



**Gachura (Being A Legal Representative of The Estate of Godfrey Mbuuri
Gachura v Muga Developers Limited & another (Environment & Land
Case 619 of 2016) [2022] KEELC 24 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 24 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 619 OF 2016**

**OA ANGOTE, J
APRIL 28, 2022**

BETWEEN

ANNE WAIHIRA GACHURA PLAINTIFF

AND

MUGA DEVELOPERS LIMITED 1ST DEFENDANT

SURAYA PROPERTY GROUP LIMITED 2ND DEFENDANT

RULING

1. In the Notice of Motion application dated 15th February, 2022, brought pursuant to the provisions of Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* and Article 50 of *the Constitution* and Order 51 of the *Civil Procedure Rules*, the Defendants/Applicants are seeking for the following orders:
 - i. That the Honourable Court be pleased to grant leave to the Defendants to re-open the Defendants' case to be heard on merit and limited to taking of the Defendants' evidence and testimony, with corresponding leave for the Plaintiff to cross-examine the Defendants' witness(es)
 - ii. That the costs of the Application be in the cause
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Peter Kiarie Muraya, the Managing Director of the 1st Defendant Company who deponed that as informed by counsel, this matter came up for hearing on 15th October, 2021 and that counsel inadvertently failed to diarize the aforesaid date as a result of which neither counsel nor the Defendants were present.
3. The 1st Defendant's Director deponed that the non-attendance was purely accidental occasioned by a genuine mistake; that the Defendants have a reasonable and merited Defence on record; that the subject



matter being land is an emotive issue and that the interests of justice dictate that all the parties be heard and the case determined on its merits.

4. In response to the application, the Plaintiffs' counsel filed a Replying Affidavit in which he deponed that the hearing notice with respect to this matter was personally served on the Defendants and thereafter served on their counsel; that the matter came up for hearing on 5th October, 2021 and not 15th October, 2021 as alleged; that no reasonable explanation has been given as to why neither the Defendants nor their counsel attended court despite both having been served and that no sufficient cause has been given warranting interference with the court's directions on closing submissions.

Submissions

5. The Defendants'/Applicants' counsel filed submissions. Counsel submitted that the Defendants have provided a reasonable and justiciable basis for the court to exercise its discretion and re-open the case for the Defence; that the Defendants have filed a Defence and witness statements which raise triable issues and that if their case is not re-opened, a grave injustice will be occasioned to the Defendants.
6. Reliance was placed on the case of *Elisbaphan Omolo Nyasita vs John Ojowi Onuko* [2015] eKLR where the court in dealing with an application to set aside ex-parte proceedings and re-open the Defendants' case, held that the ends of justice would be better served by allowing the Defendants to proceed with their case on merits. The Plaintiff did not file submissions and placed reliance on the Replying Affidavit.

Analysis & Determination

7. Having considered the Motion, Affidavit in support thereof, the Plaintiff's Replying Affidavit in opposition to the application and the written submissions by the Defendants, the sole issue that arises for determination is whether the Defendants have sufficiently demonstrated that the ex parte proceedings should be set aside.
8. The Defendants/Applicants herein are seeking to have the Defence case re-opened to enable them testify and adduce evidence with corresponding leave being granted to the Plaintiffs to cross-examine them. At the time of filing the present application, the matter had proceeded for hearing and the Plaintiff had closed her case. The court had issued directions on filing of final submissions. Indeed, as surmised by the Defendant, directions on final submissions are only issued after the close of the hearing.
9. Whereas the court undoubtedly retains inherent jurisdiction to re – open a case, such as in the circumstances sought by the Defendant, the exercise of this jurisdiction is discretionary. It is trite that where a court is called upon to exercise its discretion, it must do so judiciously and on sound principles. As expressed by the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR ;

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
10. In the present case, the matter proceeded for hearing in the absence of the Defendant pursuant to Order 12, Rule 2 of the Civil Procedure Rules which provides that if on the day a matter is scheduled for hearing and only the Plaintiff attends, the court, if satisfied that the hearing notice was duly served, may proceed ex-parte.



11. According to the Defendants, their failure to attend court on 15th October, 2021 (sic) was occasioned by mistake of counsel who inadvertently failed to diarize the hearing date. The Plaintiff has disputed this allegation by asserting that the hearing notice was served both on the Defendants personally and on their counsel and that no cogent reason has been given for their non-attendance.
12. The court has analysed the proceedings. On 4th April, 2018, the matter was set down for hearing on 29th October, 2018. On the said date, counsel for the Defendants was not ready to proceed and informed the court that he had filed an application to cease acting. The application to cease acting was allowed on 6th December, 2018. The same counsel thereafter filed a notice of appointment on 1st April, 2019, and again filed an application to cease acting dated 13th June, 2019, which application was allowed.
13. The court directed that a hearing notice be personally served on the Defendants and the matter was set down for hearing on 2nd October, 2019. On 2nd October, 2019, the Defendant's counsel indicated that he was not ready to proceed as they had just come on record. The court noted that it was apparent that the Defendants were attempting to delay the hearing of the matter and granted them a last adjournment.
14. On 8th April 2021, when the matter came up for hearing, counsel for the Defendants was absent. Counsel for the Plaintiff informed the court that he had filed an application seeking to substitute the deceased Plaintiff. The said application was allowed and the hearing date was set for 5th October, 2021, on which date the Plaintiff testified and closed his case.
15. It is apparent from the foregoing narration that the Defendants overall conduct in this matter has been less than candid and while it is true that the court must strive to give effect to the overriding objective, it is now accepted that the overriding objective is not an all-encompassing cure to a party who is out to delay the hearing and determination of a case. As held by the Court of Appeal in *M.S.K v S.N.K* [2010] eKLR;

“The overriding principle will no doubt serve us well but it is important to point out that it is not going to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”
16. The court has considered the parties' affidavits in this respect. The 1st Defendant's Director deponed that his counsel inadvertently misdiarized the hearing date. An extract of the counsel's diary for the 15th October, 2021 has been attached thereon. This is the wrong date as the present matter proceeded for hearing on 15th October, 2021 and not 5th October, 2021.
17. The aforesaid notwithstanding, no explanation has been given with respect to the circumstances leading to the alleged misdiarization, if at all, especially in light of the undisputed fact that counsel was served with the hearing notice.
18. Further, it is apparent that there was personal service of the hearing notice upon the 2nd Defendant, which fact has neither been acknowledged nor disputed by the Defendants. Indeed, no attempt has been made by the Defendants to explain why the Defendants, despite being aware of the hearing date, did not prompt their advocates to action. Whereas mistake by counsel may be overlooked, as the same should generally not be visited upon their clients, the principal obligation to follow up on a matter



remains with the client. As espoused by the Court of Appeal in *Bi-Mach Engineers Limited vs James Kaboro Mwangi* [2011] eKLR:

“It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter.”

19. In the circumstances of the case, the court is not convinced that the Defendants have laid a basis upon which the court can exercise its discretion in their favour. The fact that there has been no reasonable explanation for the failure by the Defendants to attend court together with the conduct of the Defendants leads to the conclusion that the Defendants are out to delay this matter contrary to the very overriding objectives they seek to invoke which mandates this court to among others ensure that cases are heard and determined expeditiously.
20. The upshot of the foregoing is that the application dated 15th February, 2022, has no merit and the same is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF APRIL, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Chacha for Mogeni for the Plaintiff

Bob Otieno for the Defendant

Court Assistant - John Okumu

