



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC CASE NO 64 OF 2018

KALUNZU MAVUTI.....PLAINTIFF/APPLICANT

VERSUS

MUNYOKI MAVUTI..... 1ST DEFENDANT/RESPONDENT

MUTUKU MUTINDA... 2ND DEFENDANT/RESPONDENT

RULING

1. There are two applications for determination before this court.

2. The first application is a Notice of Motion dated 6th of July, 2021 brought under Sections 1A, 1B, 3A & 63(C) of the Civil Procedure Act, Order 40 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law, where the Applicant is seeking for the following orders: -

1. Spent.

2. That the Honourable Court be pleased to find the Respondents in contempt of the Orders of this Honourable Court issued on 4th of August, 2020.

3. That the Honourable Court do find Mary Kavele Kiminza, Mutuku Mutinda, Kiminza Mutuku, Mutate Mutuku, Mwangangi Munyoki, Nzilani Mwangangi and Mumo Mwangangi the Dependants and/or agents of the Defendants/Respondents in contempt of Court Orders issued on 4th of August, 2020.

4. That the Honourable Court do order that the Respondents and the Dependants/agents be arrested by the OCS Kalawa Police Station or his subordinates and presented to court for committal to civil jail for a term of six months.

5. That the costs of this application be provided for.

3. The application is premised on the grounds on the face of the record and on the supporting affidavit of Kalunzu Mavuti sworn on 6th July 2021.

4. A summary of the grounds and the supporting affidavit of the Applicant is that vide a Decree issued on 4th of August 2020, the Defendants/Respondents were ordered by the court to move out of land parcel number Kibauni/Mutembuku/412 situated in Kalawa Adjudication Section. That the Defendants/Respondents were also permanently restrained from cultivating, alienating or disposing of the suit land. That consequently, the Defendants and their agents were served with the court orders on 8th of September 2020. That despite being aware of the said court orders, the Respondents have refused to obey the same thereby undermining the dignity of the court.

5. The application is opposed vide the replying affidavit of Mutuku Mutinda, the 2nd Respondent, sworn on 22nd November 2021. The Respondent averred that, after the court delivered an ex parte judgment on 27th September, 2017, they filed an application dated 6th October, 2017 where they sought to stay and set aside the ex parte judgment. The Respondent further averred that the said application was dismissed due to the mistake of Counsel, a breakdown in communication, procedural technicalities arising from the transfer of the file from the ELC at Machakos to ELC at Makeni and the onset of the Covid 19 pandemic.

6. The Respondent argued that the prayers sought by the Applicant were absurd as they were against parties who were strangers to the suit.

The Respondents contend that they were unable to take any action due to the fact that, as at the time when the decree was extracted, the whole country was at the peak of the Covid 19 pandemic.

7. The 2nd application is a Notice of Motion dated 30th of September 2021 brought under Order 12 Rule 7, Order 17 Rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law, where the Defendant/Applicant is seeking for the following orders.

1. Spent.

2. That this Honourable Court be pleased to grant leave to the firm of Letangule & Co Advocates to come on record for the Defendant/Applicant.

3. That pending the hearing of this application inter partes, the Honourable Court be pleased to grant a stay of execution of the ex parte judgment delivered by Honourable Justice O.A. Angote on 22nd September 2017, the orders issued on 4th August 2021 and any other consequential orders against the Defendants/Applicants.

4. That the application dated 6th October 2017 be reinstated and the orders of the Honourable Court made on 22nd October 2019 be set aside.

5. That the cost be provided for.

8. The application is premised on the grounds on the face of the application and on the supporting affidavit of the 2nd Respondent Mutuku Mutinda sworn on 29th September, 2021.

