



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 2240 of 2007

REV. FRANCIS WANGUNYU NYORO..... PLAINTIFF

**- VERSUS -
SIMON CHEGE NYORO**

FELIX MUTURI NYORODEFENDANTS

RULING

1. This is the defendants' notice of motion dated 2nd June 2011. The principal prayer was amended with leave of court on 4th June 2011. It seeks to set aside the order of 9th March 2010 dismissing the suit. The applicants pray to reinstate the suit and their counterclaim. The motion is expressed to be brought under order 22 and order 12 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act.
2. The gist of the matter is that the suit involves family land on which the applicants' family members are interred. The decree issued on 9th March 2010 ordered that the applicants be evicted from the land. The applicants contend they had a strong defence and counterclaim in the suit. Their previous lawyers, Waweru Gatonye, did not attend court on 9th March 2010. The applicants accuse them of failure to keep them informed or to release their file or part of it. The defendants were not aware of the hearing. They beseeched the court not to visit the sins of their counsel on innocent litigants. All those matters are buttressed by a deposition sworn by Simon Chege on 2nd June 2011.
3. The motion is contested. The applicants are accused of laches. The motion is attacked for misleading the court: the respondent contends that the suit was not dismissed for non-attendance by the defendant's counsel. The court heard the plaintiff's evidence in the absence of the defendants duly served. That was on 1st March 2010. Judgment was then delivered on 9th March 2010. A decree of permanent injunction and for eviction of the defendants was granted. It is the respondent's case that the application has not met the threshold for setting aside an *ex-parte* judgment.
4. I have heard the rival submissions. I take the following view. The High Court is a court of record. On 23rd October 2009, the record shows that a hearing date was taken *ex parte* by the plaintiff for 1st March 2010. On the hearing date, the court was informed that the defendants had been served. There is an affidavit of service on record sworn by Charles Ogola on 13th November 2009. Service of the hearing notice was effected upon the defendants' advocate, Waweru Gatonye, at Timau Plaza on 28th October 2009. A copy of the hearing notice is on the court file endorsed by the defendants' lawyers. I am thus satisfied that the court was entitled to proceed with the plaintiff's suit *ex parte*, sufficient and proper notice for hearing having been rendered on the opposite party.

5. The applicants now say they only learnt of the matter on 4th April 2011 when they received a notice of taxation of a bill of costs. The key consideration is whether there are sufficient grounds disclosed to set aside the *ex-parte* judgment.

6. The decision of *Maina Vs Mugiria* [1983]KLR 78 reaffirms this court's wide and unfettered discretion to set aside an *ex parte* judgment and to do substantial justice to the parties. The case cited with approval the decision in *Shah Vs Mbogo* [1967] E A 116. The latter decision held that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice. See also *Muniu Vs Giovanni* [1995 – 1998] 1 E.A 218 and *Kimani Vs McConnel* [1966] E.A 547.

7. The primary grounds of the present motion are set out at paragraphs 6,7,8 and 9 of the supporting affidavit:

6. *THAT we attempted going to their offices but were unable to get any explanation as the Advocate was always uncooperative (sic) and then they released only part of our file excluding exhibits making it difficult for M/S Muhuhu & Co. Advocates to proceed.*

7. *THAT the subject is family land where our parents are buried, my son Edward and Wambui Muturi the wife of the 2nd Defendant.*

8. *THAT on 4th April 2011 my Advocates received a taxation notice then we learnt that the Plaintiff wanted to sell the parcel to strangers thus put (sic) an objection to the LARI LAND CONTROL BOARD. (Copy of letter attached marked "SN-1").*

9. *THAT we urge the court to note we had raised a strong defence and counter claim and it would be in the interest of the family and Justice if the matter was heard (sic) with both sides".*

8. The applicants have not explained in those paragraphs clearly why they or their lawyer did not attend court for the hearing. They have not indicated the nature of the dispute with their counsel or when it arose. True, the dispute related to land. But as a corollary, the defendants should have had a keener interest in the suit. The defendants just simply state they were not informed of the hearing. I am fortified there by the following: The pleadings had closed way back in the year 2008; A list of documents was filed on 11th November 2008 as per the court records; The hearing date, as I said, was taken by the plaintiffs *ex-parte* on 23rd October 2009; The applicants were served in sufficient time. Although the applicants state at paragraph 9 of their affidavit that they have a "strong defence and counterclaim", it is then not lost on me that they did not pursue it with any vigour.

9. The order that is sought to be set aside was made on 9th March 2010. The motion to set aside was not filed until over a year later on 2nd June 2011. I agree with the plaintiff that there has been undue delay in bringing the motion. Is the delay excusable? The answer is at paragraph 10 of the affidavit which states only:

"THAT the delay is (sic) seeking the setting aside we believe is not inordinate and is explainable".

No explanation is offered at all. The delay of 1 year and 3 months is inordinate. Where there has been lengthy and unexplained delay, it can be inferred to be inexcusable. See *Allen Vs Sir Alfred McAlpine & Sons Ltd* [1968] 1 ALL ER 543 at 561. To that extent, the present motion if allowed would aid the applicants to obstruct the course of justice. The applicants have thus failed the test for setting aside an *ex-parte* judgment.

10. I am well alive that this is a land matter. But it has been in these courts since the year 2007. The suit, in fact, had originally been filed in the year 2005 as Kiambu Principal Magistrate's case No 26 of 2005. It was transferred to this court. Final decree was made on 9th March 2010. Justice is a two way street. Article 159 of the constitution as well as sections 1A and 1B of the Civil Procedure Act enjoin the

court to do substantial justice. Considering the demerits of the motion and the inexcusable delay in bringing the present proceedings, I am pointed in the other direction. I am in the circumstances not inclined to exercise my discretion in favour of the defendants. The interests of justice dictate that the notice of motion be dismissed. In the result and for all the above reasons, the defendants' notice of motion dated 2nd June 2011 is hereby dismissed with costs to the plaintiff/respondent.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 23rd day of October 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Ms Juliet Wanjiru for Mr. Chege for the Plaintiff/Respondent.

Ms Kinyanjui for Mrs Muhoho for the Defendants/Applicants.