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Swaleh v Swaleh & another (Environment and Land Case Civil Suit 99 of 2016) [2022] KEELC 3802 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3802 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND CASE CIVIL SUIT 99 OF 2016

MAO ODENY, J

MAY 11, 2022

BETWEEN

OMAR SWALEH .... PLAINTIFF

AND

HALIMA BAKARI .... 1ST DEFENDANT

AWADH SHEVO JILLO .... 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated November 2, 2021 by the defendants seeking the following orders:
    1. Spent
    2. The Honourable court be pleased to grant the firm of Michira Messah Co Advocates to come on record and represent the Applicants/defendants in this suit.
    3. Pending inter partes hearing of this application the Honourable Court be pleased to issue an order for stay of execution of the decree and all consequential orders.
    4. Pending hearing and determination of this application the Honourable Court be pleased to issue an order for stay of execution of the decree herein and all consequential orders.
    5. The Honourable Court be pleased to issue an order setting aside judgment, decree and all consequential orders issued in this suit and direct the same be heard and determined on merit.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Defendant/applicants' Case

3. The application is supported by the annexed affidavit of Halima Bakari who deponed that upon the institution of the plaintiff's suit, they instructed the firm of Katsoleh & Co Advocates to represent them and gave their witness statements together with their documents

4. The applicant deponed that the matter was fixed for hearing but their advocate did not inform them hence were not present in court for the hearing. She further deponed that a date for defence hearing was fixed for October 5, 2017 but the advocate on record indicated that he had lost communication with the defendants thus the defence case was closed on July 19, 2018.

5. The applicant further deponed that their former advocates never made an application to cease acting for the defendants and which action she stated has made them be condemned unheard.

Plaintiff/respondent's Case

6. The respondent relied on the replying affidavit dated 19th November 2021 where the advocate stated that the defendants have not met the conditions for setting aside judgment and that the application has not been brought within reasonable time as judgment was delivered on June 26, 2019.

7. Counsel further stated that the defendants did not follow up with their advocates after instructing them to find out the position of their matter therefore the applicants are guilty of laches.

Applicants' Submissions

8. Counsel filed submissions and identified four issues for determination namely whether the applicants were condemned unheard, whether the previous counsel could close the defence case without informing the defendants, whether the application is brought without delay and whether counsel could swear the replying affidavit in response to the application.

9. On the firsts issue counsel submitted that the applicants did not participate in the suit as the same proceeded undefended thus they were condemned unheard. Further that no prejudice will be occasioned to the plaintiff if the judgment is set aside and it is in the interest of justice that the applicants be granted their day in court

10. On the second issue counsel submitted that the defendant's previous counsel sought several adjournments on grounds that they had lost contact with the applicants hence counsel should have filed an application to cease acting rather than close the defence case.

11. On the third issue whether the application has been brought without undue delay, counsel submitted that the applicants became aware that the suit had been heard and determined on October 16, 2021 when police officers visited the suit property and informed the Applicants that an order of vacant possession had been issued against them.

12. On the fourth issue as to whether the respondent's advocate can swear the replying affidavit without the authority of the respondent, counsel relied on the case of *Stephen Bernard Oduor vs Afro Freight Forwarders* [2002]eKLR and submitted that it is not proper for an advocate to swear an affidavit on matters of facts which are within his/her client's knowledge and in doing so, it creates a conflict of interest. Counsel urged the court to allow the application as prayed.

Respondent's Submissions

13. Counsel for the applicant took issue with the prayer by the firm of Michira Messah & Company advocates to come on record for the defendants after judgment and stated that the conditions set out in Order 9 Rule 9 (a) or (b) of the *Civil Procedure Rules* must be met and the applicants herein have not complied with the procedure.

14. Mr Shujaa also submitted that the applicants have not met conditions for setting aside judgment/ decree as prescribed under Order 12 rule 7 of the *Civil Procedure Rules* and that the application was not brought within reasonable time as judgment was delivered on June 26, 2019 and the application was filed 2nd November 2021.

