



**Sifuna v Mulaya & another (Environment and Land Case Civil Suit
280 of 2015) [2022] KEELC 12812 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12812 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 280 OF 2015
OA ANGOTE, J
SEPTEMBER 30, 2022**

BETWEEN

DAVID K SIFUNA PLAINTIFF

AND

EMILY KIVALI MULAYA 1ST DEFENDANT

NELSON MUTURI NDEMBEYIA 2ND DEFENDANT

RULING

Introduction

1. Before this Court for determination is the Plaintiff's/Applicant's application dated 13th December, 2021 brought pursuant to the provisions of Articles 48, 50 & 159 of *the Constitution*, Sections 1A, 1B & 31 of the *Civil Procedure Act*, Order 12 Rule 7 and Order 50 Rule 6 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking the following reliefs:
 - a. That the proceedings of 28th October, 2021 and all consequential orders and directions arising therefrom be set aside and the Plaintiff's suit be reinstated for hearing on priority basis.
 - b. That this Honourable Court be pleased to enlarge time within which the Plaintiff/Applicant should file his Reply to the 2nd Defendants' Defence and Defence to the Counterclaim.
 - c. That the costs of this Application be provided for by the Respondents.
2. The application is premised on the grounds on the face of the Motion and supported by the Affidavit of David K. Sifuna, the Plaintiff herein of the same date. The Plaintiff deponed that on 28th October, 2021, the Court dismissed his suit for want of prosecution and non-attendance and that as a consequence of the dismissal, the 2nd Defendant proceeded with his Counter-claim and the matter was slated for mention to confirm filing of submissions.



3. It was deponed by the Plaintiff that his failure to attend court was not deliberate but was occasioned by the fact that he was attending to two work related meetings in which he had been nominated to make presentations; that he had, prior to the hearing date communicated his unavailability to his counsel on record who guaranteed him that he would seek an adjournment and that on the hearing date, he received calls and messages from his counsel informing him that the application for adjournment had been declined and was required to virtually attend the proceedings at 2:00pm.
4. It was deponed by the Plaintiff that his attempts to log onto the court session were futile as he was not admitted into the proceedings; that his Counsel was equally unable to be admitted into the proceedings; that after the close of business, he asked his Advocate what had transpired in court and that his Counsel informed him that the file had gone missing after court and he was unable to ascertain its position.
5. According to the Plaintiff, on 10th December, 2021, his counsel forwarded to him a copy of the 2nd Defendant's submissions and a mention notice indicating that the matter was due for mention on 14th December, 2021 to confirm filing of submissions and that he noted in the 2nd Defendant's submissions that he had not filed a Reply to the Defence and Defence to the Counter-claim which came as a surprise to him as his previous counsel had assured him that all pleadings were filed.
6. The Plaintiff deponed that the failure to file the documents was occasioned by counsel; that he has a bona fide Defence to the 2nd Defendant's Counter-claim as he is not indebted to him as alleged; that there was no contractual relationship between the two and that if the matter proceeds as undefended, he is likely to lose the suit property which is his matrimonial property.
7. The Plaintiff finally deponed that no prejudice will be suffered by the 1st Defendant who has filed a statement of admission in his favour; that the 2nd Defendant will equally not be prejudiced in any manner that cannot be compensated by costs and that the interests of justice warrant the grant of the orders sought.
8. In response to the application, the 2nd Defendant filed Grounds of Opposition and a Replying Affidavit both dated 20th December, 2021. The Grounds of Opposition are on the basis that the application is fatally defective; that the application is res judicata as the Plaintiff's counsel attended court and sought for an adjournment which was denied and that the question of refusal to grant an adjournment cannot be re-determined by the Court through the present application as it does not seek a review of that refusal.
9. The 2nd Defendant deponed that since the institution of this suit, the Plaintiff has peddled falsehoods against him as exhibited in the present application, including the false assertion that he served written submissions on 10th November, 2021 and backdated the same to 5th November, 2021 and that it was upon service of the submissions that the Plaintiff learned that the matter was scheduled for mention to confirm filing of submissions. It is the 2nd Defendant's case that the Plaintiff was served with the mention notice on 29th October, 2021.
10. According to the 2nd Defendant, on 26th October, 2021, the Plaintiff's Advocate wrote to his counsel communicating their intention to adjourn the matter due to the reasons stated by the Plaintiff; that upon receipt of the notice, he communicated to the Plaintiff's counsel that he would object to the application for adjournment and that on 28th October, 2021, Counsel for the Plaintiff sought for an adjournment which was denied by the Court which directed that the matter would proceed physically at an allocated time.



11. The 2nd Defendant deponed that due to the directions aforesaid, the Plaintiff's assertions that he was unable to virtually join the court holds no water as the court could not have been participating physically and virtually simultaneously; that on 29th October, 2021, a day after the hearing, he served the Plaintiff's then counsel with a mention notice indicating that the matter would be mentioned on 14th December, 2021 to confirm filing of submissions and that he filed the said submissions on the Plaintiff's counsel on 5th December, 2021 and filed a digest of authorities on 10th December, 2021.
12. It was deponed by the 2nd Defendant that it is apparent that the Plaintiff's work event was scheduled long after the hearing date had been confirmed and no evidence was shown that the Plaintiff attempted to reschedule the same; that it is trite that the court calendar ought not be subordinate to other activities and that the Plaintiff's issue on the court's refusal to grant an adjournment is now res judicata and the Court is functus officio in that respect.
13. The 2nd Defendant deponed that the Plaintiff's plea to file a Reply to Defence and Defence to Counter-claim 7 years after service of the Defence and Counter-claim constitutes an abuse of court process; that the Plaintiff being a lawyer ought to have been diligent and ensured all documents were in order and that the Plaintiff cannot now claim to have had no relationship with him yet he lodged a professional misconduct claim against him at the Advocates Disciplinary Tribunal.
14. The Plaintiff filed a Supplementary Affidavit in which he deponed that he has demonstrated sufficient cause warranting the grant of the orders sought; that he was unaware that his request for adjournment had been declined by the 2nd Defendant as his counsel had assured him that everything was in control and a new date would be sought and that he tried to log in virtually not having been informed by counsel that the matter was directed to proceed physically.

Submissions

15. The Plaintiff's counsel submitted that the court should exercise its inherent jurisdiction and review, vary and/or set aside its order issued on 28th October, 2021; that as expressed by the Court in *Shah vs Mbogo and Another* [1967] EA 116 cited with approval in *Securicor Courier (K) Ltd vs Owino* [1993] eKLR, the jurisdiction of the Court to review and set aside its decisions is wide and unfettered and that the principal consideration before exercising the said discretion is whether sufficient cause has been demonstrated warranting setting aside of the ex-parte decision or proceedings.
16. It was submitted that the Plaintiff's failure to attend court has been fully explained and is clearly bona fide; that while a case belongs to a litigant, counsel is under an obligation to timeously inform his client about court directions and that as expressed by the court in *Lucy Bosire vs Kebanacha Division Land Dispute tribunal & 2 others* [2013] eKLR, mistakes are a common occurrence and the fact that a mistake occurred does not mean that a party should suffer the penalty of not having his case determined on its merits.
17. According to the Plaintiff's counsel, contrary to the 2nd Defendant's assertions, the present application is not res judicata and neither is the court functus officio as the Plaintiff has availed new evidence indicating that he was away in Mombasa at the time of the hearing.
18. The 2nd Defendant submitted that the application is fatally defective; that the main issues in the application are res judicata; that the Plaintiff's application for adjournment having been denied, he had the option to stay the proceedings pending Appeal which he failed to do and that the matter proceeded as scheduled.



19. According to the 2nd Defendant, the Plaintiff's assertions are clearly falsehoods as evinced by the fact that he claims to have received calls at 2:00pm by his former counsel informing him that he was to attend court virtually whereas the matter physically proceeded at 11:30 am; that he asserts that he does not know what transpired on 28th October, 2021 while at the same time admitting to having been informed that the application for adjournment was declined and that he who comes to equity must come with clean hands.

