Gathu v Kabaru (Environment & Land Case 448 of 2017)
[2022] KEELC 2623 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2623 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 448 OF 2017

LN GACHERU, J

JUNE 23, 2022

BETWEEN

MARGARET NJERI GATHU ..... RESPONDENT

AND

ANTHONY GITHAIGA KABARU ..... APPLICANT

RULING

1. In his Notice of Motion Application dated 16th December 2021, the Defendant/Applicant Anthony Githaiga Kabaru has sought for the following orders; -

    a. That the consent letter dated 15th December 2021, be adopted as an order of this Court and consequently the Law Firm of Wokabi Mathenge & Co. Advocates, be placed on record as acting for the Defendant in place of Waithira Mwangi & Co. Advocates.

    b. That interlocutory judgment entered on 13th February 2018, be set aside and the Defendant be granted leave to file and serve a Defence and any attendant documents.

    c. That the proceedings and the consequential judgment delivered on 31st May 2018, be set aside and the parties cases be reopened for hearing afresh on a priority basis with the Defendant and or the parties being granted leave to file such pleadings as may be necessary.

    d. That costs of this application be provided for.

2 The Application is supported by the grounds set on the face of it and the annexed Affidavit of Anthony Githaiga Kabaru.

    These grounds are;

    a. That the Applicant dispute the allegations in the Plaintiff's pleadings and have a good defence to the same which raises triable issues.

b. After instructing my former Advocates, they neither informed me of any pleadings not filed and/or were missing from the Court record. It is based on their continued expression to me that the case had been withdrawn, that I took it that this case was not going on. This had been conveyed to me around late 2019 or thereabouts.

c. Having been told that the case had been withdrawn awaiting resolution as to the question of how the titles held by the Plaintiff and other persons were procured. I all along knew that the case was no longer going on. What later on followed was the release of original files by the former Advocates this included this one. The release of those filed was on 2nd March 2020.

d. On or around 3rd December 2021, persons who were unknown to me and my neighbours some who included policemen visited the land where I reside and adjacent to me are my neighbours who are also Defendants in suits, which have similar eviction orders issued, filed alongside this one. This was devastating and unusual since I had not heard of any incident requiring police intervention.

e. Upon seeking to know what was the purpose of their visit, they informed me they were police officers who had a Court order which they intended to enforce. Upon further enquiring, they showed us an eviction order issued by this Court in which they were required to supervise and provide security during the eviction.

f. That the Applicant seeks to be heard and the proceedings preceding this Application be set aside. The Applicant has a good Defence that raises triable issues that would require a hearing and hence they seek the setting aside and varying of the judgment and the decree besides all other consequential orders issued.

3 In his Supporting Affidavit, the Applicant reiterated the contents of the above grounds and further averred that he is a farmer and illiterate and is not able to read and understand English. That he lives in Gathaite area where the suit property Makuyu/Makuyu Block II/280, is situated. That he has lived on the suit land since 2006, when he purchased the same.

4 That after he instructed his Advocate on this case, she later informed him that the case had been withdrawn and she even returned his file on 2nd March 2020, through the Kigo Ndung'u, one of the officials of Gathaite Farmers Ltd.

5 That he only became aware of the eviction order on 3rd December 2021, when Police Officers and unknown people went to the suit property with intention of carrying out eviction orders. That he was shocked to learn that the matter proceeded without him and that an eviction order had been issued on 17th October 2019.

6 That he was unaware of the said eviction orders and he is likely to suffer and be prejudiced if the eviction orders are carried out. That the said eviction will render him homeless and a squatter.

7 It was his contention that his former Advocate did not request for the Supporting document of his ownership of the suit property which he still hold them todate. Further, that he has filed a draft Defence which raises triable issues and he urges the Court to set aside the exparte proceedings and Judgement and have the matter reheard afresh. It was his further contention that the title held by the Plaintiff need to be interrogated and this can only be done once the exparte proceedings are set aside and the matter reheard afresh. That if he is evicted, he will not have an alternative place of abode and this will render him homeless. He urged the Court to allow his Application.

8 The Application is contested by Margaret Njeri Gathu, the Plaintiff herein via a Replying Affidavit dated 14th January 2022. She averred that the Application herein is misconceived, incurably defective and should be struck out with costs.

9 It was her contention that the Defendant/Applicant was represented by an Advocate, but she deliberately failed to file his Defence and seeking to set aside and reopening of a concluded matter is a blatant abuse of the Court process. Further that the purported Defence is a mere denial, a sham and does not raise any triable issues.