9. A summary of the grounds and the averments by the Applicant is that, the Defendant/Applicant's application dated 6th October, 2017 seeking to stay the ex parte judgment was dismissed on 22nd October, 2017 for want of prosecution. That by an order dated 8th May, 2018, the instant file was transferred from the ELC at Machakos to the ELC at Makueni for hearing and determination. The Respondents averred that they had a communication breakdown with their previous Advocate on record which led to the dismissal of the application. That pursuant to the judgment delivered on 22nd September 2017, a decree was issued on which basis the Respondent is seeking to have the Applicants committed to civil jail. He averred that the Defendants/Applicants who were advanced in age, risked losing their liberty and property if they are committed to civil jail. The Respondents argued that they would suffer irreparable harm if the orders sought are not granted.

SUBMISSIONS

10. Both applications were canvassed by way of written submissions.

11. On the application dated 6th of July, 2021, Counsel for the Plaintiff/Applicant, through the written submissions filed on 27th of January 2021, submitted that the authority and dignity of the court has to be respected and protected at all costs if courts are to perform their duties and functions effectively. Counsel asserts that court orders must be obeyed even if a party believes that the order is irregular or void. Counsel relied on the following decisions in support of his submissions: -

a. A Jiwa Shamji Limited Vs National Land Commission & 14 Others eKLR.

b. Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & Another (2005) 1 KLR.

12. Counsel further submitted that the Respondents instead of purging the contempt irregularly filed the present application notwithstanding the fact that the orders had not been set aside. Counsel asserts that the court should not condone the disobedience of its orders as court orders are not made in vain.

13. The Applicant urged the court to exercise its powers in his favour.

14. On the application dated 6th July 2021, Counsel for the Defendants/Respondents, through the written submissions dated 24th of November 2021, submitted that the court should make a determination based on the order and circumstances of the case. Counsel submitted that the Defendants and their Dependents had all along resided on the suit property. Counsel argued that the order asking the Respondents to vacate the suit land was untenable as it was issued when there was a global pandemic. Counsel argued that the Defendants felt that their non-compliance with the order was justifiable and that they did not act out of bad faith as they are advanced in age. Counsel relied on the case of **Samuel M.N. Mweru & Others Vs National Land Commission & 2 Others (2020) eKLR.**

15. On the issue as to whether persons who are not parties to a suit can be held in contempt, Counsel submitted that it was absurd to do so as they had never been served with the court proceedings. Counsel maintains that bringing in the said parties at that point was unjust. He relied on the case of **Abdalla Mgute & 161 Others Vs Mohsin Bin Saleh Sherman & 6 Others (2017) eKLR.**

16. Counsel further submitted that the Defendants could not be punished for contempt of the court order as it did not have the penal notice as required. To buttress his submissions, reliance was placed on the case of **Caroline Mutuku Vs Amos Kones Mabele & 2 Others (2021) eKLR.**

17. On the application dated 30th of September, 2021 Counsel for the Defendant/Applicants through the written submissions filed on 24th of November 2021, submitted that the law on setting aside ex parte judgments is anchored under Section 3A of the Civil Procedure Act, Article 48, 50 and 159 of the Constitution and Order 51 Rule 15 of the Civil Procedure Rules. Counsel further submitted that justice demands that the Plaintiff should be granted an opportunity to be heard on merit. Counsel further submitted that the Applicants stood to lose their liberty and property in a matter that was not heard on merit. He placed reliance in the case of **Wachira Karani Vs Bildad Wachira (2016) eKLR, Shah Vs Mbogo & Another (1967) EA 116.**

18. Counsel argued that the Applicants previous Advocate did not attend court on a number of instances which led to the dismissal of the application dated 6th of October, 2017. Counsel argued that there was a breakdown of communication between the Respondents and their Advocate on record which was further aggravated by the transfer of the present file from the ELC at Machakos to the ELC at Makueni.

19. Counsel further submitted that the non-attendance by the Applicants was not deliberate and that no negligence could be attributed on the part of the Defendants.

