REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KERICHO

ELC SUIT NO. 99 OF 2017

JOSHUA NGENO.....PLAINTIFF /1st RESPONDENT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....1st DEFENDANT/APPLICANT

COUNTY GOVERNMENT OF KERICHO.....2nd DEFENDANT/ RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated the 13th September 2020 brought under *the provisions of Article 48 and 50(1) of the Constitution,* Order 10 Rule 11, Order 22 Rule 22 of the Civil Procedure Rules, *Section 1A, 1B, 3A & 80 of the Civil Procedure Act, and all enabling provisions of the law and which was disposed of by way of written submissions* where the Applicant seeks for orders that the Judgment delivered on the 29th July 2021 and the consequential orders arising therein be set aside and/or there be stay of execution arising for the said Judgment so as to give the Applicant an opportunity to present its evidence and defend the suit. The said application was supported by the grounds on its face as well as the supporting affidavit sworn by the Applicant on the 13th September 2021.

2. Despite there being directions that the application be disposed of by way of written submissions the Applicant did not comply. It is apparent from the averment of the Applicant's application that that due to the Covid-19 Pandemic error the law firm had implemented a "work from home policy" which affected the flow of information and other administrative tasks within the law firm including remote access to the company e-mail on movement of documents amongst the advocates and clerks arise in which Counsel for the 1st Defendant was inadvertently unaware that the matter was proceeding for hearing.

3. The Applicant now seeks to remedy the issue by seeking that the defense case be reopened and is entitled ex-debito justiciae to have their case reopened so as to allow it to present its evidence. That in so seeking, there will be no prejudice occasioned to the Plaintiff or the other parties.

4. That the tenets of justice require that no party should be condemned unheard. That the Applicant who is an entity providing services to the public using taxpayers' money risks eminent execution wherein the public shall be forced to foot the bill during these harsh economic times.

5. That the Applicant was willing to meet any attendance costs of the application set by the court and any conditions and time lines. That should the judgment not be set aside, its precedent would forever prejudice the Applicant which in turn would affect the services that it provides to the public. That in effect thereof, the Applicant stands to suffer irreparable harm if the orders as sought are not granted.

6. The application was opposed by the Plaintiff /1st Respondent's replying affidavit sworn on the 27th October 2021 and their written submissions filed on 16th November 2021 to the effect that after the suit was filed on 15th September 2017, the Applicant had entered appearance via a Memorandum of Appearance dated the 26th September 2017 and filed their statement of defence on 10th October 2017. Therein after, the Applicant failed to comply and with pretrial directions despite having been given several chances to comply and even after being penalized with costs for seeking adjournments on compliance.

7. Despite having not complied and the matter having been set down for hearing on the 26th June 2018, the Applicant filed a Preliminary Objection dated 30th April 2018 objecting to the court's jurisdiction to adjudicate and determine the Plaintiffs suit as the allegations brought forth by the Plaintiff could be determined by the liaison committee as provided for under Section 10(2) of the Physical Planning Act. The preliminary objection was dismissed following which the matter was mentioned for pre-trial compliance by the Applicant before it was set down for hearing and had proceeded on the 20th March 2019 in the presence of one Mr F. Oboso Advocate for the Applicant who participated in the proceedings and cross examined the witness. They therefore could not claim to have been condemned unheard.

8. That all along the Applicant was aware of the proceedings after judgment was delivered on 29th July 2021, it had taken the Applicant two months to react to the judgment as an afterthought. That the Applicant seeks to reopen the defense case knowing very well that they never fully complied with the provisions of Order 11 of the Civil Procedure Rules as directed by the court and is hence there are no witnesses or documentary evidence for them to present. The exercise would thus be in futility to reopen their case. That the application is a mere delaying tactic meant to deny the 1st Respondent of the enjoyment of the fruits of the judgment. That the Applicant cannot now use the Covid -19 pandemic as an excuse since the defense case proceeded on 23rd February 2021 when the courts were fully operational but the Applicant decided to stay away from the proceedings.

9. The indolence of the Applicant to defend the case upon entering appearance should not be mistaken for lack of an opportunity to defend their case if anything, equity cannot come to their aid. That if the Applicant was dissatisfied with the judgment, it is trite law and common procedure to lodge an Appeal. Reliance was placed on the decided case in **Edward Wafula Barasa vs Morris Onzee [2019] eKLR.** The 1st Respondent sought for the application to be dismissed with costs.

10. The application was further opposed by the 2nd Defendants grounds of opposition dated 8th October 2021 to the effect that the Applicant had not shown sufficient cause to warrant the setting aside of the Judgment. That the Applicant was guilty of inordinate delay, Judgment having been delivered more than three months to the date of filing the application and further that the application did not meet the threshold for the grant of the orders sought and was instead intended to delay and embarrass and/or frustrate the fair finalization of the matter. That the application was an abuse of the court process and failure to attend court when the matter proceeded was not adequately explained and therefore the application ought to be dismissed with costs.

