



Kimeria & another v Unaitas saving & credit society Co-Operative Limited (Environment & Land Case 02 of 2020) [2022] KEELC 12641 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 02 OF 2020
AA OMOLLO, J
SEPTEMBER 22, 2022**

BETWEEN

ELIUD WAITITU KIMERIA 1ST APPLICANT

JANE MUTHONI KARANJA 2ND APPLICANT

AND

**UNAITAS SAVING & CREDIT SOCIETY CO-OPERATIVE
LIMITED RESPONDENT**

RULING

1. This ruling is in respect to the defendant/applicant's notice of motion dated April 27, 2022.
2. The application is expressed to be brought under article 50 and 159 of the *Constitution of Kenya*, 2010, the provisions of section 1A, 1B, 3A, section 63 (e) of the *Civil Procedure Act*, order 51 rule 1 and 4 of the *Civil Procedure Rules*, section 173 of the *Evidence Act*, and other enabling provisions of the law.
3. The applicant seeks the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That the honourable court do set aside its orders of March 24, 2022 that allowed the proceeding of this matter in the absence of the defendants and or their witnesses and substitute the same with orders reopening cross-examination of the plaintiff's witness who testified on material date and eventual reopening of the entire proceedings.
 - iv. That the honourable court do reopen this suit and make orders allowing the defendants and their witnesses to participate in the proceedings, call witnesses, produce evidence and tender documents for purposes of fair trial and just determination of real issues of dispute herein.



- v. That the honourable court do stay and set aside all its orders of March 24, 2022 and subsequently facilitate fresh hearing of the plaintiff, its witnesses and defendants and their witnesses for interest of justice.
 - vi. That the cost of this application be provided for.
4. The application is based on the grounds on its face and supported by the affidavit sworn on April 27, 2022 by one Julius Ndichu.

Factual Background

5. The plaintiff/respondent filed its amended plaint dated July 21, 2021 on July 26, 2021. In the amended plaint, it prays for judgment against the defendants for:
- a. An order for delivery of vacant possession of all that property known as title number Naivasha / maraigushu block 18/647.
 - b. An order for eviction of the defendants in the event of their failure and/or refusal to comply with the order granted under prayer (a) above.
 - c. An order directed at the officer commanding station (OCS) Naivasha police station to provide security and ensure peace and order for purposes of implementation of the order made in prayer (b) above.
 - d. A permanent injunction to restrain the defendants from remaining on, entering into or continuing in occupation of all that property known as title number Naivasha/maraigushu block 18/647.
 - e. Damages for trespass and/or mesne profits at the rate of kshs 500,000 per month or such other sum as the Honourable Court may assess.
 - f. Any other relief the honourable court may deem just to grant.
 - g. Costs and interest of the suit.
6. From the court records there is a copy of the 1st and 2nd defendants' amended statement of defence dated July 8, 2022. The defendants denied the Plaintiff's allegation in the amended plaint and urged the court to dismiss the plaintiff's case with costs.
7. The matter came up for hearing on March 24, 2022 when the plaintiff's case was heard and closed without the defendants' presence despite service of the hearing date. The court then directed parties to file their written submissions. This is what has prompted the instant application.

Defendants/Applicant's Contention.

8. The application is supported by an affidavit sworn by Julius Ndichu, advocate for the defendants/applicants.
9. He contends that the matter was slated for hearing on March 24, 2022 when the plaintiff's case was heard and closed in the absence of the defendants after which the court ordered the defendant's case closed and further ordered that parties file their submissions.
10. He further contends that the defendants/applicants had filed their statement of defence and their respective witnesses have always been ready to defend their case.



11. It is his contention that when the matter came up for hearing, he erroneously informed that the same was to proceed virtually instead of physically. He further contends that he logged in virtually only to learn that he was to attend the matter physically. He contends that the mistake emanated from his office as a result of miscommunication and that the mistake of the counsel should not be visited upon the defendants/applicants. He contends that the instant application was brought without delay.
12. He ends his deposition by stating that it is imperative that for the ends of justice to be met, the plaintiff/respondent's case should be re-opened, defendants/applicants be allowed to participate and their case heard on merit.

Respondent's Response.

13. In response to the application, the plaintiff/respondent filed its grounds of opposition dated May 17, 2022 where it avers that the application is defective as the jurisdiction of the court to grant the reliefs sought under the law was not invoked and therefore not exercisable in the defendants/applicants favour.
14. It avers that the application is untenable as the defendants/applicants explanation of failure to attend court on March 24th, 2022 is unmitigated and inadmissible hearsay.
15. The plaintiff/respondent further avers that it is not in dispute that the defendants/applicants were notified of the said hearing which would proceed in open court. It avers that the defendants/applicants allegation that the hearing was to proceed virtually is deliberately misleading.
16. It avers that the defendants/applicants conduct is indicative of a party out to deliberately impede the early conclusion of the suit herein and therefore subvert justice.
17. The plaintiff/respondent ends its disposition by stating that even if the reliefs sought in the application are granted, it would not serve any purpose as the defendants/applicants Amended Defence constitutes mere denials.
18. The respondent further contends that the defendants never filed any list of witness, statements and documents which would entitle them to lead any evidence in the matter.

Issues For Determination.

19. The plaintiff/respondent filed its submissions on May 27, 2022 where it argued that the instant application was triggered by the ex parte hearing of March 24, 2022. It submits that if the defendants/applicants were keen to avoid the consequence of the ex parte hearing occasioned by their non attendance, they were bound to approach the court within the provisions of order 12 of the *Civil Procedure Rules*.
20. It further submits that it is evident from the face of the application that the defendants/applicants did not invoke the said provisions and therefore contends that the application is fatally defective liable for striking out with costs. It relied on the Supreme Court case in *Daniel Kimani Njibia v Francis Mwangi & another* [2015] eKLR which held:

“...that a litigant should invoke the correct constitutional or statutory provision and an omission in this regard is not a mere procedural technicality to be cured under article 159 of the Constitution.”
21. It also relied on the case of *Joyce Liku Janda v Care International* [2009] eKLR and urged the court to apply the above legal principles as set out in the said decisions and find that the application is incurably



- defective and strike it out with costs. The plaintiff/respondent relied on the case of *Wachira Karani v Bildad Wachira* [2016] eKLR and submits that no basis has been laid to warrant the granting of the reliefs sought by the defendants/applicants and further that the discretion of the court has been fully settled in the mentioned jurisdiction. It submits that it is not in dispute that the defendants/applicants had notice of the hearing of March 24, 2022 which was scheduled to proceed in open court. It further submits that there is no basis for the lack of clarity as to the manner in which the hearing was to be conducted.
22. The plaintiff/respondent submits that there is no material introduced on record to support the deposition that the defendants/applicants had any of the alleged challenges in attending court on March 24, 2022. It contends that the depositions in the supporting affidavit in so far as they purport to offer an explanation for the defendants/applicants non-attendance constitutes hearsay with no probative value which the court should disregard.
 23. The plaintiff/respondent argues that there being no sufficient explanation on the failure to attend court, this court has no basis upon which it may exercise its discretion as sought in the application.
 24. It also contends that the defendants/applicants amended defence on record does not plead any positive position as it only contains mere denials. It further contends that the defendants/applicants have not filed any bundle of documents or witness statements and therefore reopening the case would not be efficacious since they don't have any tenable defence to pursue and support in evidence.
 25. The plaintiff/respondent in conclusion submits that in the event the court was to exercise its discretion in favour of the defendants/applicants, they urged the court that the same be on such terms as to payment of assessed thrown away costs.
 26. The defendants/applicants on the other hand filed their submissions on April 27th, 2022. They identified the following issues for determination:
 - a. Have the defendants/applicants made out a prima facie case with a probability of success?
 - b. Whether the defendants/applicants have established sufficient cause to warrant a grant of the orders sought.
 - c. Whether the application meets the threshold for setting aside the ex parte proceedings and subsequent orders issued on March 24, 2022.
 - d. Costs.
 27. On the first issue, the defendants/applicants relied on the cases of *Giella v Cassman Brown* and *Mrao v First American Bank of Kenya Limited & 2 others* and submit that they have met the legal threshold to warrant grant of an injunction.
 28. On the second issue, they submit in the affirmative and argue that they did not fail to attend the hearing for purposes of deliberately delaying the course of justice but a genuine error on the part of their counsel. They relied on the case of *Shah v Mbogo* which held that the mistake of the counsel should never be visited upon the client. They also cited the case of *Joswa Kenyatta v Civicon Limited* [2020] eKLR and submit that they have established sufficient cause to warrant a grant of the orders sought.
 29. The defendants/applicants regarding the third issue for determination while answering in the affirmative submits that the plaintiff/respondent did not serve them the hearing notice informing them that the matter will proceed in open court. They further submit that their advocate logged on virtually only to learn that the matter was conducted in open court.



30. They relied on the case of *FM v EKW* [2019] eKLR and submit that by virtue of the orders issued by the court on March 24, 2022 directing those submissions be made on May 10, 2022 has since denied them the opportunity to cross examine the plaintiff/respondent and also call witnesses for his defence. They relied on the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 and submit that the honourable court has discretion to set aside orders granted ex parte under Order 51 Rule 15 of the *Civil Procedure Rules*.
31. The defendants/applicants submit that the application meets the threshold for setting aside the ex parte proceedings and orders issued on March 24, 2022 and May 10, 2022. They further submit that unless the orders sought are granted, their constitutional right of fair hearing will be infringed as they will be condemned unheard. They submit that they have proven its case and the plaintiff/respondent should bear the costs of the application.

Analysis And Determination.

32. It is not in dispute that the applicant's counsel was served with a hearing notice but failed to attend court.
33. Upon perusal of the application, supporting affidavit, grounds of opposition and submissions filed in respect of this application, it is my considered view that the issue that arises for determination is:
 - a. Whether the applicant has established sufficient cause to warrant an exercise of discretion by this court so as to review, vary and/or set aside the orders of March 24, 2022.
 - b. Who should bear the cost of this application?A. Whether the applicant has established sufficient cause to warrant an exercise of discretion by this court so as to review, vary and/or set aside the orders of March 24, 2022.
34. The Law relating to setting aside orders is found order 51 rule 15 of *Civil Procedure Rules* and it provides as follows;

“The court may set aside an order made ex parte.”
35. Article 159 of the constitution of Kenya, 2010 sets out the principles that shall guide courts and Tribunals while exercising judicial authority. Notable among them is that Justice shall be not be delayed and shall be administered without undue regard to procedural technicalities.
36. The power of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) 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.”
37. In *Joswa Kenyatta v Civicon Limited* [2020] eKLR, the Learned Judge, in his obiter Dictum, singles out the principles to be considered in exercising discretion in favour of an applicant seeking to set aside ex parte judgment and /or proceedings. My analysis of them is as follows;
 - a. The applicant must demonstrate sufficient cause.
 - b. The applicant must have filed a defence which raises triable issues.



- c. The discretion to set aside ex-parte proceedings must be done upon terms which are fair to both parties.
38. In the decision of *Wachira Karani v Bildad Wachira* [2016] eKLR, the Learned Judge what is meant by sufficient cause as follows:
- “Sufficient cause is thus the 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...”
39. The defendants/applicants have given reasons for their failure to attend court on March 24, 2022. They explain that it was as a result of a genuine error on the part of their counsel. They state that their counsel was under the impression that the matter would proceed virtually only to learn that the hearing was being conducted in open court.
40. I have perused the hearing notice and it clearly states that the hearing would be proceeding in open court. The assertions by the defendants/applicants are therefore not entirely true. What might have been a plausible reason is that they did not properly read the contents of the hearing notice.
41. In order to advance the cause of justice, as is called upon me under article 159, I find that the failure to attend the hearing by the applicants was not due to their negligence but was on account of mistake by counsel.
42. Consequently, I hold that the applicant has demonstrated a sufficient cause upon which the court can exercise its discretion.
43. The second principle is that an applicant must demonstrate that it has a defence which raises triable issues. In *Spinners and Spinners Limited v Kimilili Wholesalers (K) Limited* [2021] eKLR, the learned Judge cited with approval the decision the court in Uganda *Libyan Arab Bank v Intrepol Ltd* (1985) HCB wherein the Court held:
- “In its written statement of defence, it was clear that the defendant denied being indebted to the plaintiff in the manner alleged by the plaintiff in the plaint. This was perfectly proper defence to raise against the plaintiffs claim which raised triable issues of fact and Law fit for trial by this court.”
44. The plaintiff contends that the defence raises mere denials and does not serve any useful purpose. On perusal of the amended defence, I note that the defendants deny that the suit property was sold by public auction and avers that the purported sale by public auction is illegal and unlawful.
45. Further, contrary to the plaintiff/respondent’s contention, that the defendants/applicants have not filed a list of documents and witness statement, the court record shows that they were filed on July 7, 2022. The list of documents includes two titles pertaining to the suit property. In one, the suit property is registered in the name of the plaintiff/respondent while the other is in the name of the defendants/applicants.
46. In my view these are matters that necessitate further enquiry and I am therefore not convinced that the defence raises mere denials.
47. In view of the foregoing, the second principle for setting aside ex parte proceedings has been met.



48. The final principal is that the discretion to set aside must be done upon terms which are fair to both parties. The plaintiff has closed its case and the suit was pending submissions and judgement.
49. Setting aside the ex parte proceedings will invariably delay justice for the plaintiff and no doubt cause him a considerable amount of inconvenience.
50. The defendants have also expressed that the court should consider awarding them thrown away costs, should this application to set aside proceedings succeed. However, they have not prayed for a specific amount.
51. In *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 Duffus P held thus;
“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules....”

B. Who should bear the costs of this application?

52. The general rule is that costs shall follow the event. This is in accordance with the provisions of section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

Disposition.

53. In view of the foregoing and in order to meet the ends of justice, I find that this is a fit case for the exercise of the court’s discretion. Justice shall be better served when both parties are given an opportunity to be heard.
54. Consequently, the application dated April 27, 2022 is allowed in the following terms.
 - a. The orders made by this honourable court and proceedings of March 24, 2022 are hereby set aside.
 - b. The plaintiff’s case is re-opened for purposes of cross- examination of the plaintiff by the defendants/applicants.
 - c. The defendants/applicants case shall be re-open for purposes of tendering evidence and cross examination.
 - d. The plaintiff/applicant shall have thrown away cost of kshs 20,000 to be paid before the hearing date.
 - e. The costs of this application shall abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the defendants/applicants.

No appearance for the plaintiff/respondent



Court Assistant; Monica Wanjohi