15. On the issue of counsel swearing an affidavit on behalf of the respondent, Mr Sujaa stated that the same is proper as it does not dwell of the disputed facts but on the contents based on the proceedings conducted by the advocate and the law. Counsel relied on the case of *Sireret Farmers Company Limited v William Audi Ododa* [2000] eKLR.

16. Counsel therefore submitted that the defendants were given an opportunity to be heard but they squandered it and consequently the judgment entered against them was regular and that the defendants have not shown that their failure to attend Court was due to inadvertence, or excusable mistake or error.

17. Counsel relied on the cases of *Shah v Mbogo & another* [1967] E.A 116, quoted with approval in the case of *Joswa Kenyatta v Civicon Limited* [2020] eKLR and the *Grace Cherotich Kemboi v Simon Kipkoech Ngotwa & another* [2020] eKLR and urged the court to dismiss the application with costs.

Analysis And Determination.

18. This is an application for setting aside judgment and all consequential orders on the ground that counsel for the defendants did not notify them of the hearing date hence they were condemned unheard.

19. Order 10 Rule 11 of the *Civil Procedure Rules* provides that where a judgment has been entered under the said order, the Court may set aside or vary such judgment and any consequential decree of order upon such terms as are just. The court also has discretion to set aside the ex-parte proceedings though the discretion must be exercised judiciously.

20. In the case of *Tree Shade Motor Ltd v D T Dobie Co Ltd* CA 38 of 1998 and *Mania v Muriuki* [1984] KLR 407 the court held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

21. Similarly, in the case of *CMC Holdings Limited v James Mumo Nzioki* [2004] eKLR, the Court stated that:

> " The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."

22. It is on record that the defendants engaged the services of the firm of Katsoleh and Co Advocates and Mr Obaga has been in the conduct of the case on their behalf. It is also on record that the defendants filed a defence, counterclaim and list of documents in respect of the case.

23. In applications for setting aside judgments, the court is under a duty to consider the reasons why either the defence was not filed in time, or why the applicant did not turn up for the hearing of the case and whether the applicant has a reasonable defence on record.

24. The previous counsel on record owed the defendants a duty to inform them of the hearing of their case and if he had lost communication as he had alleged, the honourble action to take was to file an application to cease acting and not closing the defence case without authority. This action amounts to negligence on the part of counsel for not being diligent with the client's case.

25. The applicant must show sufficient cause why the discretion should be exercised in their favour as was held in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, that:

> "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..."

26. Further, in the case of *Attorney General v Law Society of Kenya & another* [2017] eKLR sufficient cause was defined as: -

> "Sufficient cause" or "good cause" in law means: .....the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused". See *Black's Law Dictionary,* 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical,convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

27. The applicants have explained that their advocate did not inform them of the hearing date hence were not able to attend court. That they were only aware that the case had been determined after they were served with and eviction notice.

28. On the issue whether the application was brought without inordinate delay, in the case of *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR the court held that;

> "Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

29. The application might appear not to have been brought timeously but the court has to consider all the surrounding circumstances as was held in the Utalii case (supra). What explanation has the applicant given to warrant the court to grant the orders of setting aside judgment. What is the nature of the case, is the explanation excusable?

30. The judgment was delivered on June 26, 2019 and the application was filed on 2nd November 2021 which is approximately 2 years 5 months of which if we construe the meaning of inordinate delay to mean the dictionary meaning then the applicant would not have a chance in this case. The court is cognizant of the fact that even one day after judgment would be construed as inordinate delay depending on the nature of the case whereby setting aside would cause prejudice to the opposing party. The court is also aware that the circumstances surrounding a case may consider that 2 of 5 years as reasonable time within which to file an application.

31. I therefore find that the explanation given by the applicant is sound and the defendants are hereby given an opportunity to be heard on merit. However this comes at a cost of thrown away costs of Kshs 20,000/ to be paid to the plaintiff within the next 30 days as the court is aware of the prejudice caused by the setting aside of the judgment.

32. The defendant to fix the case for defence hearing within 30 days failure to which the order lapses.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.