Determination.

11. Having considered the Application herein to set aside the judgment, of the 29th July 2021 and the submissions for and against allowing the said application, I find that the law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which stipulates that;

> *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.*

12. I have considered the reasons that were presented by the Applicant seeking to set aside the judgment delivered on 29th July 2021, reopen their case and present the evidence. I have also considered the averments herein deponed for failure to comply nor prosecute their defence. I have keenly perused the affidavits filed in support of the application to find out whether the Applicants had valid reasons for the said failure.

13. In their application to set aside the judgment, the Applicants have stated that that due to the Covid-19 Pandemic error, the law firm had implemented a "work from home policy" which affected the flow of information and other administrative tasks within the law firm including remote access to the company e-mail on movement of documents amongst the advocates and clerks in which Counsel for the 1st Defendant was inadvertently unaware that the matter was proceeding for hearing. Subsequently they only came to learn that judgment had been entered against them upon service of a letter from the Plaintiff's Counsel seeking execution of the same.

14. Setting aside a judgment is a matter of the discretion of the court, as was held in the case of **Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR** where the court citing relevant cases on the issue held *inter alia:-*

> *''The discretion is free and the main concern of the courts is to do justice to the parties before it (see **Patel vs E.A. Cargo Handling Services Ltd**.) the 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see **Shah vs. Mbogo**). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See **Sebei District Administration vs Gasyali.** It also goes without saying that the reason for failure to attend should be considered."*

15. The Court of Appeal for Eastern Africa in the case of ***Mbogo v Shah [1968]*** **EA 93**, held that for the court to set aside a judgment, the court must be satisfied about one of the two things namely:-

> *a. either that the Defendant was not properly served with summons; or*
>
> *b. that the Defendant failed to appear in court at the hearing due to* **sufficient cause.**

16. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until the entry of the Judgment herein and I am satisfied that the Applicant was guilty of inaction as the turn of events depict that since the matter was initiated in court in the year 2017, the Applicant had always been represented but despite the many chances given to them to comply with the pre-trial issues, they had ignored and/or failed to do so to the point that when the matter came up for hearing on the 20th March 2019, the Applicant had not yet filed their documents and therefore they had no evidence to offer and the matter proceeded to its logical conclusion culminating into the impugned judgment.

17. I have asked myself whether the failure to comply by Counsel for the Applicant and thereafter defend the suit constituted sufficient cause or whether it was meant to deliberately delay the cause of justice and I find that the turn of events was inadequately explained and did not constitute sufficient cause to warrant the exercise of the court's discretion.

18. The Supreme Court of India in the case of **Parimal vs Veena** ***2011 3 SCC 545*** *attempted to describe what* **sufficient cause** constituted when it observed that:-

> *"**Sufficient cause**" is an expression which has been used in large number of statutes. The meaning of the word "**sufficient**" is "**adequate**" or "**enough**", in as much as may be necessary to answer the purpose intended. Therefore the word "**sufficient**" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "**sufficient cause**" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "**not acting diligently**" or "**remaining inactive.**" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously*

19. The test to be applied is whether the Applicant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the Applicant could not be blamed for their 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, the Applicant did not demonstrate sufficient cause why they never defended their defence despite the indulgence by the court.

20. From the record, only the Plaintiff /Respondent and the 2nd Defendant/Respondent had complied with the provisions of Order 11 of the Civil Procedure Rules, by filing witness statements and documents to be relied on as exhibits at the hearing. The record does not contain the Applicant's witness statement and no document to be relied upon as exhibits at the hearing. The question therefore is whether the kind of defence the Applicant claims in this application, that they seek to adduce is triable and/or raises triable issues.

21. Despite the court having mentioned the matter severally after noting that the Applicant had not filed its documents, the Applicant has all along not deemed it fit to regularize the said anomaly. The Court of Appeal in the case of **Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others [2014] eKLR** expressed itself as follows:-

> *"we agree with the noble principles which goes further to establish that the court's discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."*

22. In the present suit, I find that the Applicant deliberately failed to prosecute their case and thereby refusing to avail itself of the court process. Further that no evidence was placed on the record even by way of witness statements or documents. I find that the Application is an afterthought, a waste of judicial time and an abuse of the court process to vex the Respondent/Plaintiff and put him to expense. The Respondent/Plaintiff is being gravely prejudiced by the Applicant/Defendant and therefor there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. That the court is not powerless to grant relief, when the ends of justice and equity so demand, to this effect, I find that the Application dated 13th September 2020 has no merit and proceed to dismiss it with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 24TH DAY OF MARCH 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE