Masinde v Wafula (Environment & Land Case 144 of 2017)
[2022] KEELC 3028 (KLR) (15 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3028 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 144 OF 2017

FO NYAGAKA, J

JUNE 15, 2022

BETWEEN

JULIUS MASINDE ..... PLAINTIFF

AND

FRANCIS WAFULA ..... DEFENDANT

RULING

The Application

1. The notice of motion application dated February 28, 2022 for determination before me was filed by the defendant on the same day as it was dated. It was anchored on articles 50 and 159 (2) (d) of the *Constitution*, sections 1, 1A, 1B, 3 and 3A of the *Civil Procedure Act* and order 12 rule 7, order 22 rules 22 and 25 and order 51 rules 1, 3 and 4 of the *Civil Procedure Rules*. It sought the following reliefs:

    a. ...spent

    b. ...spent

    c. ...spent

    d. That the *ex parte* proceedings and judgement dated June 7, 2021 and the decree dated June 23, 2021 be set aside and all the consequential orders;

    e. That the honorable court be pleased to set down the suit for hearing and the matter be determined on merit;

    f. That costs of the application be provided for.

2. The application was supported by the grounds on the face of it and further by the affidavit of the defendant. The defendant noted that the suit proceeded for hearing *ex parte* in his absence and that of his erstwhile advocate. He contended that he was never informed of the hearing date by his former

learned counsel. He argued that his failure to be present during the hearing was as a result of the negligence and/or mistake of his counsel at that time. He stated that such mistake should not be visited upon him. He deposed that a communication breakdown with his former advocates ensued shortly after the prevalence of the Covid-19 pandemic.

3. He deponed further that he became aware of the *ex parte* judgment when he perused the court file since he was unable to obtain information from his former counsel. He avowed that his defence raised triable issues as the suit land belonged to his late father and he was therefore entitled to a share. He informed the court that the plaintiff was his brother. He stated that the plaintiff stood to suffer no prejudice as the application had been made timeously. His case was that if the orders were not granted, he stood to suffer great prejudice.

The Response

4. The application was vehemently opposed. in his replying affidavit sworn on April 25, 2022 and filed on April 27, 2022, the plaintiff deposed that the application was misleading and based on falsehood. The plaintiff avowed that the defendant was always aware of the developments in the matter as and when they occurred but chose to not participate. The plaintiff then gave a chronological background of the matter. He also annexed various mention and hearing notices as proof of proper service upon the defendant's former advocates. I will not belabor on the same since they are a reflection of the developments in the court file.

5. I will, however, add that plaintiff deposed that on December 22, 2021 the defendant's former advocates served the plaintiff's counsel with an application seeking to set aside judgment. The application was served three hours after the plaintiff served the firm with the plaintiff's bill of costs. i thoroughly perused the court file but I did not find in it the application referred to: only the instant one was.

6. Regarding the instant application, the plaintiff added that it was filed with inexcusable inordinate delay. He computed the days it took to file it after judgment had been delivered. They were 266. He urged this court to dismiss the application with costs.

Rejoinder

7. In response to the plaintiff's replying affidavit, the defendant filed a supplementary affidavit on May 23, 2022. He stated in it, that his application was hinged on his right to a fair hearing as provided for in the *Constitution*. He maintained that he did not deliberately fail to attend Court as and when required. He rued his delay in filing his defence. He affirmed that his former advocates never informed him of the relevant dates in this matter, despite the court and parties having the correct email address of his former counsel. He confirmed that the application dated December 22, 2021 was never filed and/or prosecuted. He advanced that the delay was not inordinate and the decree was yet to be executed.

Submissions

8. Parties disposed of the application by way of written submissions. The defendant filed his submissions on March 8, 2022. In addressing the present issues for determination, he reiterated that a mistake by advocate should not be visited upon his client. He submitted that the rules of natural justice dictate that a court must not drive away a litigant from the seat of justice without according him a hearing. He was insistent that if the application failed, he would be condemned unheard. He urged this court to use its discretion to award costs to him as provided in section 27 (1) of the *Civil Procedure Act*.

