Kuria v Kemeli (Environment and Land Case Civil Suit 56 of 2017) [2022] KEELC 3648 (KLR) (19 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3648 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND CASE CIVIL SUIT 56 OF 2017

FO NYAGAKA, J

MAY 19, 2022

BETWEEN

ESTHER KURIA ..... APPLICANT

AND

ROSELINE CHEMUKUN KEMELI ..... DEFENDANT

RULING

On whether to issue an order for setting aside of the judgment of the court

1. By a notice of motion dated October 8, 2021 filed on October 14, 2021, the defendant/applicant moved this court under sections 3, 3A, 1A, 1B, 63(e), and 80 of the *Civil Procedure Act*, Order 45 and 12 rule 7 of the *Civil Procedure Rules* and article 159(1) of *the Constitution* of Kenya. She sought the following specific orders:

   (1) ...spent

   (2) ...spent

   (3) That this honourable court be pleased to set aside the ex parte judgment entered against the defendant/applicant herein on October 30, 2018 be reviewed and set aside and the applicant be allowed to defend this case (sic).

   (4) That costs of this case (sic) be in the cause.

2. The application was based on four (4) grounds and supported by the affidavit sworn by Roseline Chemukun Kemeli on October 8, 2021 and filed on October 14, 2021 together with the application. It restated the four grounds which were mainly that, one, she was not served with a hearing notice; two, she was condemned unheard; three, she had a good defence; and four, the best interests of justice would be met if she was

given a chance to adduce evidence in the suit. To the affidavit she annexed and marked as a copy of a notice to show cause why she would not be committed to civil jail which she deponed was the one that made her to know of the existence of the judgment. She deponed further that upon service of the Notice she visited the court registry and perused the file only to discover that judgment was delivered against her on October 30, 2018. She then stated that she was never notified of the hearing date. She attacked the contents of the affidavit of Service that indicated that she was served, as being full of falsehood. She argued also that she was never notified of the delivery of the judgment. While arguing that the respondent would not suffer prejudice if the application was granted, the Applicant contended that she had a good defence with high chances of success and was likely to suffer irreparably if the judgment was not set aside.

3. The application was opposed through an affidavit sworn on March 4, 2021 by learned counsel on behalf of the respondent and filed on March 10, 2022. The deponent stated that the application was a waste of judicial time since the defendant did not have a good defence. He swore further that the application was an afterthought and the applicant deserved no exercise of judicial discretion in her favour since she was not vigilant in following up her defence. He contended that the applicant was always served with notices through her address of service, which the deponent gave. He then prayed for the dismissal of the application.

Submissions

4. Although the submissions filed herein erroneously indicated as having been filed for the plaintiff/petitioner, this court deduced that they were for the defendant. This was because on February 1, 2022 the law firm that subsequently filed the submissions filed a notice of appointment of advocates to act for the defendant/applicant. Thus, the applicant filed written submissions on the application on March 29, 2022. In them she submitted that she admitted to owing the sum of Kshs 150,000/= out of the Kshs 4,000,000/=. She then submitted that having filed her defence, she never expected the suit to proceed ex parte, to the exclusion of her testimony. She then accused the plaintiff's advocate of not acting in good faith when he knew her residential place in Kibomet within Kitale and did not serve her physically, and sent the letter by post. She then stated that her address had been closed. But there was no evidence from the Postal Corporation of Kenya to that effect.

5. That notwithstanding, her further submission was that she should be allowed to defend her case and by so doing demonstrate that the Kshs 150,000/= "amount is too little to cause her eviction from the suit land." Lastly, she accused the plaintiff of the change of mind because the land has appreciated in value. She relied on the cases of *Southern Credit Banking Corporation Ltd v Jonah Stephen Nganga* [2006] eKLR and *Patel v EA Cargo Handling Services Ltd* [1974] 1 EA 75 (CAM).

6. The respondent file her submissions dated April 12, 2022 on April 13, 2022. She summed it up that the applicant admitted that she is using the same address - PO Box 446 Kitale, which is the same address she has always used. She summarized the provisions of Order 12 rule 2(a) regarding non-attendance by a defendant when the plaintiff only attends court. She also repeated the import of Order 6 rule 3(2) of the *Civil Procedure Rules* about the address of service of a defendant appearing in person. She then summarized it that the defendant was duly served and was only deliberately attempting to evade or otherwise obstruct or delay the cause of justice.

Analysis And Determination

7. I have carefully considered the application, the affidavit by the applicant and the one in response, the annexures to both, the applicant's submissions and the respondent's, the law and case law cited. I find two issues for determination. These are:

    a. Whether the court should set aside the judgment delivered on October 30, 2018

    b. What orders should issue on costs?

