



Gachuhi v Mzee; Nyakundi (Interested Party) (Environment & Land Case 119 of 2013) [2022] KEELC 13398 (KLR) (29 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 119 OF 2013
EO OBAGA, J
SEPTEMBER 29, 2022**

BETWEEN

LILIAN WAITHERA GACHUHI PLAINTIFF

AND

DAVID SHIKUKU MZEE DEFENDANT

AND

WILSON NYABERI NYAKUNDI INTERESTED PARTY

RULING

1. This is a ruling in respect of a notice of motion dated March 29, 2022 in which the defendant/applicant seeks to set aside the proceedings of November 10, 2021.
2. This case has been in the corridors of justice for 19 years. The reason for failure to have the same concluded is because of the many applications made therein. On July 5, 2018 this case proceeded *ex-parte*. The plaintiff closed her case. As the defendants counsel and the defendant were not present, the defence case was deemed closed.
3. The defendant made an application to have the *ex-parte* proceedings set aside. The court partially allowed the application to the extent that the defendant was allowed to have the witnesses who had testified recalled for cross-examination. The hearing could not proceed thereafter for one reason or another.
4. On one occasion, hearing could not proceed as counsel for defendant was engaged in a Court of Appeal matter in Nakuru. On another occasion, the matter could not proceed as counsel for defendant was bereaved. On yet another occasion, the case was adjourned on account of bereavement on the part of the defendant's counsel. The defendant's counsel was said to have lost his step mother.



5. On one other occasion, the hearing was adjourned as defendant had filed an application to amend. Yet on another occasion, the hearing could not proceed as all parties and their counsel were not present. On February 16, 2021, the case could not proceed as the interested party had served his documents late. On April 16, 2021, the case could not proceed as the plaintiff and her witness were locked up at a Naivasha due to covid -19.
6. The hearing which had been set for April 15, 2021 was adjourned to July 20, 2021. There is no record in the court file as to what transpired on July 20, 2021. The trial judge came back to Eldoret for hearing of part-heards. This case was fixed for hearing on November 10, 2021.
7. On November 10, 2021, the matter was called out in the presence of Ms Chesoo for Plaintiff and in absence of Mr Momanyi for defendant. The matter was placed aside to 10.00a.m thereafter, the record shows that Ms Chesoo for Plaintiff and Mr Kamau for Interested party were present. Ms Chesoo informed the court that she had informed Mr Momanyi about the hearing date and that since Mr Momanyi was absent as well as the defendant, she prayed that the defence case be closed. She also indicated that she has closed plaintiff's case. Mr Kamau for Interested party also informed the court that his client did not wish to testify and that he had closed his case. The court then proceeded to order the defence case closed and directed parties to file written submissions within 14 days. It is after the defendant's counsel was served with written submissions by the plaintiff's counsel that he realized that the case had proceeded *ex-parte*.
8. The applicant contends that his counsel was bereaved having lost his nephew and had written a letter to the plaintiff's counsel informing them of his absence before court on November 10, 2021. The applicants counsel who also swore an affidavit in support of the application stated that it was insensitive on the part of the plaintiff to have proceeded when they had been informed in writing that he had lost his nephew whose burial had been slated for November 12, 2021.
9. The plaintiff/respondent opposed the applicant's application based on a replying affidavit sworn on May 7, 2022. The respondent contends that the applicant's application is an abuse of the process of court in that the applicant is out to delay the finalization of this old suit; that the application was made after inordinate delay and that the applicant has not provided proof of the alleged bereavement by way of either burial permit or eulogy.
10. The respondent further contends that the applicant has been the cause of previous adjournments and that to allow the setting aside of the proceedings of November 10, 2021 will be prejudicial to the respondent. The respondent argues that she has been kept out of her property since 1994 and if the proceedings were to be set aside she will be prejudiced greatly.
11. The parties were directed to file written submissions. The applicant filed his submissions on July 25, 2022. The defendant filed her submissions on June 17, 2022. The interested party seems not to have filed any response to the application.
12. I have carefully considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the written submissions by the three parties to this suit. There is only one issue for determination in this application. This is whether the applicant has demonstrated that there is sufficient cause for the court to be called upon to exercise discretion in setting aside the proceedings of November 10, 2021.
13. The applicant's counsel was aware of the hearing date of November 10, 2021. The issue of mistake as submitted by all the three parties and the authorities in support thereof does not arise. What the court is to consider is whether the reason given for nonattendance is plausible or in other words whether



that reason amounts to sufficient cause as to call for the exercise of the court's discretion in favour of the applicant.

14. In the instant case, the reason for non attendance in court was that the applicant's counsel counsel was bereaved. He had lost his nephew whose burial had been set for November 12, 2021. On November 9, 2021, the applicant's counsel wrote to the Respondents informing them of his bereavement. This letter was received at the respondent's advocates firm on the same day. Though the letter was copied to the Deputy Registrar of the court, it appears it was not put in the court file as there is still no copy in the court file.
15. The court record of November 10, 2021 does not show whether the respondent's advocate informed the court of Mr Momanyi's bereavement. The counsel for the respondent Ms Chesoo merely said that she had informed Mr Momanyi of the hearing date and that in his absence she applied for closure of the defence case.
16. Professional courtesy demanded that Ms Chesoo should have brought it to the attention of the court that though Mr Momanyi was absent, he had written to them informing them that he was bereaved. The respondent's counsel would then proceed to make her application for the court to decide whether to close the defence case or not in the circumstances.
17. The respondent's counsel submits that Mr Momanyi did not prove that he was bereaved by either annexing a copy of burial permit or eulogy to the application. This court takes judicial notice of the African Culture of most communities where issues of bereavement are taken seriously. Mr Momanyi had lost a son to his brother who is said to be deceased. It would not have been expected that Mr Momanyi would have left the arrangements of his departed nephew to come to court and argue the case. He was courteous to write to the respondent's counsel to inform him of the same. In the circumstances it will be inconsiderate to expect Mr Momanyi to go to an extent of annexing burial permits or eulogy as proof of bereavement.
18. There is an application which was made in this case seeking to strike out the applicant's defence. This application was not allowed as the court found that the defence had a triable issue. Failure to attend court on November 10, 2021 was not willful. It was due to bereavement which does not knock when it comes. Let the applicant be given an opportunity to be heard. I therefore allow the applicant's application. The proceedings of November 10, 2021 are hereby set aside. As this case has been in the corridors of justice for 19 years, I direct that it should be set down for hearing on a priority basis. As to costs, I will order that each party do bear their own costs as it will not be fair to penalize a party whose absence in the proceedings was due to circumstances beyond his control.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 29TH DAY OF SEPTEMBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Momanyi for Defendant.

Court Assistant –Albert

E. O. OBAGA

JUDGE



29TH SEPTEMBER, 2022