9. In his supplementary submissions filed on May 23, 2022, the defendant submitted that his former advocates failed to discharge their duties as required by law. They failed to notify him of the progress

in the matter. He maintained that he had demonstrated that there was sufficient cause to warrant the reopening of the suit.

10. On his part, the plaintiff filed his submissions on April 27, 2022. He submitted that the defendant was undeserving of the orders sought. He pitted out that the defendant was dishonest and could not benefit from the court's discretion. The defendant urged this court to hold that a case is in the interest of a party and not his advocate. In the circumstances, he blamed the defendant for not advancing his case accordingly. He challenged the defendant's assertions on communication breakdown with his erstwhile counsel by stating that his former advocates did not depose as to those facts. He propounded that it would have been in the defendant's best interests to file an affidavit deposed by his former counsel on the issue. He added that no excuse has been put forward to explain why he had filed the present application 266 days after judgement had been entered. He submitted that the instant application was designed to delay the course of justice. He urged this court to dismiss the application with costs.

Analysis and Determination

11. I have considered the application, the relevant law and the respective affidavits of the parties herein. I have also considered the respective rival written submissions by parties. I now wish to address the application as hereunder. Two issues which arise from the application and call for determination are whether the application is merited and who to bear the costs thereof.

12. Beginning with the merits or otherwise if the application, it sought to set aside the court's judgement delivered on June 7, 2021. The judgement was delivered in the absence of the defendant. It was rendered after the plaintiff testified *ex parte* in court on May 25, 2021. The defendant further prayed that the suit be set down for hearing and determination on its merits.

13. The germane provisions that give a court discretion to set aside *ex parte* judgment is found in order 12, rule 7 of the *Civil Procedure Rules*. It stipulates thus:

> " 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."

14. The principles governing setting aside ex-parte judgments and orders have been well settled in our jurisdiction. In *Shah v Mbogo & another* [1967] EA 116 the court held thus:

> " I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so 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."

15. Again, Kneller, JA observed as follows in the Court of Appeal case of *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR:

> " ...Sheridan, J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley, J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely:
>
> > "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for

any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30:

> "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..." .....

A defence was before the court in time which was not dealt with at the trial. The respondent could have been compensated by costs for the delay occasioned by his advocate's dilatoriness and the appellant should not have been denied a hearing because of his advocate's mistake even if it amounted to negligence, in the circumstances of this case. Shabir Din v Ram Parkash Anand (1955) 22 EACA 48, 51 and Hancox J (as he then was) in Gurcharan Singh s/o Kesar Singh v Khudadad Khan t/ a Khudadad Construction Company Nairobi HCCC 1547 of 1969. The magistrate did not take these matters into consideration when he exercised his discretion. So the learned judge was entitled to interfere with the decision of the magistrate although it was a discretionary one. See Brandon LJ in The El Amria [1981] 2 Lloyd's Rep 539."

16. This court would call to its armory more decisions but the two already cited are instructive. What is evident from the jurisprudence in which this court ascribes to is that the court's discretion to set aside a judgment entered against a party when he/she fails to attend a hearing is very wide. It is for the fact finder to ascertain whether the reasons advanced by the applicant fall within the parameters of sufficient cause to justify a set aside order. This is because it is generally presumed that an ex parte judgment was entered regularly.

17. Additionally, the decree–holder, in whose favor the *ex parte* judgment is entered, suffers some prejudice if the ex parte order is set aside as he is essentially condemned to putting on hold the enjoyment of the fruits of the judgment. That is why appeasement by way of costs ought to be made if the setting aside of the *ex parte* judgment has to be made. An award of costs are one of such terms the court may set when exercising its discretion.

