Warui v Nabiliki (Environment & Land Case 151 of 2015) [2022] KEELC 3743 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3743 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 151 OF 2015

FO NYAGAKA, J

JULY 27, 2022

BETWEEN

FREDRICK BUNDI WARUI .... PLAINTIFF

AND

MATTHEW WABWOMBA NABILIKI .... DEFENDANT

RULING

The Application

1. The substantive notice of motion before me for determination is dated April 8, 2022. It was filed by the plaintiff/judgement-debtor on April 11, 2022. It invoked the provisions of sections 1A, 1B, and 3A of the *Civil Procedure Act* as well as order 12, rule 7 of the *Civil Procedure Rules* seeking the following reliefs:

   (1) ...spent

   (2) ...spent

   (3) ...spent

   (4) That the honorable court be pleased to vacate and/or set aside the orders dismissing the suit hereto and all consequential orders thereto;

   (5) That the suit be re-admitted for hearing on merit upon the plaintiff filing the amended plaint;

   (6) That he be allowed to amend his plaint as per the order made on the February 16, 2021 and his suit be set down for hearing on a priority basis;

   (7) That costs of the application be in the cause.

2. The application is anchored on the grounds on its face and supported by affidavit of the plaintiff/ judgment-debtor, Fredrick Bundi Warui, as follows:

3. That warrants of arrest had since been obtained against him following dismissal of the suit with costs. He was arrested on March 24, 2022 and released on bond terms on March 25, 2022. The annexed the bond document marked FBW-2. This flowed from the taxed costs in favor of the defendant/decree-holder.

4. It was upon his arrest that he discovered that that court dismissed the suit with costs to the defendant/ decree-holder on February 16, 2021. He admitted that he was aware of the court's orders to file the amended plaint within three (3) days as communicated by his former advocates. He stated that he trusted his advocates would comply with the court's orders. However, instead of complying with those orders, the advocates filed an application for review dated February 22, 2021 annexed and marked FBW1. After the filing of that application, there was a communication breakdown between the applicant and his former counsel as he was never informed of the outcome of that application.

5. The judgment-debtor furthered that he is the bona fide purchaser of the suit land and thus claimed legal ownership. The failure to be heard rendered him prejudiced. The failure to abide by the court's orders of February 16, 2021 was through no fault of his own but attributable to his erstwhile Advocates. Such mistake ought not to be visited upon him. He expressed willingness to abide by the orders of the court if the application was successful. He urged this court to administer justice without undue regard to technicalities. He prayed that he be allowed to amend his plaint which draft was annexed and marked FBW-3 and allow the application as prayed.

The Response

6. The application was opposed vide the defendant's/decree-holder's replying affidavit sworn on April 22, 2022 and filed on April 26, 2022. The gist of his response was that the application was filed with unclean hands. He argued that the applicant was and had always been aware of the proceedings in this matter. For this presupposition, he cited and annexed as MWN-1 a case law. In chronologically setting down a background abridgment of the matter, following dismissal of the suit, the assessment of costs was conducted on November 30, 2021. The certificate of costs was issued on December 8, 2021 and was annexed as MWN-2. The applicant was subsequently served with a notice to show cause dated December 23, 2021 that was heard on February 8, 2022. The hearing took place after the court was satisfied with service of the same. The return of service was annexed and marked MWN-4.

7. The applicant attended court on February 8, 2022 and sought leave from the court to grant him time to formulate a proposal in settlement of the taxed costs. The matter was further mentioned on two occasions, that is, February 15, 2022 when the applicant was represented by an advocate and March 15, 2022 when the applicant failed to show up. Even then, since then the present application was not filed. Consequently, warrants of arrest were issued against him. He was then presented to court on March 24, 2022. The applicant then instructed a new firm of advocates to represent his interests. He was then released on bond with the matter being mentioned on April 12, 2022 and later May 17, 2022. He annexed a case law, MWN-5, for the proposition that equity aids the vigilant and not the indolent. He accused the applicant of being dilatory in instituting the present application one (1) year two (2) months after the dismissal order. That delay was inordinate and inexcusable. He cited another case law marked it as MWN-6 for this presupposition.

8. He maintained that the application was res judicata, similar to that filed on February 23, 2021. He cited that litigation must come to an end. He reminded this court that the suit was previously dismissed on March 16, 2017. Soon after, the court pardoned him and reinstated suit. He maintained that the suit

remained a non-starter as the applicant had no claim over the suit land. He urged this court to dismiss the application with costs.

Rejoinder

9. The applicant filed a further affidavit on May 19, 2022 raising a prolix thirty-two (32) grounds. He denied the averments in the replying affidavit and reiterated the contents in his application and affidavit in support. He added that his application was not frivolous, untruthful or an abuse of the process of the court. He defended his position that he sought more time in the notice to show cause hearing as he sought more time to establish his next cause of action. He admitted to the respondent's averments that he filed the application more than a year later save through no fault of his own. He maintained that the present application was not res judicata. He supported his bid to have the suit reinstated by annexing FBW 1, search certificate of the suit land. He was of the view that the arguments raised in the response concerning the suit land are the very reasons why the application ought to be reinstated.