8. I start the analysis with a discussion by first analyzing the relevance of the provisions relied on. I do so by beginning with a summary of the history of this matter. This suit was instituted on March 17, 2017. It would appear summons to enter appearance were served on the defendant who entered appearance on April 19, 2017. She filed a defence on May 4, 2017. It is worth of note that the defence which contained only 6 paragraphs was a mere denial of the contents of the plaint. The following digest shows how it was as much. Paragraphs 1 was descriptive of the party, paragraph 2 admitted the contents of paragraphs 3 and 4 of the plaint, 3 denied the contents of paragraph 5 of the plaint while 4 denied those of paragraphs 6, 7, 8, 9 and 10 of the plaint. Save for paragraph 4 of the defence which added an averment that the remaining balance of Kshs 150,000/= which she did not even attempt to show it reduced from the Kshs 550,000/= pleaded by the plaintiff had always been rejected by her, all the other paragraphs ended at the denial aspect: no more averment. Lastly, while paragraph 5 denied paragraph 11 of the plaint, paragraph 6 admitted paragraphs 12 and 13. That was all on the part of the defence. Thus, apart from the pleading that the plaintiff rejected payment of balance, the rest of the defence is a bare and mere denial.

9. After the defence was filed, the plaintiff filed a reply to the defence on May 22, 2017. In the course of time the matter was fixed for hearing twice but did not proceed to hearing. After that it was fixed for hearing on October 3, 2018. This was the date it proceeded, after the court being satisfied as to the service of the hearing notice. It is the affidavit of service sworn on October 2, 2018, on which the court based its decision to proceed with the hearing in absence of the defendant, that is now the gravamen of the application before me.

10. The above being the facts and background of the application before me, it is my view that since the application is based on the allegation that the suit proceeded to hearing in the absence of the defendant, and that the defendant's contention was non-service of a hearing notice, then the proper provisions under which the application should have been brought was Order 12 rule 7 of the *Civil Procedure Rules*. This is because it is the provision that governs the setting aside of a judgment entered under the rules governed by the Order titled "hearing and consequence of non-attendance." Order 12 rule 7. It provides 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. It therefore follows that all other provisions sought to be relied on by the applicant except article 159(2) of the *Constitution* are irrelevant. There is nothing alleged by the applicant to warrant the court to consider the application under Order 45 of the *Civil Procedure Rules*. This then turns me to the consideration of the issues herein.

a. Whether the Court should set aside the judgment delivered on October 30, 2018

12. The ultimate question to answer in this application is whether or not the application dated October 8, 2021 is merited. Thus, under Order 12 rule 7 if the court is to set aside a judgment or order made in absence of a party, the court has to consider the circumstances of the case and set aside the impugned judgment or order upon "such terms as may be just." The power of a court to set aside its judgment or order is discretionary. It is very wide. But in exercising it, the court is to do so judiciously.

13. In being guided in regard to the extent of the discretion and its limits, this court relies on the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019)] eKLR which cited with approval the case of Shah vs Mbogo [1979] EA 116 which case held that the discretion of the court in setting aside a judgment is very wide. In the holding the court stated thus:

> "……this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice."

14. Also, in *Patel v EA Cargo Handling Services Limited* (1974) EA 75, cited with approval in the case of *Stephen Wanyee Roki v K-Rep Bank Limited & 2 Others* (2018) eKLR the court held as follows:

> "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

15. In *Esther Wamaitha Njihia & 2 Others v Safaricom Limited* [2014] eKLR, the learned judge, citing the case of *Stephen Ndichu v Monty's Wines and Spirits Ltd* [2006] eKLR, held as follows:

> "The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See *Patel v EA Cargo Handling Services Ltd* [1974] EA 75). 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See *Shah v Mbogo* [1969] EA 116). 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 v Gasyali* [1968] E Way. 300). It also goes without saying that the reason for failure to attend should be considered."

16. The case of Wachira Karani v Bildad Wachira [2016] eKLR cited that of *Ongom v Owota* where it was held that for an order of setting aside of an ex-parte judgment to issue, the court must be satisfied with 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.

17. The second limb which the court referred to in the case law cited immediately above is the one which is relevant herein: an applicant to demonstrate that failure to appear in court was due to a sufficient cause. This is because the defendant did not fail to attend court for failure of service of summons to enter appearance or filing of defence. She was served with summons and filed a defence. She only failed to attend the hearing for the reason of, as per her allegations, failure to be served with a hearing notice.

