Thiongo (Suing as the administrator of the Estate of Michael Thiongo (Deceased) v Ontonyi & 2 others (Environment & Land Case 551 of 2016) [2022] KEELC 3242 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3242 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 551 OF 2016

JM ONYANGO, J

JULY 28, 2022

BETWEEN

PETER GATETE THIONGO SUING AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL THIONGO (DECEASED) ..... PLAINTIFF

AND

JAMES ONTONYI ..... 1ST DEFENDANT

BEATRICE ONTONYI ..... 2ND DEFENDANT

MACHUKA ONTONYI ..... 3RD DEFENDANT

RULING

1. This ruling herein is in respect of a Notice of the Motion dated April 6, 2022 filed by the defendants/ applicants seeking that the order dated March 23, 2022 dismissing the defendants' claim for non-attendance be set aside and the suit to be heard afresh on merit.

2. The application is premised on the grounds stated out on the face thereof and the supporting affidavit sworn by one Evans Ogesare Omwoyo a Clerk with the firm of S. O Omwega & Co. Advocates acting for the applicants. He averred that the failure to attend court on March 23, 2022 by the Applicant's counsel was not deliberate. He also averred that the failure to attend court by his counsel was caused by the failure on his part to record the hearing date in their diary. He deposed that the Applicants were not aware that the case had been fixed for hearing on March 23, 2022 and thus their failure to attend court was not intentional. He averred that the dismissal of the application would amount to condemning the applicants unheard as they have a valid claim against the Respondent. He also averred that the application was filed without undue delay.

3. The application is opposed by the plaintiff/respondent through a replying affidavit sworn on 27th April, 2022 and filed in court on April 5, 2022. In the said affidavit, the respondent avers that the

application is an abuse of the court process and the same should be dismissed. He avers that the affidavit in support of the application was sworn by a person who does not have locus standi to do as he is not one of the litigants in the matter nor is he an Advocate in conduct of the matter. The respondent also depones that the application is brought under the wrong provisions of the law and it was thus untenable.

4. He contends that the defendants have never been interested in defending this matter or generally in the finalization of this matter. He urged the court to take judicial notice of the fact that from the proceedings of this case and ELC case No. 462 of 2011 the applicants and their counsel have failed to attend court on several occasions feigning want of service.

5. He recounted that on July 5, 2021 when the matter came up for mention for purposes of taking a hearing date, the applicant's counsel falsely claimed that he had not received his further Amended Plaint and witness statements despite having been served with the same two months earlier. This forced his Advocate to file an affidavit of Service. He termed the applicant's conduct as a clear indication of a pattern of deceit and indolence. Further, the respondent deponed that upon them being served with the further Amended Plaint on July 18, 2021, the appellants filed their amended defence and counterclaim 8 months later after being prompted by the respondent's Advocate.

6. He further averred that on March 23, 2022 when the matter proceeded for hearing, the 1st and 3rd Applicants were in court when the matter was called out and a time allocation was given. They however disappeared and never went back to court at the appointed time, a clear indication that the hearing date had been communicated to them by their Advocate. This is the reason why they have shied away from swearing affidavits in support of the application thus making this application nothing but a mockery of the court process.

7. The respondent further deponed that the applicants had not demonstrated the hardship they would suffer if this application was not allowed.

8. He lamented that the dispute has been pending in court for almost a decade now and he had undergone great mental anguish and a huge financial burden. He urged the court not to allow the application as it amounts to an injustice to him. It was his contention that the applicants defence does not raise any triable issues and reinstating the suit would amount to a mere academic exercise.

Issues For Determination

9. The main issues for determination are;

    a. Whether the supporting affidavit sworn by the clerk of the law firm of advocates representing the applicant should be struck out.

    b. Whether the threshold for setting aside the consent order/ decree has been met by the Interested Parties.

Analysis And Determination

Whether the supporting affidavit should be struck out.

10. Before determining whether the application meets the requirements for grant of an order to set aside the dismissal of the Applicants Counterclaim, it will be necessary to determine whether the Supporting Affidavit should be struck out.

11. Order 19 Rule 3 of the *Civil Procedure Rules* provides that affidavits should be confined to such facts as the deponent is able of his own knowledge to prove. It is drawn as follows: -

Matters to which affidavits shall be confined [order 19, rule 3.]

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.

12. From the above provision, it is clear that every formal application to the court must be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts. The mere fact that an affidavit was sworn by the clerk of the law firm does not render it defective.

13. That being the case, I see no reason why the clerk of the firm representing the Applicant who had personal knowledge of the reason why the Applicant and his Advocate were unable to attend the court could not swear the supporting affidavit as required under the Civil Procedure Rules.

14. The legal threshold to be considered by the court in the exercise of its discretion to set an aside exparte judgment or order entered for non-attendance of a party was outlined in the case of *Caroline Mwirigi v African Wildlife Foundation* [2021] eKLR where the court held as follows:

> " .....the court has a wide discretion to set aside default judgment or an order for dismissal of a suit for non-attendance, provided the applicant demonstrates to the court by affidavit evidence that-
>
> a) The non-attendance was not deliberate or through negligence but due to inadvertence and honest mistake;
>
> b) The application for setting aside was made without unreasonable delay;
>
> c) The suit is meritorious and the applicant has not lost interest in prosecuting the same;
>
> d) He/she stands to suffer more prejudice compared to the opposing party if the application is declined;
>
> e) The interest of justice demands that the application be allowed."

15. In the instant case, the reason given for the applicants' failure to attend court is the Advocates failure to diarize the matter. As a result, counsel who had the conduct of the matter was not informed that the matter was fixed for hearing on 23.3.2022. The question that arises is whether the Applicants failed to attend the hearing on 23.3.2022 due to willful neglect.

16. Having carefully considered the explanation given by the Applicant and the circumstances of this case, I am satisfied that the failure to attend the hearing by the applicants was not due to their negligence but a genuine error on the part their counsel. Even though the Respondents have claimed that some of the Applicants were present on the hearing date, this claim cannot be inferred from the proceedings of the court before me because the court was not made aware of their presence before it proceeded to entertain the hearing of the Counterclaim. In fact, from the record, it is clear that the court proceeded with the hearing after being informed by counsel for the respondent that the Applicants and their Advocates were absent during the hearing despite their Advocates having been served and an affidavit of service was on record.

17. As to whether the application was filed without unreasonable delay, I have established the application was filed on April 6, 2022, exactly 12 days after the dismissal of the applicant's case against the Respondent. The delay by 12 days is not in my view unreasonable.

18. As regards the issue of the prejudice that will be occasioned by allowing the application, the Respondent argued that he would suffer prejudice if the application was allowed since the dispute has been pending in court for more than ten years owing to delays occasioned by the applicants. He also stated that there was a risk of losing the suit property which is currently occupied by the Respondents.

19. However, a perusal of the file reveals that the delay in disposing of this matter has been occasioned by both parties. For instance, it cannot be blamed on the Applicants when the Respondent's father who was a key party to the dispute was unable to prosecute the suit causing the matter to be adjourned on May 23, 2017.

20. It is also clear that despite the court directing the parties to take a hearing date in the registry within 45 days on July 18, 2017, the parties including the Respondent's late father appeared in registry on 29th March, 2019 when they agreed to have the matter heard on 6th November, 2019. The court record also reveals that despite the matter being set for hearing on 6th November, 2019 the Respondent's late father filed an application dated 15th July, 2019 seeking to amend his plaint in relation to ELC CASE NO. 462 of 2017. The Respondent's father subsequently passed away and the respondent was joined to the matter pursuant to an application for substitution dated April 19, 2021.

21. In light of the foregoing, it is evident that the delay cannot be blamed solely on the Applicants. I am of the considered view that greater injustice would be occasioned to the Applicants if they are driven away from the seat of justice owing to the mistake of their advocate. In arriving at this decision I am guided by the case of *Lucy Bosire v Kehancha Division Land Disputes Tribunal & 2 others* (2013) eKLR where Justice Odunga held that:

> " In this case the dispute revolves around land which is a very emotive subject in this country. Accordingly, such matters ought to be heard on merits as far as possible so that parties do not feel that they were driven out of the seat of justice without being afforded an opportunity of being heard. In this case the blame is placed at the doorstep of the applicant's erstwhile advocates. It is true that where the justice of the case mandates, the mistakes of advocates even if blunders should not be visited on their clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of not having his case determined on its merits".

22. I concur with the above decision. It is therefore my finding that the Applicants have explained to my satisfaction, the reason why they failed to attend court on the hearing date.

23. I note that the Respondents has urged this court to compel the Applicant to pay thrown away cost of Kshs. 85,000 being legal fees paid to the advocate who represented him during the ex-parte hearing. However, in as much as the Respondent is entitled to thrown away costs, the same cannot be pegged on the legal fees paid to his advocate. Thrown away costs are based on the discretion of this court and cannot be granted according to the wishes of a party.

24. The upshot is that the application is merited and I grant it in the following terms:

    a. The Orders made on March 23, 2022 marking the Applicant's Defence in Elc Case No. 462 of 2017 closed and dismissing the Counterclaim are hereby set aside.

b. The suit is hereby reinstated for hearing and determination on merits.

c. A hearing date shall be granted on priority basis due to the age of the matter.

d. The Applicants shall pay the Respondent Kshs. 20,000 being thrown away costs before the hearing date.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY, 2022.

…….

J.M ONYANGO

JUDGE