10 Again, if the Defendant/Applicant had been given his original file, he ought to have found out the reasons for such release and needed to make genuine inquiries from his Advocates.

11 She also contended that the Defendant/Applicant has not explained what steps he has taken since 2017, when he was served with the Court's Summons and why he failed to follow up his matter and that he should not attempt to hide behind the illiteracy as an excuse for failure to file his Defence.

12 That his former Advocate was aware of what was happening in Court, since they had been served with all the Notices, but they deliberately failed to attend Court and the Applicant's remedy therefore lies elsewhere as all the Hearing and Mention Notices were duly served.

13 She urged the Court not to exercise its discretion in favour of the Defendant/Applicant. It was her contention that the Defendant/Applicant's prayers are made in bad faith and are meant to deny the Plaintiff the fruits of the Judgement and that litigation should come to an end. That this Application is a delaying tactics meant to circumvent the smooth dispensation of justice. That the Defendant/Applicant remedies lies elsewhere if he has an issue with his former Advocates. The Plaintiff/Respondent urged the Court to dismiss the Application for being misconceived and an abuse of the Court process.

14 This Application was canvassed by way of written submissions.

15 Through the Law Firm of Wokabi Mathenge & Co. Advocates, the Defendant/Applicant submitted that the consent letter dated 15th December 2021, should be adopted as the order of the Court as the Defendant/Applicant has complied with Order 9 Rule 9 of the *Civil Procedure Rules*. That there is a consent to change Advocate, which has been executed and filed and the effect is that the new Law Firm is now properly on record.

16 On the setting aside of the exparte Judgment, the Defendant/Applicant relied on Order 10 Rule 11 of the Civil Procedure Rules which

Provides; -

> "Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

17 The Applicant submitted that the Courts discretion was emphasized in the case of *Elizabeth Kavere & Another vs Lilian Atho & Another* (2020) eKLR where the Court held; -

> "The Court has a very wide discretion under the order and rule and there are limits and restrictions on the discretion of the judge except that if the judgments is varied, it must be done on terms that are just: *Patel vs Cargo Handling Services Ltd* (1974) EA 75, ***http://www.Kenyalaw.orge-Page*** 5/16 *Elizabeth Kavere & Another v Lilian Atho & another* (2020) eKLR 76 BC.

> This 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 course of justice: *Shah v Mbogo*(1969) EA 116, 123 BC Harris J."

18. The Applicant further submitted that the Interlocutory and/or default Judgement herein was not obtained regularly as there was no proof that the hearing notice were effected to the Applicant former Advocates. It was his submissions that the Interlocutory and exparte Judgements being irregular, then the execution of the same cannot be said to be legal. He stated that the spirit of Article 50 of *the Constitution*, is on the fair hearing. He also relied on Article 159(2) d of *the Constitution* and urged the Court to stay the execution of the exparte judgement and that he should be given leave to defend the suit.

19. Further that since it was not clear whether the Defendant/Applicant former Advocate were properly served, therefore it is not clear whether Order 10 Rules 9, 10 & 11 of the Civil Procedure Rules were complied with.

20. On whether the Applicant has a Defence on merit with triable issues, the Defendant/Applicant submitted that the Draft Defence filed herein is a good Defence which raises triable issues and that the same would require a hearing and hence the prayer for setting aside and varying of the Judgement, Decree and all consequential Orders herein.

21. Reliance was placed on the case of *Philip Kiptoo Chemwolo & Another vs Augustine Kubende* (1986) eKLR, where the Court held;

> " I think a distinguished equity Judge has said "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 determined on its merit".

22. The Plaintiff/Respondent filed her written submissions dated 4th February, 2022, and submitted that the Defendant/Applicant did not deserve the orders sought

23. That the Defendant/Applicant was served with the Summons to enter appearance. That his Advocate filed the Notice of Appointment, but failed to file Defence. That the said Advocate had even filed a Replying Affidavit dated 15th December 2017, and even attended pre-trial conference. That it is then very clear that the said former advocate knew of the matter, but failed to follow it up. Therefore, the Defendant/Applicant's remedy lies in claiming against the said former Advocates. Reliance was placed on the case of *Ruga Distributors Ltd vs Nairobi Bottlers Ltd* (2015) eKLR, where the Court held; -

> " I wholly agree with the above persuasive holding by Honourable Justice Kimaru and add that it is not enough for a party to blame their advocates, but to show the tangible steps taken by him in following up his matter".

24. It was the Plaintiff's Submissions that the Judgement/Decree entered herein being regular, the Applicant is trying to evade, obstruct and/or delay the cause of justice.

25. It was further submitted that if the Court is to find in favour of the Defendant/Applicant, then it should direct and order the Applicant to pay costs of 50,000/= which should be exemplary and punitive in the circumstances.

26. The above being the facts and the submissions of the rival parties herein, the Court has carefully considered the same and the court proceedings generally. The issue for determination is whether the instant application is merited?

27. It is evident that the suit herein proceeded exparte after the Defendant/Applicant failed to file Defence. After the formal proof. Judgement was entered in favour of the Plaintiff on 2nd July 2018. The said Judgement was to the effect that the Defendant by himself, family members, employees, agents and whomsoever claiming under him to vacate the suit land, Makuyu/Makuyu/Block II/1280, within 60 days and in default, eviction was to issue.

28. The Defendant/Applicant alleges that he was not aware of the said exparte Judgement and therefore did not vacate.

29. The Plaintiff filed an Application dated 28th March 2019, seeking for the eviction of the Defendant herein. The said Application was allowed on 21st November 2019.

30. The Defendant/Applicant alleges that on 3rd December 2021, Police Officers and unknown persons, went to the suit property to carry out the eviction order. Thereafter, the Applicant filed this Application on 16th December 2021.

31. It is not in doubt that this Application has been filed after entry of Judgement. The Defendant/Applicant was initially represented by Law Firm of Waithira Mwangi & Co. Advocates.

32 This Application has been filed by Wokabi Mathenge & Co. Advocates and thus Order 9 Rule 9, of the Civil Procedure Rules comes into play.

33 The said order 9 Rule 9 (b) of the Civil Procedure Rules provides;

> "b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

34 There is a consent letter dated 15th December 2021, signed by both advocates. The Defendant/Applicant has prayed for it to be adopted as the order of the Court. Since the said consent letter has been executed and filed, then Order 9 Rule 9(b), has been complied with and the Law Firm of Wokabi Mathenge & Co. Advocates is properly on record.

35 Further the Defendant/Applicant has sought for stay of execution of the Decree/Orders issued arising from the Judgement that was delivered on 2nd July 2018, and any consequential orders pending the hearing and determination of this Application. This prayer was being sought at the first instance pending the hearing of the Application. This prayer has been overtaken by events as the Application is being determined now. There is nothing to stay.

36 The main prayer herein is for setting aside of the Interlocutory Judgment of 11th May 2018, and thereafter the exparte Judgment entered on 2nd July 2018.

40 From the Courts proceedings, it is clear that the Defendant filed a Notice of Appointment of his Advocate Waithira Mwangi & Co. Advocates on 21st November, 2017. The said Advocates failed to file a Defence and as a results, Interlocutory Judgement was entered on 11th May 2018, under Order 10 Rule 10 of the Civil Procedure Rules. After the Interlocutory Judgement was entered, the matter was set down for formal proof.

41 The application herein is under Order 10 Rule 11 which provides; -

> " Where judgment has been entered under this Order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

42 The Interlocutory Judgment was entered in default of filing a Defence. Therefore, the said Interlocutory Judgment is procedural and/or regular Judgement, which was entered after failure to file a Defence.

43 It is also clear that after the Interlocutory Judgement, the matter proceeded for formal proof and an exparte Judgement was entered on 2nd July 2018. Since an exparte Judgement was entered as a consequence of the Interlocutory Judgement and matter proceeded for formal proof, the Court should at this juncture determines whether the said exparte judgement and all consequential orders should be set aside/varied or not.

Order 12 Rule 7 of the Civil Procedure Rules Provides;

> "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."

44 The power to set aside exparte Judgement/Order is discretionary and the said discretion must be used judiciously. See the case of *Shah vs Mbogo & Another* (1967) EA 116, where the Court held;

> "this 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 is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."

45 Further the Court's discretion to set aside an exparte Judgement is not restricted, but the same should be examined so that it does not cause injustice to the opposite party. See the case of *Patel vs E A Cargo Handling Services Ltd* (1974) EA 75, where the Court held; -

> "The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

46. The Question now for determination is whether the Defendant/Applicant is deserving of the orders of setting aside the exparte Judgement herein.

