Okal & another v Muigai & 2 others (Environment & Land Case 3440 of 1995) [2022] KEELC 13308 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13308 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 3440 OF 1995

JA MOGENI, J

SEPTEMBER 22, 2022

BETWEEN

CHARLES ODHIAMBO OKAL ..... 1ST PLAINTIFF

LINET ANYANGO ODHIAMBO ..... 2ND PLAINTIFF

AND

CAXTON CHEGE MUIGAI ..... 1ST DEFENDANT

JOB MOGENI OBANDA ..... 2ND DEFENDANT

NAIROBI CITY COUNCIL ..... 3RD DEFENDANT

RULING

1. I have a notice of motion application dated June 22, 2022 seeking to have the judgment delivered by this court set aside. The application is brought under order51 rule 1 of the *Civil Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act*, article 50 and 159 (2) (d) of the *Constitution*. Caxton Chege Muigai the 1st defendant is seeking to set aside the judgment delivered by this court on the June 8, 2022 on the principal ground that the failure by the applicant/defendant attending court was as a result of inadvertence from his advocate and therefore the mistake of the advocate should not be visited on the client.

2. The applicant alleges that the defendant's case is merited and it raises triable issues and failure to reopen the case would prejudice the defendant and he would be condemned unheard contrary to the provisions of articles 50 and 159(2) (d) of the *Constitution*. The applicant states that his defence discloses triable issues which ought to be heard on the merits and consequently, he seeks this court to re-open the case.

3. The application seeks the following orders:

    i. Spent.

ii. That the court be pleased to order a stay of execution of the judgment delivered herein on June 8, 2022 and all other order consequential therefrom pending the hearing and determination of this application inter partes.

iii. That the honorable court be pleased to set aside the judgment delivered on June 8, 2022 and re-open the proceedings.

iv. That leave be granted to the applicant to present his evidence and/or call witnesses to support his case.

v. That the honorable court be pleased to make such other or further orders as may be necessary to bring into effect prayers 3, 4 and 5 above or as the justice of the case may demand.

vi. That the costs of the application be in the cause.

4. The application was based on the grounds on the face of it and on the sworn affidavit of Caxtone Chege Muigai dated June 22, 2022.

5. Briefly, the applicant asserted inter alia, that the non-attendance in court on the part of his counsel was not intentional but was occasioned by factors beyond his control and in spite of his best efforts. That the application has been brought without inordinate delay. That it is only fair that the court exercises its discretion leniently and be pleased to set aside the judgment delivered on June 8, 2022 and re-open the proceedings. That the respondents do not stand to suffer any damage if the judgement is set aside and the suit is heard and determined on its own merits. Further that the defendant's case is merited and it raises triable issues and if the case is not re-opened then then the defendants will be condemned unheard

6. By a replying affidavit sworn by Charles Odhiambo Okal the 1st plaintiff on behalf of Linet Anyango Odhiambo with her full authority dated July 13, 2022, opposed the application. The grounds among others are;-

a. The application lacks merit and is an abuse of the court process since the 1st defendant was given ample time to put his house in order but he failed.

b. That the 1st defendant has brought this application almost six months since the last appearance by both parties in court which was on January 20, 2022 when the date for the judgment was issued that is June 8, 2022.

c. That the 1st defendant has not indicated when he was informed by his advocates on record that the matter was not cause-listed since his advocates on January 20, 2022 requested the court to put aside the file to allow the 1st defendant come to court but he never re-appeared.

d. That the 1st defendant has failed to comply with order 9 rule 9 for change of advocates since the final judgment has already been delivered.

e. The 1st defendant should not be granted audience before this court unless he complies with the court judgment and vacates the suit premises.

f. That a trial should be able to start and conclude and that this matter has been in court for 27 years and so article 50 and 159 of the *Constitution* do not apply.

g. That the plaintiffs will suffer serious prejudice if the application is allowed since the matter is not one where compensation by way of costs would be adequate.

7. In the affidavit of Caxton Chege Muigai sworn on June 22, 2022 it is deponed that the applicant attributes his non-representation at the hearing of this suit on his advocate's failure to inform him that the matter was listed for defence hearing on January 20, 2022 leading to his failure to attend court since when he was called he was in Thika and could not make it to Milimani courts. The defence hearing could therefore not proceed since the plaintiff had earlier closed its case. The matter was therefore marked as undefended and a judgement was later delivered on June 8, 2022.

8. In that judgment the honourable court dismissed the applicant's defence and counterclaim for want of prosecution. The applicant however contended that the failure to attend court was not intentional but was an honest mistake on the part of his advocate. That as the legitimate owner of the suit property, he stands to suffer irreparable lose if the judgment is executed. Further that this application has been made without undue delay. Further that the mistakes of its advocates on record should not be visited on him. That if the judgement is set aside the respondent will not suffer any prejudice. That the suit should be heard on merit and the applicant given a chance to ventilate its case on ownership to the suit land.

9. In its submissions the applicant has urged the court to set aside the judgment and re-open the case to allow the applicant to lead their defense. That the defendants should not be condemned unheard. That its defence was not heard/case undefended due to error of the advocate where they advised the applicant that the case was not in the cause list. That the transgressions of counsel should not be visited upon them. The applicant has framed three issues as being those requiring address:

    a. Whether the stay of execution orders should be granted to the applicant.

    b. Whether the court has jurisdiction to re-open a case and call witnesses.

    c. Whether the present application has been made without inordinate delay.

10. The plaintiffs/respondents did not file any submissions nor frame issues but in their replying affidavit they stated that the applicant had showed reluctance in prosecuting its case even when the court indulged them before the determination of the suit. That on the day of hearing the applicant was not in court.

Analysis and Determination

11. I consider the issues for determination in an application for setting aside *ex parte* judgment to be whether there was proper service of a hearing notice, whether the judgment on record was regular or irregular, and whether the applicants are entitled to stay of execution of the decree and order of the court.

12. The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel v East Africa Cargo Handling Services*[supra]where Duffus,V.P stated;

> " 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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable

issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

13. The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated ''sufficient cause" to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase "sufficient cause" mean. The Supreme Court of India in the case of *Parimal v Veena* civil appeal 1467 of 2011 observed that:-

> " sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

14. In exercising my discretion in the instant case I must ask myself whether there was proper service of the hearing notice on the advocates for the defendant. It is not disputed that a hearing notice was served on the advocate for the applicant/1st defendant but he applicant contends that the advocate inadvertently did not inform the client of a hearing date. The history of this matter shows that on the date when the matter came up for hearing, the advocate on record informed the court that she had no instructions despite being on record. She even asked that the file should be placed aside to allow her to trace her client. The advocate for the plaintiffs was magnanimous and agreed to have the file placed aside for some time. The applicant was however not able to attend court despite all these efforts.

15. I note that when this matter first, came up for defence hearing on November 2, 2021 the applicant asked the court to grant him time to file a notice of appearance so that he appears in person and to file the bundle of documents and witness statements. He was granted 14 days and the matter was now rescheduled to December 20, 2021. The court did not sit on that particular date and the matter was rescheduled to January 20, 2022. Second, the applicant did not file the notice of appearance despite the order of the court and neither did he attend court on January 21, 2022 when the matter came up in court. Instead his counsel Ms Wangare attended court and sought for the file to be put aside as she traced the applicant who however was not able to attend court on that day.

16. From the above brief history of this matter it is clear that the 1st defendant's counsel was duly served with a hearing notice, given a second chance to avail his client but did not do so. The tired phrase of mistake of counsel should not be visited upon a client does not apply in this case. No other reason or sufficient cause has been advance to enable the court exercise its discretion in favour of the applicant.

17. In the case of *Bl Mech Engineers Ltd v James Kahoro Mwangi*, (2001) eKLR in which Justice Waki J.A as he then was held;

> " The applicant had a duty to pursue his advocate to find out the position of the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocate. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter.

If the advocate was simply guilty of inaction that is not an excusable mistake which the court may consider with some sympathy. "

18. Indeed, as circumstances are the court can only sympathize with the applicant and go no further than that.

19. On the issue as to whether the judgment was regular or irregular, the court is guided by the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another*, civil appeal No 6 of 2015 eKLR (Msa), the learned judges of appeal had this to say;-

> " We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & another v Shah* (supra), *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & another v Kubende* [1986/ KLR 492 and *CMC Holdings v Nzioki* [2004/ 1 KLR 173).
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango 0100 v Attorney General* [1986-19891 EA 456)'.

20. This case falls under the category of regular judgment. It should be noted that the defendants entered appearance, filed a defence and counterclaim have been participating in the case through their advocate on record. Further the advocate made a case for them and was allowed to have the matter deferred to allow the defendants attend court.

21. Notably this matter has been in court for the last 27 years and it has been adjourned several times. The applicants were accorded ample time to even act in person but they did not show up when the

matter was fixed for the application to be filed and argued. They were accorded the right to be heard but squandered the opportunity. I therefore find that the judgment was regular.

22. The court will therefore not look at the issue of stay of execution as the applicant has failed to provide sufficient reasons why they did not attend court during the hearing. I am not persuaded that the reasons given warrant a setting aside of the judgment and therefore I will not look at the stay of execution because it fails in the face of upholding the regular judgment.

23. Having found that there was proper service, I find that the application lacks merit and is therefore dismissed with costs to the plaintiff.

It is so Ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 22ND DAY OF SEPTEMBER 2022

.....

MOGENI J

JUDGE

In the virtual presence of: -

Mr. Onyango for the 1st and 2nd Plaintiffs/Respondents

Ms. Koech for the 1st Defendant/Applicant

None appearance for the 3rd Defendant

Court Assistant: Vincent Owuor

.....

MOGENI J

JUDGE