to cross examine the plaintiff/applicant on her case and to tender his defense to this suit.
    5. That this honourable court be pleased to grant any other order it may deem necessary.
    6. That costs be in the cause.

2. The application is premised on the grounds inter alia that the failure to attend court for the hearing of the case on 12th October, 2022 was not deliberate and it is in the interest of justice that the application be allowed.

3. The application was supported by the affidavit of the defendant/ applicant sworn on even date. The defendant/applicant deposed that upon service of the decree, he was prompted to visit his previous Advocate to understand what transpired in court since he has never failed to attend court when informed. He further deposed that his previous counsel was reluctant to talk to him and he instructed the Advocates now on record who informed him that the matter proceeded ex-parte on 12th October, 2022 in the absence of his Advocate. Further, that he was surprised to learn that the matter proceeded to its conclusion and despite his previous Advocates being served, he was never informed of the hearing.

4. The defendant/applicant further deposed that this court has condemned him unheard and he stands to suffer immensely despite the fact that he has a good defence. He deposed that failure to attend court for hearing was not deliberate and prays that he be granted a chance to ventilate his defence which raises triable issues.

5. The application was opposed by the replying affidavit of the plaintiff/respondent sworn on 22nd September, 2023. In her response, the plaintiff/respondent deposed that at all material times, the defendant/applicant was represented by the firm of Koech J. K & Co. Advocates who received all the pleadings, notices and correspondences without protest and at no time did the said firm inform the process server of not having instructions to act for the defendant/applicant.

6. The plaintiff/respondent further deposed that the hearing notice was duly served upon the firm of Koech J. K & Company Advocates on 8th November, 2022 and despite the notification, he did not attend the hearing on the said date. The plaintiff/respondent deposed that the application has been filed seven months after delivery of judgment and around three months after service of decree and no reasonable explanation has been advanced for the inordinate delay. Further, that no tangible evidence has been shown that the defendant/applicant made a follow up of his case which shows laxity and indolence on his part.

7. The application was canvassed by way of written submissions. On the 27th October, 2023 the defendant/applicant filed his written submissions dated 23rd October, 2023 where he raised two issues for determination as listed below: -

    1. Whether it is in the interest of justice to penalise the defendant/applicant for the mistake of an advocate.

    2. Whether the delay in bringing this application is inordinate or otherwise.

8. On the first issue, the defendant/applicant submitted that there is nothing to suggest that he knew about the hearing except his previous Advocates who were served and had the obligation of informing their client of the hearing date. He submitted that his previous Advocate despite not attending the hearing, he did not also file an application to cease acting and thus the defendant/ applicant remained in darkness until he was served with a decree. He submitted that it would not be in the interest of justice to deny him a chance to ventilate his defence having filed all the required documents. Further, that the mistake of failing to represent him was done by his advocate. The defendant/ applicant relied on the case of *Geoffrey Oguna & Another versus Mohamed Yusuf Osman & 2 Others* [2022] eKLR.

9. On the second issue, the defendant/applicant submitted that judgment in the matter was delivered on 21st February, 2023, the decree was issued on 8th June, 2023 and service of the same was effected around the month of August, 2023 or thereabout and therefore, the application has been brought in time and is not an afterthought.

10. The plaintiff/ respondent filed her written submissions dated 30th October, 2023 where she raised two issues for determination as listed below: -

1. Whether the exparte judgment delivered on 21st February, 2023 should be set aside.

2. Whether the application should be dismissed with costs.

11. On the first issue, the plaintiff/respondent submitted that this court has discretion to set aside or vary the judgment but should only do so if it is just, and not in assistance of deliberate obstruction of delay of justice by the other party. The plaintiff/ respondent relied on the cases of *International Air Transport & Another versus Roskar Travel Limited & 3 Others* [2022] KEHC 200 (KLR), *Savings and Loans Limited versus Susan Wanjiru Muritu* HCCS No. 397 of 2002, *Neeta Gohil versus Fidelity Commercial Bank Limited* [2019] eKLR and *Samwel Kipsang Kitur & Another versus Eunice Kitur & 2 Others* [2005] eKLR.

12. On the second issue, the plaintiff/respondent submitted that the ground raised by the defendant/ applicant of the mistake of his advocate does not hold water and the application ought to be dismissed with costs.

13. I have considered the application, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the defendant/applicant has reasonable cause to enable this court set aside its judgment.

14. Order 12, rule 7 of the *Civil Procedure Rules* states thus:

> " 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."

15. In the case of, *Kimani versus MC Conmell* (1966) EA 545, the court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues. Further in *Jomo Kenyatta University of Agriculture and Technology versus Musa Ezekiel Oebal* (2014) e KLR, the court stated that the purpose of clothing the court with discretion to set aside ex-parte judgment is:

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

16. Similarly, in the case of in *Shah versus Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

> " This discretion is intended 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."

17. However, there is an interesting twist to this application. The defendant/applicant had instructed the firm of Koech J.K & Company Advocates to represent him in the matter. The said firm of advocates was duly served with all pleadings and correspondences, a fact which the defendant/applicant has admitted. It was his deposition that his advocate was reluctant to talk to him which prompted him to seek the services of the Advocates now on record.

18. Order 9, rule 9 of the *Civil Procedure Rules* provides as follows;

> "When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."

19. Order 9, rule 10 of the *Civil Procedure Rules* further provides;

> "An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first."

20. Pursuant to order 9 rule 9, the defendant/applicant ought to have first sought leave to come on record and in making such application, he would accompany the prayers contained in the instant application alongside it. This was not done. The said provision of the law is a mandatory requirement for a party to comply with the same if there is any change of Advocate post judgment. The said application, therefore offends the provision of the law.

21. This court cannot therefore attempt to deal with the application when this procedure has not been complied with.

22. Arising from the above, the notice of motion application dated 6th September, 2023 is hereby struck out with costs to the plaintiff/respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 5TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE