



REPUBLIC OF KENYA



**Mbogo v Obago & 3 others (Environment & Land Case 101 of 2018)
[2022] KEELC 14681 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14681 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 101 OF 2018
MN KULLOW, J
OCTOBER 31, 2022**

BETWEEN

JAMES ATITO MBOGO PLAINTIFF

AND

SAMWEL OTIENO OBAGO 1ST DEFENDANT

FELIX OMONDI OBAGO 2ND DEFENDANT

COUNTY LAND REGISTRAR, HOMABAY 3RD DEFENDANT

HON. ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. By Notice of Motion dated October 28, 2020, the plaintiff sought the following orders: -
 - a) That this honourable court be pleased to set aside its orders of September 6, 2020 dismissing the plaintiff's suit for non-attendance and/or want of prosecution and all consequential orders ensuing therefrom.
 - b) That pursuant to the grant of prayer 1 above, this honourable court be pleased to reinstate the plaintiff's suit (O.S) dated August 29, 2017.
 - c) That the costs of this Application be provided for.
2. The application is based on the 7 grounds thereof and the supporting affidavit of plaintiff sworn on October 28, 2020. It is his contention that he was informed by his previous advocate on record; Kirui & Co. Advocate, that the matter was scheduled for hearing on October 7, 2020. On the said date, he attended court but unfortunately, he found out that the matter had not been cause listed. Upon inquiry; he was informed that the same had been dismissed on the September 6, 2020 for non-attendance.



3. It is his claim that he was neither aware of the earlier date of September 6, 2020 nor did he fix the said date and was thus surprised that the matter had been scheduled for hearing during the court's vacation.
4. He thus urged the court to set aside the dismissal orders and not to visit the inadvertent and inordinate mistake on the part of his previous counsel on him. He maintained that he is willing to comply with any orders of the court and is ready to prosecute his claim.
5. The application was opposed. The 1st respondent filed a replying affidavit sworn on December 14, 2020, on his own behalf and on behalf of the 2nd defendant/ respondent. It is his contention that since the inception of the suit in 2018, the plaintiff either by himself or through his advocate has not taken any steps to prosecute his case and thus owing to the said inaction, the same was legally and procedurally dismissed.
6. He dismissed the allegations by the plaintiff of the mistakes of the advocate not being visited upon the client and further averred that the plaintiff ought to have been vigilant. He maintained that he stands to suffer grave injustice should the Application be allowed. He thus urged the court to dismiss the Application.
7. The Application was disposed of by way of written submissions; however, upon perusal of the court record, only the 1st and 2nd defendants/ respondents had filed their submission and authorities in support of their case. The applicants despite being given time failed to file their submissions. Be that as it may, I will proceed to issue my ruling as hereunder;

Analysis And Determination

8. This court is of the considered opinion that the sole issue arising for determination is: -
 - a. Whether the plaintiff/applicant has made out a case for setting aside the dismissal Order made on February 6, 2020 erroneously indicated in the Application as (September 6, 2020) and all the consequential orders.
9. The grounds for setting aside an *ex-parte* order are well established. The court in determining whether or not to grant setting aside orders ought to exercise such powers judiciously, taking into account the circumstances of each case and the reasons advanced therein. There is no straight jacket formula in the exercise of this discretion.
10. In *Mbogo v Shah* 1968 EA 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”
11. This court has carefully perused the court record to ascertain the averments by the applicant. When the matter came up in court on 9/12/2019, the plaintiff was present in court while the defendants were absent. The matter was scheduled for hearing on the October 6, 2020. On February 6, 2020 the matter came up again whereupon both parties were absent. Consequently, court issued its ruling stating that since both parties were duly served as per the EMS receipt & stamp and no reason had been advanced for their non- appearance, the matter was dismissed with no orders as to costs pursuant to Order 12 of the CPR and article 159 (2) (b) of the Constitution of Kenya.



12. I do however note that from the Hearing Notice served by the court via EMS Courier Service upon the parties' advocates, the hearing date indicated is October 16, 2020. Therefore, there is reason to believe the applicants' assertions that he was not aware of the said hearing date of February 6, 2020 hence his failure to attend court as scheduled. He however attended court on the October 16, 2020 as informed and it is then that he found out that the matter had been dismissed.
13. It is therefore unclear how the said matter came up in court on February 6, 2020 as per the record, which in my humble opinion happened erroneously. Neither the plaintiff nor his previous advocate were made aware of the said date. I therefore find that there was no justification for dismissal of the suit for want of prosecution.
14. The Court of Appeal in *Phillip Chemwolo & another v Augustine Kubende* [1986] eKLR, Apaloo J.A. recognized that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.
15. 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.
16. It is well settled that the right to be heard before an adverse decision is taken against a person is very fundamental and permeates our entire justice system. This court intends to allow the parties herein to be on equal arms and allow the dispute between them to be decided on merit. See *Onyango Oloo vs Attorney General* [1986] EA.

Conclusion

17. In the upshot, I accordingly find that the Application dated October 28, 2020 is merited and I proceed to allow the same on the following terms;
 - a) An Order be and is hereby issued setting aside the dismissal orders of February 6, 2020 dismissing the Plaintiff's suit for non-attendance and/or want of prosecution and all consequential orders ensuing therefrom.
 - b) An Order be and is hereby issued reinstating the plaintiff's suit (O.S) dated August 29, 2017 for hearing and determination on priority basis.
 - c) Costs of the Application in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31ST DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Non-Appearance for the Applicants



Non – Appearance for the Respondent

Tom Maurice - Court Assistant