Analysis and Determination

20. Having considered the application, the Affidavits and the submissions by the parties, the issues that arise for determination are;
- i. Whether the application is competent and if so;
 - ii. Whether the prayers for reinstatement of the Plaintiff's suit and setting aside the proceedings of 28th October, 2021 are merited?
 - iii. Whether the Plaintiff should be granted leave to file a Reply to Defence and Defence to Counter-claim?
21. The 2nd Defendant has submitted that the application is incompetent and that having not reviewed or appealed against the court's decision to reject the application for adjournment, this court has no jurisdiction to deal with this issue.
22. In response, the Applicant contends that the matter is not res judicata because he has brought new material which demonstrates sufficient cause as to why the prayers sought should be granted and that the court has the requisite jurisdiction to grant the orders and as such is not functus officio.
23. The principle of res judicata is encompassed in Section 7 of the *Civil Procedure Act* which provides as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
24. In *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd* [2017] eKLR the Court of Appeal defined res judicata thus;
- “The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;
- (a) The suit or issue was directly and substantially in issue in the former suit.
 - (b) That former suit was between the same parties or parties under whom they or any of them claim.
 - (c) Those parties were litigating under the same title.
 - (d) The issue was heard and finally determined in the former suit.



(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

25. By way of a brief background, the Plaintiff instituted this suit as against the Defendants seeking permanent injunctive orders restraining the Defendants from any dealings with all that land known as Sub-Division No 9967, Original No 9690/7 Section 1 Mainland North (the suit property) and for the unconditional release of the title to the suit property aforesaid to the Plaintiff.
26. The 1st Defendant vide an amended Defence/Statement of Admission conceded to the prayers sought by the Plaintiff and vide its Ruling of 28th June, 2018, the court entered judgment on admission in favour of the Plaintiff as against the 1st Defendant.
27. On its part, the 2nd Defendant filed a Defence and a Counter-claim seeking for the transfer of the suit property to himself executed by the Deputy Registrar of the court. In his Defence and Counter-claim, the 2nd Defendant claims to be entitled to the suit property by virtue of being a lien/security for a debt.
28. When the matter came up for hearing on 28th October, 2021, counsel for the Plaintiff sought for an adjournment on the ground that the Plaintiff was in Mombasa on official duties. While confirming that he received communication on the same, the 2nd Defendant objected to the application for adjournment on the ground that the suit was an old matter having been in court for over seven years. The Court declined to grant the application for adjournment. While declining to adjourn the matter, this court observed that ‘the matter was old and the Plaintiff’s official duties are not more important than the business of the Court.’
29. In the presence of the Plaintiff’s counsel, the court directed the parties to proceed with the hearing physically at 11:15 am. At 11:30 am, the matter was called out in the open court. Neither the Plaintiff nor his counsel were in court and the matter was dismissed for non-attendance. The 2nd Defendant proceeded to testify in respect to the Counter claim and closed his case.
30. In the present application, the Plaintiff is seeking to set aside the proceedings of 28th October, 2021; have his suit reinstated and be allowed to file his Reply to Defence and Defence to Counterclaim. The applicant is not asking the court to reconsider the order declining the adjournment, but rather to have his suit reinstated, and therefore to be allowed to file his Defence to the Counter Claim out of time. That being the case, it is the finding of this court that the application is not res judicata neither is this court functus officio.
31. The present application is founded on Order 12 Rule 7 of the [Civil Procedure Act](#) which grants the court the discretion to reinstate a suit. Order 12 Rule 7 of the Civil Procedure Rules, 2010 stipulates as follows:-

“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.”
32. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. As correctly stated by the Plaintiff, this position was expressed in the case of *Shah vs Mbogo & Another* (1967) EA 116 by the Court of Appeal of East Africa as follows:

“The 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 it is not



designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

33. More recently, the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR stated that:

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by the court to do deal with real and substantial justice to the parties in a suit...”

34. The Plaintiff’s suit was dismissed on 28th October, 2021. This was after the Plaintiff’s counsel sought for an adjournment on the basis that the Plaintiff was in Mombasa for official duties, which application was declined by the court. The reason being advanced in the current application for non-attendance of court by the Plaintiff is the same reason that was given by his counsel whilst seeking for an adjournment.
35. That being the case, and in view of the fact that at no particular point did the court schedule this matter for a virtual hearing at 2;30pm as alleged by the Plaintiff, I decline to exercise my discretion in favour of the Plaintiff. Indeed, despite the Plaintiff and his then advocate having been aware that the application for adjournment had been declined, they did not bother to peruse the court file and file the current application immediately, but waited until the 2nd Defendant served them with his written submissions.
36. Having declined to set aside the proceedings of this court of 28th October, 2021, the issue of whether the Plaintiff should be granted leave to file a Reply to Defence and Defence to the Counter claim does not arise.
37. For those reasons, I dismiss the application dated 13th December, 2021 with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Busiega for the Plaintiff/Applicant

No appearance for the Defendants

Court Assistant - June