20. Counsel further submitted that the failure by the Defendants to follow up on the matter was occasioned by the breakdown in communication with their previous Advocate and due to their old age and illness. Counsel argued that no prejudice would be occasioned to the Respondent if the matter was to be heard on merit. He placed reliance on the case of **John Nahashon Mwangi Vs Finance Bank Ltd (in liquidation) (2015) eKLR.**

21. On the issue as to whether the Applicants were indolent and that they had abused the court process, Counsel submitted that the Applicants have never been indolent or abused the court process but for the circumstances leading to the failure to prosecute the application.

22. On the issue on as to whether the consequences of failure by the Applicants previous Counsel to prosecute the application ought to be visited upon the Applicants, Counsel submitted that the 2nd Defendant who is advanced in age was unaware that the file had been transferred from the ELC at Machakos to the ELC at Makueni. Counsel argued that following the transfer of the file to the ELC at Makueni, there was a breakdown in communication between the Respondents and their Counsel which caused the matter to be unattended until the application was dismissed on 22nd October 2019. To buttress his submissions, he placed reliance on the case of **Jim Rodgers Gitonga Njeru Vs Al-Husain Motors Ltd & 2 Others (2018) eKLR.**

23. As regards the application dated 30th September 2021, Counsel for the Plaintiff/Respondent submitted that the application was irregularly before the court, as the court became *functus officio* after it issued the decree. Counsel contends that this court in hearing the said application would amount to sitting on appeal of its own judgment.

24. Counsel further submitted that the application sought to be reinstated was filed on 06/10/2017 and remained unprosecuted until 12th February, 2018 when it was dismissed for want of prosecution. Counsel submitted that the Defendants did not give any plausible reason as to why they did not attend court to prosecute their application. Counsel further submitted that there was inordinate delay in bringing the application for reinstatement which was an afterthought as it was filed after the Applicants were served with the application citing them for contempt.

25. Counsel submitted that the reasons given by the Applicants previous Advocate in the application to cease acting, was lack of instructions and not due to a breakdown of communication. That in any event, no evidence was tabled in court to demonstrate that the Applicants had been following up the matter. Counsel contends that the application is a delaying tactic meant to deny the Plaintiff the fruits of his judgment. Counsel argued that the Defendant had approached the court with unclean hands as they were in contempt of the court orders.

26. Counsel further submitted that the application seeking to set aside the ex parte judgment was dismissed on 12th February, 2018 and if there was an order for dismissal dated 22nd October, 2018, then it was irregular as there was nothing left for the court to dismiss.

ANALYSIS AND DETERMINATION

27. Having considered the application dated 6th of July 2021 and the application dated 30th of September 2021, I find that it will be prudent to analyse and determine the application dated 30th of September 2021 before analysing the application dated 6th of July 2021. I have considered the application, the affidavits and the rival submissions and I find that the issue for determination is whether the Applicant is entitled to the orders sought.

28. In the application dated 30th of September, 2021, the Applicant is seeking for orders to stay the judgment delivered on 22nd September, 2017 amongst other orders. The application is premised on Sections 1A, 1B and 3A of the Civil Procedure Act and Order 12 Rule 7, Order 17 rule 1 of the Civil Procedure Rules.

29. Section 1A and 1B of the Civil Procedure Act provides for the objective of the Act which is to ensure the just, expeditious, proportionate and affordable disposal of cases.

30. Upon perusal of the record, I note that this matter was initially filed at the ELC at Machakos. This matter proceeded for hearing as a formal proof on 5th of February, 2015 and the court rendered its judgment on the 22nd of August, 2017.

31. Thereafter, the Applicants filed an application dated 6th of October, 2017 where they sought to set aside the judgment. The application was dismissed on 22nd of October 2019 for want of prosecution.

32. The Defendants/Applicants argued that owing to the breakdown of communication with their previous Advocate, the transfer of the file from the ELC at Machakos to ELC at Makueni and the onset of the Covid 19 pandemic, the matter remained unattended leading to the dismissal of the application dated 6th of October, 2017. Counsel submitted that the mistake of the Defendants previous Counsel should not be visited upon the Respondents.