Submissions

10. Parties agreed to dispose of the application by way of written submissions. However, as at the time of writing this ruling, I had not received a filed copy of the applicant's submissions. The applicant on May 30, 2022 undertook to file his submissions. Regrettably, it appears that he did not act affirmatively.

11. On the part of the respondent, it was submitted that the suit was dismissed on account of the applicant's non-compliance with the orders of the court. The respondent accused the applicant of not being candid as he was well aware when the suit was dismissed. Furthermore, the applicant was indolent in prosecuting the application filed on February 23, 2021. He was therefore undeserving of the orders sought. The respondent further submitted that he had filed a similar application before. His conduct was prejudicial to the respondent.

12. Submissions not being evidence or forming part of the parties' pleadings as was stated in the case of in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, I will not be bothered much about their lack or presence. I will consider the ones that are in the file but still decide the matter on merits. In the Appeal the Court of Appeal stated:

> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

Analysis And Disposition

13. I have considered the application, the grounds as well as the affidavit in support. I have also considered the replying affidavit and the filed submissions on record. The applicant seeks to set aside the dismissal orders in this matter and consequently reinstate the suit. The application is premised on the provisions of order 12, rule 7 of the *Civil Procedure Rules*.

14. The principles governing setting aside *ex-parte* judgments and orders have been well settled in our jurisdiction. The court in *Shah v Mbogo & another* [1967] EA 116 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. In the present case, the applicant is aggrieved by the dismissal of the suit for want of prosecution. The applicant maintained that he was only aware of the judgment when he was served with a notice to show cause. It was upon his arrest that he discovered that the court dismissed his (emphasis mine) suit with costs to the respondent on February 16, 2021. I do not agree with him as much. I hasten to add that it is quite deplorable for the applicant, who is the plaintiff in this suit, to be aware of such a drastic decision, at that juncture, when he is the profounder of the present suit. One would think that a plaintiff would be on a hands-on deck in his suit as he is the one that sued the defendant in this matter.

16. Next and interestingly, the applicant admitted that he was aware of the court's order of filing the amended plaint within three (3) days as commutated by his former advocates. He stated that he trusted his advocates to comply with the court's orders. However, instead of complying with those orders, the advocates filed an application for review dated February 22, 2021. Simply put, my understanding of the facts espoused is that the applicant had been notified about the court's directions issued on February 16, 2021. In the presence of parties' respective counsel, the court gave the following directions:

> " Consequently, I hereby order that the plaint be amended within three days from the date of the order in default of which the suit stands dismissed automatically for want of prosecution."

17. I am, beyond any shadow of a doubt, not convinced that the applicant was only notified about the orders to amend the plaint. The default clause was clear and next to the condition of amendment. In my view, he is engaged in a fishy expedition to distance himself from blame and impute the same entirely to his advocates who are not on record and cannot explain the steps they took to notify their former client.

18. Furthermore, the applicant admitted that his former advocates filed an application for review. A cursory perusal of the affidavit in support of the application at paragraph 2 revealed:

> "That the orders made on February 16, 2021 by this honorable court that i amend the plaint to plead against Andrew Okiya failure of which the suit stands dismissed automatically is quite prejudicial to me".

19. Nothing can further demonstrate the applicant has been caught on the hop fabricating and casting aspersions on his former advocates who essentially, dutifully and properly discharged their duties. Such machinations are utterly pitiful and must be rejected. His actions are an anathema to the principles of fairness, justice and equity and must be condemned with utmost precision.

20. When mentioned on February 24, 2021, which date was given in parties' presence, the applicant was not only absent but also had failed to comply with the court's directions. Consequently, the suit stood automatically dismissed. The orders of February 16, 2021, the subject of the proceedings were made inter partes.

21. I have similarly noted that the suit was previously dismissed for non-attendance on the part of the applicant on March 16, 2017. This court however vindicated him and elected to reinstate suit on November 30, 2017. From this perspective alone, it appears that the applicant has developed a propensity to violate and circumnavigate court orders and then cry foul after. It is clear that the applicant is not interested in pursuing this suit. The buck stops with him to take the necessary steps

to advance his claim. Why should the court waste its precious judicial time to give him another chance to escape compliance when millions of Kenyans out there, who are desperate for justice and ready to abide by court's directions, can be afforded such an opportunity?

22. Other than what has been discussed earlier, the applicant's recourse lay in an appeal or an application for review. The orders of setting aside herein cannot issue. The upshot of the above is that the application dated April 8, 2022 lacks merit and is hereby dismissed with costs to the respondent.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 27TH DAY OF JULY, 2022.

DR IUR FRED NYAGAKA

JUDGE, ELC, KITALE.