18. Turning to the instant application, the defendant submitted that the application was instituted upon the realization that judgment had been entered on June 7, 2021. According to the defendant, his former advocates did not make him aware of the developments in the matter. He was essentially in the dark in so far as this matter was concerned. The plaintiff dismissed the claims as false and misleading with intent to benefit from his indolence.

19. The general dogma held by courts is that a mistake by an advocate should not be visited upon his client. Consequently,

> "it does not follow that just because a mistake has been made, a party should suffer the penalty of not having his case heard on merit." (*Winnie Kibinge & 2 others v March Electricals Limited* Civil Case No 222 of 2010).

20. However, courts have also departed from that general principle of absolving litigants from errors which they tend to place on their advocates. This is because, often learned counsel have been used as scape

goats for obvious mistakes of the parties. In *Julius Kibiwott Tuwei v Reuben Argut & 7 others* [2022] eKLR this court held that,

> "In my view not all mistakes of advocates pull out litigants from the mud they drag them into. Courts have held that it was the duty of the plaintiff to follow the progress of their case by constantly checking it from their advocates."

21. It would be foolhardy for courts to take a party's assertion as about an error having been committed by an advocate as gospel truth. To do so would place the party at a higher pedestal of doing right and wash his misdeeds through sacrificing learned counsel in the altar of justice. It is the duty of the court to carefully investigate and weigh the circumstances of the case and come out with the truth on whether or not the advocate was in error. And where such errors are as a result of negligence or malpractice, they still would not absolve the party from the consequences of the mistake. They would instead elicit action by the applicant against the advocates while leaving the order or judgment of the court intact.

22. The practice of attaching a matter to learned counsel but not the litigant should be abhorred. This has often led to learned counsel doing all they can, including investing in emotions, in litigants' suits and this has at times led to counsel using trickery and other dirty means to ensure a client's case succeeds. A matter before the court is not an advocate's but a litigant's. Thus, in *Utalii Transport Co Ltd & 3 others v NIC Bank & another* [2014] eKLR, the court held that:

> "It is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court."

23. Also, in the persuasive case of *Ruga Distributors Limited v Nairobi Bottlers Limited* [2015] eKLR, the learned judge cited Kimaru, J in *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi HCCC 397/2002, where he stated;

> " 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."

24. Also, in the persuasive authority in *Ahmed v Trade Bank PLC* [1996] 3 NWLR Pl 437, 445 in which the court stated;

> " That the sins of counsel should not be visited on the litigant is without a doubt a judicial expedience and although conveyance, must not be jeopardized by Indiscriminating applications hence, to be able to sustain the concept, the applicable needs to show that he acted promptly in giving instructions to his solicitor to file the appeal, but that the inadvertence or negligence of the solicitor caused the delay. It is also the law that even when the applicant acted promptly, instructing his counsel he is still expected to ensure that the counsel carried out the instructions. This is so because the litigant who fails to ascertain if his counsel has taken the necessary steps to bring his appeal is as well negligent."

25. Additionally, in *Ali Alaba International Ltd & nother Sterling Bank* PLC [2018] 14 NWLR (Pt 1639) Eko JSC stated; -

> " I should think that a time has come for defaulting litigants, relying on error or blunders of their counsel, to be told, and I hereby tell the appellants herein, that it is not enough for them to rely on the error or blunder of the counsel of their own choice, when they are in default of statutory prescribed time table for taking steps in litigation, they must show what efforts they made themselves to follow up on the counsel in order that their counsel carried out their instructions within the time prescribed."

26. I am also alive to the fact that once an advocate receives instructions to come on record, it is incumbent upon him to make appearances in court since he represents his client sufficiently. If there is any reason impeding the advocate from attending court, the said advocate is required, as a matter of principle, to notify his counterpart as well as the court. An advocate owes a duty to not only his clients but the court, the opponent and parties generally. In all these instances, the general presumption is that his client is aware of how the matter morphs.

27. But it is also obligatory on a litigant to always follow up on his matter with is advocate and ensure that he/she is sufficiently abreast with what is happening in the matter. Gone are the days litigants used to instruct a lawyer and go back home, sit and wait for results. In the modern era, litigants have been sufficiently enlightened on the fact that they have rights which include the right to information from respective places or persons, including their lawyers. Thus, it is not enough for a litigant to whip the emotions of the court through allegations that the learned counsel failed them in apprising them of the developments in their matter, particularly, in regard to whether the suit is due for hearing or mention in court to take steps. It is the party's duty to act first, otherwise it will be negligence on his part not to act hence it cannot be taken to be an error on the part of the advocate. In other words, litigants or parties have a higher burden to discharge in convincing the court that their learned counsel committed a mistake which should not be visited on them. Let parties be sufficiently warned of this.

28. Having said about the obligation of litigants about their case, I have taken the liberty to also peruse through the proceedings in this matter. I note that the defendant's former counsel did not attend court on several instances in spite of proper service of hearing and mention notices. The dates included, March 5, 2019, July 30, 2020, September 22, 2020, October 8, 2020, October 15, 2020, January 28, 2021, February 3, 2021 as well as those of the hearing and judgment in this matter. The reasons for the lack of participation on their part on those dates was not furnished. I am thus inclined to find that the reasons furnished by the defendant in that there was a communication breakdown with his former advocates are probable. The advocate remained duly served with the requisite documents when this matter progressed. I give the benefit of doubt to the defendant in that he was not aware of what may have been transpired. Moreover, I have noted that the dispute herein pits brother against his own brother. Resolving the matter on merits may bring long lasting solutions than relying just on failure by one to attend court. I therefore find that the reasons preferred were sufficient.

29. On whether the delay was inordinate, I am guided by the Court of Appeal decision of *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR that held:

> " There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant's

conduct from the time the appeal was field up to the date the application for reinstatement was filed.....".

30. I too am enjoined to look at the conduct of the applicant from the time judgment was entered to when the application was filed. The applicant emphasized that he was not aware of the proceedings in the matter until the time of the bill of costs being served on him. Granted that the position was as he stated, then he would not have done much about the judgment from soon after delivery.

31. Additionally, I am also guided by the interest of justice aphorism. If from the facts and circumstances of the case, the interest of justice dictates that an application be granted, the time it took to file the application notwithstanding, and that the respondent can be compensated by an award of costs, then I see no reason why the instant application should collapse. It would be of important consideration to set down conditions to be met by the applicant when balancing the interests of justice on a pendulum.

32. I note that the defendant had every intention of setting aside the *ex parte* judgment in good faith. It is for these reasons that he attempted to file one in the first place as pointed out by the plaintiff on December 22, 2021. The upshot is that the interest of justice compel me to sustain the application rather than dismiss it. I am reminded that a court is dutifully bound to avoid injustice or hardship. Additionally, every party has the right to an audience to ventilate his case. The right to a fair hearing as enshrined in the Kenyan *Constitution* includes the right to be heard before a competent court. These are the dictates of the *audi alteram partem* rule. Consequently, I allow the application in the following terms:

    a. The *ex parte* judgment dated June 7, 2021 and the subsequent decree dated June 23, 2021 as well as all other consequential orders are hereby set aside on fulfillment of condition (d) below first, and to the extent that only the closure of the plaintiff's and defence cases are set aside.

    b. This matter shall be set down for further hearing on a priority basis.

    c. The hearing shall proceed from cross examination of the plaintiff.

    d. The plaintiff is awarded thrown away costs in the sum of Kenya shillings fifty thousand (KShs 50,000.00) only to be paid within twenty-one (21) days from the date hereof failure of which the orders in (a), (b) and (c) shall automatically lapse without any further reference to this court.

    It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15TH DAY OF JUNE, 2022.

DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE.