



**Mosica Properties Ltd v Nzioka (Environment & Land Case  
428 of 2017) [2022] KEELC 15010 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15010 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 428 OF 2017  
A NYUKURI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**MOSICA PROPERTIES LTD ..... PLAINTIFF**

**AND**

**MOUREEN NDUNGE NZIOKA ..... DEFENDANT**

**RULING**

1. Before court is a notice of motion dated February 19, 2022 filed by the defendant seeking the following orders;
  - a) Spent
  - b) That the order of this honourable court given on May 26, 2021 and issued on February 2, 2022, dismissing the application dated March 2, 2020 be reviewed, set aside and the application be reinstated for hearing
  - c) Spent
  - d) That the cost of this application be in the cause.
2. The application was anchored on the grounds on its face together with the affidavit sworn by the defendant/applicant on February 19, 2022. The applicant's case is that there is *ex parte* judgement on record against her, which judgment was entered irregularly and obtained without service of summons on the defendant. That execution followed entry of *ex parte* judgment against her whereof she filed the application dated March 2, 2020 under certificate of urgency seeking to set aside the *ex parte* judgment herein.
3. The defendant stated further that on May 25, 2021 when the application dated March 2, 2020 came up for hearing, the same was dismissed for want of prosecution on account of his counsel's non-attendance. She argues that the mistake of her advocate should not be visited on her. Her position is



that she has a good defence to the plaintiff's suit and should be granted an opportunity to prosecute her application dated March 2, 2020.

4. The application was opposed. Charles Mwangi Muchiri, a director of the plaintiff company swore a replying affidavit on 18<sup>th</sup> March in opposition to the application. The plaintiff/respondent's case was that the application is in bad faith and a manifestation of the defendant's lethargy and indolence in prosecution of her application dated March 2, 2020. He stated that the defendant did not bother to fix the application for hearing ever though she was enjoying interim orders of stay and so the hearing date was fixed by the plaintiff counsel.
5. The respondent's position was that the applicant was only forced to move the court because of execution proceedings as the applicant had two opportunities to prosecute her application, which she failed to use. Further that the advocate of the applicant was only her agent and so she ought to have ensured her application is prosecuted and not blame the advocate. He maintained that the fact that the amount sought in the suit and granted by court in the judgement was owed by the applicant is not disputed and that the application is intended to derail the execution process.
6. The application was canvassed by written submissions. On record are the defendant's submission filed on October 26, 2022, and the plaintiff's submission filed on October 31, 2022. This court has taken into account both parties' submissions.

### Submissions

7. The defendant/applicants counsel submitted that no one should be condemned unheard and argued that the applicant's rights were violated for failure to serve on the part of the respondent. Counsel relied on the cases of *International Centre for Policy and Conflict v Attorney General & others* Nairobi Misc Court Case No 226 of 2013 and *Gulf Fabricants versus County Government of Siaya* [2020] eKLR for the proposition that substantive justice is only achieved when parties are given opportunity to be heard on merit.
8. Counsel argued that if the application dated March 2, 2020 is not heard on merit, the applicants right to a fair trial will be permanently violated and the applicant stands to lose over Kshs 10 million.
9. Further, counsel contended that the court's discretion to set aside *ex parte* orders of dismissal is unfettered. To buttress their argument counsel relied on the cases of *Mbogo & another v Shah* and *Wachira Karani v Biload Wachira* among others. It was submitted for the applicant that consequences of non-attendance of the advocate should not be visited on the client.
10. On their part, counsel for the plaintiff/respondent submitted that the applicant did not dispute service of hearing notices of hearing of the application dated March 2, 2020. Counsel pointed out that the applicant has not demonstrated any reasons why she did not move the court to fix a hearing date for her own application but chose to enjoy interim orders at the detriment of the plaintiff who could not enjoy the benefits of the judgement.
11. Counsel observed that the application for want of prosecution was dismissed on May 26, 2021, the plaintiff applied for notice to show cause, served on December 16, 2021, but the applicant did not make an application in a period of seven months and hence she is guilty of laches.
12. It was contended by the respondent's counsel that to obtain orders of review, the applicant must satisfy the conditions set out in order 45 rule 1 of the *Civil Procedure Rules* by demonstrating that there is discovery of new evidence, mistake or error apparent on the court record or any sufficient reason. Further that the applicant did not satisfy any of these conditions.



13. On the issue of non-attendance by counsel for the applicant, counsel argued that the case belongs to the litigant and not her advocate and that therefore there is no justification in blaming the advocate. Reliance was placed on the case of *Savings and Loans Limited v Susan Wanjiru Murithi* (Milimani HCC No 397 of 2002)

### **Analysis and Determination**

14. I have carefully considered the application, the supporting affidavit, the replying affidavit and the submissions of parties. The issue for determination is whether the applicant has demonstrated a sufficient cause to warrant setting aside *ex parte* orders made on May 26, 2021.

15. The court has unfettered discretion to set aside *ex parte* orders. However, that discretion must be exercised judiciously, and not capriciously or whimsically. Legal provisions for setting aside *ex parte* orders is stated in order 12 rule 7 of the [Civil Procedure Rules](#) as follows;

"Where under this order judgment has been entered or the trial has been dismissed, the court on application, may set aside or vary the judgment or order upon such terms as may be just."

16. In considering an application to set aside *ex parte* orders, the court ought to consider whether the applicant was aware of the hearing date and whether his non-attendance was based on sufficient reason. In the case of *Onjom v Owota* Civil Appeal No 14 of 2001 [2003] UGSC 16/20 March 2003, the Supreme Court of Uganda held as follows;

"However, what constitutes "sufficient cause" to prevent a defendant from appearing in court, and what would be fit conditions for the court to impose when granting such an order necessarily depend on circumstances of each case."

17. In the instant suit, service of the hearing notice is not disputed. The only reason given by the applicant is that her advocate did not attend court on May 26, 2021 despite service and that the mistake of her advocate should not be visited upon her.

18. I have considered the record and I note that the defendant filed the application dated March 2, 2020 on March 3, 2020 and obtained interim orders of stay of execution on March 3, 2020. The application was then fixed for inter-parties hearing on March 24, 2020. Subsequently, on May 5, 2020 at the height of Covid-19 pandemic the court extended the interim orders and fixed the hearing for the said application on June 10, 2020.

19. The record further shows that nothing happened until October 1, 2020 when counsel for the plaintiff fixed the application for hearing on November 18, 2020. Subsequently the matter was fixed on February 3, 2021 and thereafter on May 26, 2021. On May 26, 2021, the application dated March 2, 2020 was dismissed for want of prosecution. The applicant did not move the court and about five months thereafter, that is November 18, 2021, the plaintiff's counsel fixed the matter for notice to show cause on January 19, 2022. On January 19, 2022, counsel for the defendant attended court and the matter was fixed for notice to show cause on February 16, 2022. On that date counsel for the applicant was in court, but just like on January 19, 2022, he had not come on record. The court being satisfied the service was done, proceeded to issue warrant of arrest against the defendant. It is upon issuance of warrants of arrest that the applicant now filed the application dated February 19, 2022 on February 21, 2022.

20. The only reason given by the applicant is that consequences of her advocate's non-attendance should not be visited on her. The record shows that the application came up in May 2021, when it was dismissed. The applicant was served with notice to show cause and only moved the court on February



21, 2022, which is nine months after grant of the orders dismissing the application dated March 2, 2022.

21. A suit belongs to a litigant and not the advocate. An advocate is merely an agent of the litigant. The applicant has not explained why he did not move the court for 9 months after her advocate failed to show up in court on May 26, 2021. It is not enough for an applicant to blame their advocate; they must demonstrate that they attempted to mitigate rather than exacerbate the consequences of their advocate's mistakes. The applicant's application which was only filed after a warrant of arrest was issued, was in my view, not filed in good faith or based on sufficient cause. The application was for reasons of forestalling the warrant of arrest.
22. In the premises, I am not satisfied that there is sufficient cause to justify setting aside ex parte orders made on May 21, 2021. I therefore find no merit in the application dated February 19, 2022 and the same is hereby dismissed with costs to the respondent.
23. Orders accordingly

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

**Ms Kitenge for the Defendant/Applicant.**

**Mr. Jumba for Plaintiff/Respondent.**

**Court Assistant – Josephine**

