



REPUBLIC OF KENYA



KENYA LAW
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**Ali (Suing as Administrator and Legal Representative of the Estate
of Twahiri Famau -Deceased) v Werimo & another (Land Case
41 of 2013) [2022] KEELC 14556 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14556 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 41 OF 2013
MAO ODENY, J
OCTOBER 31, 2022

BETWEEN

**MUNAA TWAHIR ALI (SUING AS ADMINISTRATOR AND LEGAL
REPRESENTATIVE OF THE ESTATE OF TWAHIRI FAMAU -
DECEASED) PLAINTIFF**

AND

AGNES WERIMO 1ST DEFENDANT

BEATRICE ONCHUMBO 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated March 17, 2020 by the Defendant/Applicants seeking the following orders; -
 - a. Spent
 - b. Spent
 - c. That upon *inter partes* hearing, this honourable court be pleased to review and set aside its judgment entered against the defendants on the 30th day of January 2020 by reopening the defence case to enable the defendants to defend themselves to grant leave to the defendants to file a supplementary list of documents, further witness statement and supplementary list of witnesses in order to place all relevant facts before court for full and final adjudication;
 - d. The honourable court be pleased to order that the suit proceeds on priority basis and a time limit be set for compliance in order to expeditiously and finally conclude the matter;
 - e. That the honourable court be pleased to grant any further or other directions as it may deem fit in furtherance of interest of justice; and



- f. That costs of this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Defendant/applicant's Submissions

3. The Applicant relied on the sworn affidavit of Agnes Werimo Morris the 1st Defendant who deponed that on March 11, 2020 she was served with a final decree dated January 30, 2020. She further stated that she had been residing on the suit property with her late husband before the 1992 when the same was allocated to him.
4. It was the Applicant's case that she learnt of this case on April 12, 2013 through one Awadh Salim Hiyesa who served her summons and instructed the firm of Richard O & Company Advocates to defend her whom she supplied with all the documents necessary for her defence.
5. The Applicant stated that she did not receive any communication from her advocates despite her visits to the advocate's offices to enquire on the progress which prompted her to instruct the firm of Riziki Emukule & Co Advocates and urged the court to allow the application as prayed.
6. The Defendants further filed a Notice of Motion dated June 8, 2021 seeking the following orders; -
 - a. Spent
 - b. The applicants be granted leave to appoint the firm of Muli Ole Kina advocates to act for them in this matter
 - c. There be stay of execution of the orders of the honourable court issued on May 26, 2021 pending the hearing and determination of this application.
 - d. The honourable court be pleased to discharge, vary or set aside the orders issued on May 26, 2021.
 - e. The honourable court be pleased to list the defendants' application dated 2020 for hearing.
7. The application is based on the sworn affidavit of Beatrice Ochumbo the 2nd Defendant who states that the 1st Defendant is her co widow who deponed that previously they had been represented by the firms of Richard O and Riziki Emukule & Co advocates and judgment having been delivered they seek for leave to change their advocate and have the firm of Muli & Ole Kina advocates come on record.
8. It was the Applicant's case that the firm of Riziki Emukule & Co advocates filed a Notice of Motion seeking *inter alia* to set aside the judgment of the court and stay was granted on March 19, 2020 which application is yet to be heard. Further that there seems to be an error on the face of the record as the court proceeded to hear the Plaintiff's application dated October 22, 2020 before the stay on record was set aside.
9. The Applicant stated that they only became aware after they were served with demolition notice and summons to appear before Hindi Police station which led them to calling their new advocate Mr ole Kina who informed them that upon perusal, their application had not been heard following the down scaling of court's operations.
10. Counsel submitted that the Plaintiff sought a declaration against parties who were not the registered proprietors of the suit property and failed to disclose at the time he commenced the suit that Morris Ochumbo Oluoch was deceased and the suit property was registered in his name.



11. Counsel further submitted that failure by the Applicants to prosecute the application dated March 17, 2020 was not attributed to the Applicants but rather was an inadvertent mistake on part of the advocates on record thus the Applicants should not be condemned unheard.
12. The Respondent filed a Replying Affidavit and gave a chronology of the suit and the application. The Respondent blamed the delay in prosecuting the application on counsel who did not take action and update them on the progress of the case.
13. Counsel identified three issues for determination as follows: -
 - a. Whether the plaintiff and his counsel failed to disclose material facts.
 - b. Whether the mistake/error on the part of counsel for the defendants ought to be visited upon the defendants
 - c. Who bears the costs.
14. Counsel relied on the case of *Shah Vs Mbogo & Another* (1967) on the issue of the courts discretion and submitted that the Plaintiff's counsel had a duty to inform the court that at the time of filing the suit Morris Ochumbo Oluoch was deceased and this failure amounted to material non-disclosure by the Plaintiff and his counsel.
15. Counsel further cited the case of *Bahadurali Ebrahim Shamji Vs Al Noor Jamal & 2 Others* [1998] eKLR where the Court of Appeal held that the duty of the Applicant applies not only to material facts known to the Applicant but also to any additional facts which he would have known if he had made sufficient inquiries which depends on the circumstances of the case.
16. It was counsel's further submission that mistake of counsel should not be visited on the Applicant and relied on the case of *Lucy Bosire v Kebanacha Div Land Dispute Tribunal & 2 others* [2013] Eklr.
17. Mr Ole Kina also cited the cases of *Suleiman vs Amboseli Resort Limited* [2004] 2 KLR 589 and *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR and urged the court to allow the applications as prayed.

Analysis and Determination

18. The issue for determination is whether the Applicant has met the threshold for setting aside order s dated January 30, 2020 and leave to file additional documents and the case be heard on priority basis.
19. The Applicant also relied on the ground that mistake of counsel should not be visited on the litigant. This is a case where the Applicant instructed counsel who filed a defence.
20. In the case of *Gideon Mose Onchwati V Kenya Oil Co Ltd & Another* (2017) eKLR cited the case of *Shah V Mbogo* and *Ongwom V Owota*, the Court held that; -

“Although it is an elementary principle of our legal system that a litigant who is represented by an Advocate, is bound by the acts and omissions of the advocates in the course of representation, in applying that principle, Courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default unless the litigant is privy to the default or the default results from failure, on the part of the litigant, to give the advocate due instructions.”



21. Similarly, in the case of *Belinda Murai & Others - v- Amos Wainaina* (1978) LLR 2782 (CALL) Madan, JA (as he then was) stated: -

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate."

22. It should be noted that applications based on grounds of mistake of counsel which should not be visited on a litigant must be dealt with on a case by case basis as litigants may also devise a scheme of changing advocates in order to blame their previous counsel. This is not a blanket ticket for such applications to be allowed. The prejudice that may occur to the opposing party must also be looked at and the delay in filing the application.
23. I have considered the applications and find that the application has merit. The ex parte judgment dated January 30, 2020 is hereby set aside and all consequential orders. Defendants granted 14 days to comply with order 11 and the matter to be mentioned before the Deputy Registrar to confirm compliance.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF OCTOBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

