



REPUBLIC OF KENYA



**Magige & 4 others v Wasonga (Environment & Land Case 96 of 2018)
[2022] KEELC 14478 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 14478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 96 OF 2018
MN KULLOW, J
SEPTEMBER 27, 2022**

BETWEEN

**MARWA IKANGA MAGIGE 1ST PLAINTIFF
CHRISTOPHER MWIKABE NYANCHERU 2ND PLAINTIFF
MWITA IKANGA MAGIGE 3RD PLAINTIFF
MWIKABE WANKIO 4TH PLAINTIFF
NYAMUHUNDA IKANGA MAGIGE 5TH PLAINTIFF**

AND

MARGARET WASONGA W/O SAMWEL CHACHA DEFENDANT

RULING

1. By notice of motion dated November 18, 2021, and filed under certificate of urgency, the applicants sought the following orders: -
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. Spent
 - e. The honourable court be pleased to vary, rescind and/or set aside the orders issued on the November 8, 2021.
 - f. Consequent to prayer No 5 hereinabove being granted, the honourable court be pleased to reinstate and/or re-admit the plaintiffs/ applicants suit herein for hearing and disposal on merit.



- g. Cost of this application do abide the cause.
2. The application is based on the 13 grounds thereof and the supporting affidavit of Marwa Ikanga Magige on November 18, 2021, on his own behalf and on behalf of the other plaintiffs/ applicants. It is his contention that the defendant/ respondent's advocate and/or his representation fixed the suit for hearing in secrecy and failed to inform their advocate by issuing a hearing notice to that effect. Consequently, on the hearing date; November 8, 2021, their advocate was not present in court neither did the defendant's advocate inform the court that he did not serve the plaintiffs' with the said hearing date. The suit was thus dismissed for want of prosecution.
 3. It is the applicants' claim that they have been condemned unheard and their rights to fair hearing has violated/ infringed.
 4. They further contend that there was no affidavit of service whatsoever filed in court by the defendant/ respondent and therefore the defendant/ respondent's advocate proceeded to ask the court to dismiss the suit without any justifiable reason.
 5. They are apprehensive that since the defendant/ respondent has extracted the decree, she is likely to proceed to execute the said decree at any time and as a result they are bound to suffer substantial loss and damage.
 6. It is their contention that having demonstrated a sufficient cause to warrant the setting aside of the orders issued on the November 8, 2021, they urged the court to allow the application *ex-debito justitiae*.
 7. The application was opposed. The respondent's advocate indicated to the court on January 27, 2022 that they had filed their replying affidavit; however, on a perusal of the court record, i have not seen any such replying affidavit. Be that as it may, I will proceed to analyze the evidence tendered by the applicants in determining the application.
 8. This court issued directions that the application be disposed of by way of written submissions on November 24, 2021. The applicants' counsel filed their submissions dated May 16, 2022, which I have taken into account in arriving at my decision. Respondent's counsel on the other hand informed the court on May 31, 2022 that they would be relying on their pleadings as submissions.

B. Analysis and Determination

9. This court is of the considered opinion that the sole issue arising for determination is: -
 - a. Whether the applicants have made out a case for setting aside the proceedings and orders made on November 8, 2021 and all the consequential order.
10. The grounds for setting aside an *ex-parte* judgment are now well settled. The court in determining whether or not to grant such orders ought to exercise such powers judiciously taking into account the circumstances of each case and the reasons advanced.
11. In *Mbogo v Shab* 1968 E.A 93 the court held that: -

“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”
12. As stated above, an order for setting aside is discretionary in nature and such discretion ought not to be exercised in favor of an undeserving party. The applicants contends that the hearing dated of November



8, 2021 was fixed by the respondent's advocate and/or his representative, however, they failed to serve a hearing notice to that effect for purposes of informing the plaintiffs/ applicants of the said hearing date. Consequently, on the November 8, 2021, when the matter came up for hearing, neither the applicants/ plaintiffs nor their advocate attended court since they were not aware of the said date. They thus urged the court to allow the application *ex-debito justitiae*.

13. In defining what amounts to sufficient cause, Mativo J in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR held that: -

“sufficient cause is thus cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

14. This court has taken the liberty to peruse the court record to ascertain the averments by the applicants that they were never served with the hearing notice notifying them of the hearing date of November 8, 2021. On September 22, 2021, when the matter came up for mention for directions, there was no representative for the applicants/ plaintiffs. This court issued the hearing dates of 8th & November 9, 2021 and directed the defendant's advocate to serve the plaintiffs with a hearing notice to that effect.
15. On the scheduled hearing date of November 8, 2021, neither the plaintiffs nor their advocate on record was present in court. I have however noted that the respondent's advocate did not file any return of service to prove that they had indeed served the applicants/ plaintiffs with the hearing notice as directed. Therefore, in the absence of the affidavit of service, there is reason to believe the applicants' assertions that they were not aware of the said hearing date hence their failure to attend court as scheduled. Since there is no proof that they were served and notified of the hearing date, I find that there was no basis for dismissal of the suit for want of prosecution.
16. It is in the interest of justice that a party shall not be condemned unheard; article 50 of the *Constitution* provides the right to have any dispute decided in a fair hearing before a court. Further, the requirements of article 159 of the *Constitution* and the overriding objectives demands the courts to often strive to serve substantive justice.

Conclusion

17. In the upshot, I accordingly find that the application dated November 18, 2021 is merited and I proceed to allow the same on the following terms;
- a. The *ex-parte* proceedings on November 8, 2021 and all the consequential orders be and are hereby set aside and the plaintiffs' case is hereby reinstated for hearing.
 - b. The applicants/ plaintiffs herein are hereby directed to fix the matter for hearing on a priority basis.
 - c. Costs of the application in the cause.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 27TH DAY OF SEPTEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE



Ruling delivered in the presence of: -
Plaintiff/ Applicant present in person
Nonappearance for the Respondent
Tom Maurice - Court Assistant

