



Riverbank Plaza Limited v Nairobi (Environment and Land Case Civil Suit 1958 of 2007) [2022] KEELC 3106 (KLR) (27 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1958 OF 2007**

**SO OKONG'O, J
JUNE 27, 2022**

BETWEEN

RIVERBANK PLAZA LIMITED PLAINTIFF

AND

CITY COUNCIL OF NAIROBI DEFENDANT

RULING

1. This suit was filed in the High Court on 27th July 2006, about 16 years ago before it was transferred to this court in 2007 and given its current case number. In its plaint dated 27th July 2006, the plaintiff sought judgment against the defendant for among others, an order of a permanent injunction to restrain the defendant from trespassing upon, damaging, meddling with, alienating and/or in any other way interfering with or dealing with all that parcel of land known as L.R No. 3734/843(hereinafter referred to as “the suit property”) and general damages for trespass.
2. The plaintiff averred that it was the registered owner of the suit property and that from the year 2006, some people who claimed that the suit property had been leased to them by the defendant had trespassed on the suit property from time to time sometimes in the company of the defendants Askaris and threatened to arrest the plaintiff’s servants and agents on the property. The plaintiff claimed that the defendant had no right over the suit property and that it had suffered loss and damage as a result of the defendant’s acts aforesaid. The defendant filed a defence denying the plaintiff’s claim.
3. The parties have spent the better part of the 16 years’ lifetime of this suit engaging in interlocutory applications. When I delivered a ruling on 6th February 2020 in one of such applications, I hoped in view of the sentiments that I expressed in the ruling that it would be the last ruling on an interlocutory issue. It appears that that was not going to be.
4. On 8th June 2015, the defendant filed an application for leave to amend its defence and plead a counter-claim against the plaintiff. The application was opposed by the plaintiff. In a ruling delivered on 24th



January 2017, I allowed the application and granted the defendant 7 days from the date of the ruling to effect the amendment. It was until 18th April 2017 that the defendant filed its amended defence and counter-claim.

5. On 3rd May 2017, the plaintiff filed a reply to amended defence and defence to counter-claim. The plaintiff also filed a Notice of Preliminary objection to the effect that the defendant's counter-claim was time barred and that the same was frivolous, vexatious and amounted to an abuse of the process of the court.
6. On 4th May 2017, the plaintiff filed an application seeking to strike out the defendant's amended defence and counter-claim on the ground that the same was filed outside the 7 days that was prescribed by the court without leave of the court. The application was served upon the defendant. The defendant neither filed a response to the application nor appeared in court on 25th July 2017 when it came up for hearing. In the absence of any opposition to the application, the court allowed the same and struck out the defendant's amended statement of defence and counter-claim dated 6th February 2017 filed in court on 18th April 2017.
7. What is now before the court is the defendant's Notice of Motion application dated 10th July 2021 seeking two orders namely; that the court be pleased to set aside its order made on 25th July 2017 striking out the defendant's statement of amended defence and counter-claim and that the time that was granted to the defendant on 24th January 2017 within which to file its defence and counter-claim be extended and the defendant's amended defence and counter-claim filed on 18th April 2017 and served upon the plaintiff on 19th April 2017 be deemed duly filed and served.
8. The application which is supported by the affidavit of Abwao Erick Odhiambo was brought on the grounds that the defendant's advocates failed to file the defendant's amended defence and counter-claim as a result of an oversight and failed to attend to the plaintiff's application to strike out the amended defence and counter-claim through inadvertent error. The defendant contended that the said mistakes were committed by its advocates on record and the same were highly regretted.
9. The defendant averred that it was granted leave to amend its defence for good reason which would be defeated if the orders sought were not granted. The defendant urged the court to allow the application in the wider interest of justice. The defendant averred that the plaintiff stood to suffer no prejudice if the application was allowed since it had already filed a reply to the amended defence and defence to the counter-claim.
10. The application was opposed by the plaintiff through grounds of opposition and a replying affidavit sworn by Simon Ndungu both dated 5th October 2021. The plaintiff contended that the application was brought after inordinate delay in that the same was seeking to set aside the orders that were made more than 4 years ago. The plaintiff contended further that the application did not disclose sufficient grounds for setting aside the orders of 25th July 2017 and that the same was an abuse of the court process. The plaintiff contended that the application was aimed at delaying the determination of the suit and urged the court to dismiss the same in the interest of justice.
11. The application was argued by way of written submissions. The defendant filed its submissions dated 15th October 2021. The defendant reiterated that no prejudice would be suffered by the plaintiff if the application was allowed. The defendant submitted that it should be accorded an opportunity to proceed with its case as amended.
12. The plaintiff filed submissions dated 14th October 2021. The plaintiff reiterated that no sufficient reason had been put forward to warrant the grant of the orders sought. The plaintiff submitted that



failure by an advocate to enter a date in a diary or negligence of an advocate is not a sufficient reason warranting the setting aside of a court order. The plaintiff submitted that such acts of negligence should not be allowed to obstruct or delay justice.

13. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the plaintiff's grounds of opposition and replying affidavit filed in opposition to the application. Finally, I have considered the submissions of counsel. The issue that I have been called upon to determine is whether the defendant has put forward sufficient reasons to warrant the setting aside of the orders made herein on 25th July 2017 and the extension of time that was set by the court on 24th January 2017 within which the defendant was to file its amended defence and counter-claim.
14. The defendant has not cited the rules of the Civil Procedure under which its application has been brought. I believe that the application falls for consideration under Order 51 Rule 15 and Order 50 Rule 5 of the Civil Procedure Rules which give the court discretionary powers to set aside orders made ex parte on applications and to extend time.
15. It is settled that the court's discretionary powers must be exercised judiciously and not capriciously. The rationale behind the judicious exercise of discretionary powers was explained by the Court of Appeal in Patriotic Guards Ltd. v James Kipchirchir Sambu, Nairobi CA No. 20 of 2016, [2018] eKLR as follows:

“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.”
16. The principles to be considered by the court in setting aside an ex parte judgment were set out in the case of Shah v Mbogo [1967] E.A 116 as follows:

“...the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”
17. Applying the said principles to this case, I am inclined to exercise my discretion in favour of allowing the application. In the ruling granting leave to the defendant to file an amended plaint and a counter-claim, I stated as follows in part:

“I have perused the affidavit in support of the defendant's application together with the draft amended defence and counter-claim. I am satisfied that the amendment sought would prevent multiplicity of suits and would also enable this court to effectually and completely adjudicate upon and settle all questions in controversy in this suit.”
18. In the ruling made on 25th July 2017 allowing the plaintiff's application seeking to strike out the defendant's defence and counter-claim for having been filed out of time, I stated as follows:

“I am in agreement with the plaintiff that the defendant's Amended Defence and Counter-Claim dated 6/2/2017 was filed outside the period which was allowed by the court in the ruling dated 24/1/2017 without leave of the court. The same is therefore incompetent. In



the absence of any application by the defendant for extension of time, the court has no alternative but to accede to the plaintiff's application." (emphasis added)

19. No reason has been given by the defendant for its failure to file its amended defence and counter-claim within the time that was prescribed by the court. No reasonable explanation has been given by the defendant why it failed to respond to the plaintiff's application seeking to strike out its amended defence and counter-claim. No reasonable explanation has been given by the defendant for its failure to attend court on 25th July 2017 when the plaintiff's application came up for hearing and no reasonable explanation has been given by the defendant for its delay in filing the present application. The scenario playing out is what was described by the Court of Appeal in one of the cases as "litany of errors" on the part of the advocates acting for the defendant. The errors are totally inexcusable. I am in agreement with the plaintiff that an advocate's negligence cannot be a sufficient reason to set aside a court order.
20. That said, the said inexcusable errors on the part of the advocates for the defendant does not take away the discretion of this court conferred under the provisions of the Civil Procedure that I have cited above. Should the court sustain the striking out of the defendant's amended defence and counter-claim that resulted from these errors? I am of the view that the court must consider the wider interest of justice. The consequences that the defendant should incur as a result of its advocate's blunders if the application is not allowed should be proportionate to the prejudice that the plaintiff would suffer should the application be allowed.
21. In *Phillip Chemwolo & Another v Augustine Kubede* [1982-88] KAR 103 at 1040, Apaloo J (as he then was) stated as follows:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."
22. In *Richard Nchapi Leiyangu v IEBC & 2 others*, Civil Appeal No. 18 of 2013, the court stated that:

"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality".
23. I am not persuaded that the plaintiff is likely to suffer any prejudice that cannot be compensated in costs. No such prejudice is mentioned either in the grounds of opposition or replying affidavit. The only prejudice mentioned by the plaintiff is delay. I have noted from the record that the plaintiff filed unconditional reply to amended defence and defence to counter-claim on 3rd May 2017. I am unable to see how the hearing of the matter would be delayed if the defendant's amended defence and counter-claim to which the plaintiff has responded to is reinstated. Overall, the case is now 16 years old. As I mentioned earlier, the hearing of the case has not taken off over the years due to the numerous interlocutory applications filed in the matter for which the defendant cannot be blamed. I am of the view that the interest of justice would be served by allowing the defendant's application. I had ruled that the amendment that had been sought by the defendant would prevent multiplicity of suits and



would also enable this court to effectually and completely adjudicate upon and settle all questions in controversy in this suit.

24. As the Court of Appeal had observed in *Patriotic Guards Ltd. v Kipchirchir Sambu* [2018] eKLR, that was cited by the defendant, I am of the view that there is no reason grave enough that would warrant denying the defendant an opportunity to pursue its counter-claim against the plaintiff.
25. In conclusion, I find merit in the defendant's Notice of Motion application dated 10th July 2021. The application is allowed on the following terms;
 - a. The order granted herein on 25th July 2017 striking out the defendant's amended defence and counter-claim dated 6th February 2017 filed on 18th April 2017 is set aside
 - b. The time within which the defendant was to file its amended defence and counter-claim pursuant to the leave that was granted on 24th January 2017 is extended to and including 18th April 2017.
 - c. The defendant's amended defence and counter-claim dated 6th February 2017 filed on 18th April 2017 is deemed as properly filed and served.
 - d. The defendant shall pay to the plaintiff thrown away costs assessed at Kshs. 40,000/- payable forthwith and in any event before the next hearing date.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JUNE 2022

S. OKONG'O,

JUDGE.

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

Mr. Shivugu for the Plaintiff

Mr. Hussein h/b for Mr. Adano for the Defendant

Ms. C.Nyokabi-Court Assistant