18. What amounts to sufficient cause was defined by the Supreme Court of India in the case of *Parimal v Veena* which also was cited in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR. In the case, where the Supreme Court 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"
>
> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it. The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his 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. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

19. On the first contention regarding service, I find that in the instant application the applicant disputes having been served with the hearing notice for the date when the suit proceeded to hearing. On the other hand, the plaintiff/respondent denies this allegation. It goes without saying that, if it is found that the applicant was not served, then it would as a matter of right be to her that she has to be given a hearing. She would deserve a hearing. Under the rules of natural justice, it would be unfair to permit a judgment where a party has not been given opportunity to be heard to stand. The right to be heard is one of the fundamental rights which the 2010 Constitution espouses. Moreover, the Supreme Court of India forcefully underscored the importance of the right to be heard as follows in *Sangram Singh v Election Tribunal, Koteh*, AIR 1955 SC 664, at 711:

> " [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their

lives and property should not continue in their absence and that they should not be precluded from participating in them."

20. The instant case is not an exception: no party herein should be condemned unheard. But then the issue is, was applicant given an opportunity but squandered it? The only document that shall unravel the mystery of service or lack of it on the defendant is the affidavit of Service, annexture RCK 3(b), whose original is in the court file, and which the Applicant attacked as being full of falsehood. The affidavit was sworn by one David Ingosi on October 2, 2018, learned counsel for the plaintiff, and filed the following day. In it counsel stated that he caused to be served a hearing notice to the last known address of the defendant on May 25, 2018. He annexed to the affidavit a copy of a hearing notice dated the same day and a registration posting slip known as "certificate of posting registered postal article" issued by the Postal Corporation of Kenya, bearing a postal stamp of the same date addressed to Roseline Chemukun Kimeli of P O Box 446, Kitale. The said Roseline is the applicant herein. From both annextures, it is clear that the addressee was the defendant and the address to which it was sent was hers, even as shown from her pleadings. The applicant does not deny that the address is hers. Actually, in her defence she gave the same address as hers.

21. Lastly, I am of the view that it is important to consider whether the defence of the defendant is good one with high chances of success as she put it in the third ground of the application, and paragraph 6 of her affidavit in support of the application. The applicant argues that she needs to tell the court that the sum of Kshs 150,000/= is small compared to the whole sum hence failure to pay it be excused. With due respect the argument is misplaced. The issue before the court is breach of a contract and whether that could be reasonably explained and therefore excused. I reproduced the summary of the averments in the defence filed on May 4, 2017. I have observed above that the defence is a mere denial. It raises no triable issue. It is one which should have been struck out if the court would have been moved by the plaintiff in that respect. All the defendant wants the court to hear from her is that the plaintiff rejected the payment of the balance of Kshs 150,000/=. Again, from her submission, the Applicant only wishes to inform the court that the sum of Kshs 150,000/= is very small compared to the other sum agreed upon for the land. In my view, this would not change the position that there was a breach of contract, and would lead to the same result: judgment in favour of the plaintiff. She did not plead how and when the payment of the balance was made so as to leave the balance she admits to, and even then when the same was given to the plaintiff and she rejected it. She actually is silent on the breach. The defence indirectly admits breach of the contract in issue. That is the crux of the matter.

22. There is a posting slip of registration of the letter. The defendant does not even state that the Post Office Box number used to send the letter was closed or not in use. In any event, it is surprising that as late as October 8, 2021 when the applicant swore the affidavit in support of her application to set aside the judgment herein she used the same address of service which she claims to have been closed. It is the same address she gave for the application. In the affidavit, she stated, "I, Roseline Chemukun Kemeli, c/o. of P O Box. 446 - 30200, Kitale...". Clearly, it is the same address the applicant says was closed. If indeed it was closed, how come she is still using it? When was it closed and when was it re-opened? And if it was closed and then reopened, where is all the correspondence that was withheld by the Postal Corporation during the closure? In my view, the assertion of closure of the Post Office Box is a mere lie designed to mislead the court into believing that no service was effected on the applicant.

23. All she states in her affidavit is that the affidavit of service was false. She does not state or identify the falsehood in the document. There is a document which was posted to her address. She does not state which document she received as a result of the postage and what happened to it. A mere denial of that nature cannot benefit the applicant. If anything, she is the one who appears to be lying that she never received any mail from the post office. She should have been candid to say she received a document but

did not act on it. That would have made the court believe her. In conclusion, the application dated October 8, 2021 is not meritorious at all and is hereby dismissed.

b. What orders should issue on costs

24. In regard to costs, it is clear that application before me has failed. The applicant should bear its costs.

Orders accordingly.

RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 19TH DAY OF MAY, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.