47. As the Court had observed earlier, the matter proceeded via formal proof and a Judgement was delivered on 2nd July 2018, in favour of the Plaintiff. The said matter proceeded without the Defendant and his Advocate only filed a Notice of Appointment but did not file a Defence. However, the said Advocate was served with hearing notices.

48. Several applications were later filed in pursuant of the enforcement of the said exparte Judgement. The Defendant/Applicant has not disputed that the said applications were served on him. However, he averred that since he had appointed an Advocate, he expected the said advocate to follow up the matter.

That at one time the former Advocate alluded that the suits had been withdrawn and she returned the Court file to them as is evident from annexture 1.

49. Further the Defendant/Applicant submitted that he only come to learn of the exparte Judgement herein on 3rd December 2021, when Police Officers and other unknown persons went to carry out and supervise the eviction of the Applicant.

50. The Defendant/Applicant herein as a litigant had a duty to check the progress of his case and ensure that the same was prosecuted without delay. See the case of *Savings and Loans Ltd vs Susan Wanjiru Muritu*, Nairobi HCCC NO. 397 of 2002, where the Court held;

> " Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates, failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal".

51. Though the Applicant had the duty to check the progress of his case, he failed to do so. The Defendant/Applicant has not given sufficient cause as to why he failed to file Defence and/or attend Court.

52. However, the Court is alive to the fact that it is supposed to exercise its discretion judiciously and ensures that the end of justice has been met and that no party should suffer prejudice. See section 3A of the *Civil Procedure Act*.

> " Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

53. In the case of Philip Kiptoo Chemwolo & Another (supra) the Court and held; -

> " I think the broad equity approach to this matter is that unless there is fraud, intention to overreact, there is no error or default that cannot be put right by payment of costs. The Court as is often said exists for purpose of deciding the rights of the parties and not for the purposes of imposing discipline".

54 Also see the case of *CMC Holdings Ltd vs Nzioka*(2004) IKLR, where the Court held;

> "That discretion must be exercised upon reasons and must be exercised judiciously.....In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst, others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such as excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate".

55 Even if there are no sufficient reasons given for non attendance, the Court has looked at the Draft Defence. The Court finds that it raises some triable issues. The Defendant/Applicant has alleged that he purchased the suit property in the year 2006 and he has been on the suit property since then. He alleged that his occupation of the suit property is lawful and that the Plaintiff acquired the title irregularly and unprocedurally. This Court has looked at the draft Defence and the Court finds that the Defendant should be given an opportunity to advance his Defence. See the case of

56. *Kenya Commercial Bank vs Reuben Waweru* High Court Civil Case No. 325 of 1999 where the Court held;

> " The court has unlimited discretion to set aside or vary judgment entered by default of appearance, but as usual with the discretionary powers, the same discretion must be exercised judicially and upon reasons".

57 Given that the Defendant/Applicant has alleged that he genuinely purchased the suit property in 2006, and the Plaintiff/Respondent might have procured her title fraudulently, the Court finds that the Defendant/Applicant should be given his day in Court. The orders of eviction herein were obtained exparte and are drastic and capable of removing him from the suit property before being heard.

58 It is this Courts findings that the Draft Defence filed by the Defendant/Applicant raises triable issues. For the above reasons, the Court finds it prudent to set aside the Interlocutory Judgement of 11th May 2018, and exparte Judgement of 2nd July 2018, and all the consequential orders emanating from therein.

59 Order 12 Rule 7 of the Civil Procedure Rules provides that the setting aside should be done upon such terms that may be just.

60 The Judgement herein was delivered on 2nd July 2018, and Plaintiff/Respondent has filed several applications towards enforcement of the said Judgement.

61 The Court finds that the Plaintiff is entitled to throw away costs of 50,000/= payable before commencement of the re-opened suit.

62 For the above reason, the Court allows the Defendant/Applicant's Notice of Motion Application dated 16th December 2021, entirely in terms of prayers No. 3,4,5, with a throw away costs of 50,000/ = payable to the Plaintiff.

63 Further the Defendant/Applicant is directed to file his Defence within the next 14 days from the date hereof. Failure to do so, the usual sanctions to ensues. The suit should be set down for hearing expeditiously.

64 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE, 2022.

L.GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Mr Bwonwonga for the Plaintiff/ Respondent

Absent for the Defendant /Applicant

L.GACHERU

JUDGE

23/6/2022