33. Upon perusal of the Court record, it is evident that the application dated 6th October, 2017 was filed by the firm of Mwangangi and Associates. Counsel submitted that the Defendants are elderly and that the mistakes of their counsel should not be visited upon them.

34. The general principle is that an Applicant should not suffer due to a mistake of its counsel. This was the position in **Lee G Muthoga Vs Habib Zurich Finance (K) Ltd & Another Civil Application No 236 of 2009** where the court held that;

“It is widely accepted principle of law that a litigant should not suffer because of his advocates oversight, is well settled that mistake of counsel should not be visited upon the litigant.”

35. The Defendants have given reasons as to why they did not attend court. There is no evidence to demonstrate that the Respondents were notified by their Advocate that the matter was slated for hearing. I find that the Defendants have given plausible reasons why they did not attend court.

36. On the issue as to whether the application dated 6th October, 2017 should be reinstated for hearing and the dismissal orders set aside, **Order 12 Rule 7 of the Civil Procedure Rules** provides 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.”

37. The court record shows that this matter was heard before Honourable Justice Angote sitting in the ELC at Machakos. Judgment was delivered on 22nd of September, 2017. The Applicants thereafter filed an application dated 6th of October, 2017 where they sought to set aside the ex-parte judgment entered on 22nd September, 2017 amongst other orders.

38. The record is not clear when the file was transferred from the ELC at Machakos to the ELC at Makueni. This matter was last in the ELC at Machakos on 12th of February, 2018 before the Deputy Registrar. Both parties were absent. The Deputy Registrar directed that the file be returned to the registry. On 26th of June, 2018 the matter was placed before Hon. Justice Mbogo. Mr. Hassan was present holding brief for Kamanda for the Plaintiff. The firm of Mwangangi & Co. that was on record for the Defendants was absent. Mr. Hassan informed the court that the Defendant’s application to set aside the judgment was dismissed. The court directed the Plaintiff to table evidence to confirm that the application was dismissed and fixed the matter for mention on 24th of July, 2018. On the date of mention, Mr. Hassan informed the court that he had since confirmed that the application dated 6th October, 2017 was not dismissed. The court fixed the matter for mention for directions.

39. I have carefully perused the court record and I find that the court issued a mention notice dated 20th of August, 2019 to the firm of Mwangangi and Associates and to the firm of J. Kamanda & Co Advocates for parties to attend court on 22nd of October, 2019. On 22nd of October, 2019, the Plaintiff, the Defendants and their Advocates on record were absent. The court dismissed the application dated 6th of October, 2017 for want of prosecution.

40. The Respondents averred that their previous Counsel did not notify them about the hearing date. I have carefully looked at the mention notice dated 29th August, 2019 issued by the court to the firm of J.K Kamanda & Co Advocates and to the firm of Mwangangi and Associates and I find that it does not have a received stamp from either firm of Advocates. There is no affidavit of service by the court process server to demonstrate how service upon the two law firms was effected. It is therefore possible that the Defendants were not aware of the mention date.

41. The application to reinstate the suit was filed promptly and without delay. It is a clear indicator that the Respondents are desirous of having the application prosecuted.

42. For clarity sake, the following orders hereby granted;

i. Leave is granted to the firm of Letangule & Co. Advocates to come on record for the Defendants/Applicants.

ii. Stay of execution of the ex-parte Judgement delivered by Hon. Justice O. A. Angote on 22nd September, 2017, the orders issued on 4th August, 2021 and any other consequential orders against the Defendants/Applicants is hereby granted.

iii. The application dated 6th October 2017 is hereby reinstated.

iv. That the order of this Honourable Court made on 22nd October, 2019 dismissing the Defendants’ application is hereby set aside.

v. Each party to bear its own costs.

43. Having granted the orders sought in the application dated 30th of September, 2021, the net effect is that the application dated 6th of July, 2021 cannot be dealt with at this stage.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MARCH, 2022

IN THE PRECENCE OF: -

Kamanda for the Plaintiff

Letengule for the Respondent

Mr. Kwemboi – Court Assistant