



Abdalla v Shee alias Mohamed Sudi Sheikh (Environment & Land Case 76 of 2013) [2022] KEELC 14766 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 76 OF 2013
SM KIBUNJA, J
NOVEMBER 15, 2022**

BETWEEN

ZUBEDA SAID ABDALLA PLAINTIFF

AND

MOHAMED SUDI SHEE ALIAS MOHAMED SUDI SHEIKH DEFENDANT

RULING

1. The plaintiff moved the court through the notice of motion dated the June 19, 2019 seeking for the following prayers;
 - a. That the order of February 28, 2019 closing the plaintiff's case be set aside and or varied to the extent that the plaintiff's case be opened for hearing and determination on merit;
 - b. That the plaintiff's son, named Omar Awadh Mbarak, be allowed to act, prosecute and defend the interests of the plaintiff in this case through the power of attorney dated the June 2, 2017.
 - c. That the costs be in the cause.

The application is based on the five (5) grounds on its face marked (a) to (e) and supported by the affidavits sworn by Zubeda Said Abdalla, on the June 26, 2019 and January 31, 2020 respectively, deposing inter alia that her case was closed on the 28th February due the confusion caused by the inconsistencies in her names in the pleadings, Zubeda Mbarak Awadh, and medical report, Zubeda Awadh Mbarak Awadh, as they appear in her National Identity card and Passport respectively. That she has been unwell for long, and had in 2017 given her son, Omar Awadh Mbarak, a power of attorney to represent her in any matter, including this suit. That the court should allow the said Omar to prosecute this suit and defend her interests as she is bedridden with deteriorating health issues. That though the signatures attributed to her are different, they are hers. That the warrant of arrests against her had been lifted by Omollo J. That it is in the interests of justice to set aside the orders closing her case, and allow it to be heard and determined on merit.



2. The application is opposed by the defendant through the replying affidavit sworn by Mohamed Sudi Sheikh on the September 23, 2019, in which he among others deposed that the applicant is not the plaintiff who appended her signatures on the verifying affidavit to the plaint, statement, and the supporting affidavit to the application on April 26, 2013. That upon being served with the suit papers, he filed his defence and counterclaim among others on 11th June 2013. That the plaintiff did not file a defence to the counterclaim. That the hearing took place on the September 17, 2013, when the plaintiff was heard *ex parte* and closed her case. The judgment was then set for the November 18, 2013. That on learning of the *ex parte* hearing, he filed an application dated the September 19, 2013 to set aside the orders of the September 17, 2013. That the application was not heard and the judgement was delivered on the February 21, 2014. That he then filed the application dated the March 14, 2014, seeking to stay the judgement and or orders of February 21, 2014. That application was struck out and he filed another dated the March 31, 2014. The plaintiff responded and on the April 4, 2014, he was granted 60 days' stay pending determination of the application. That during the 60 days stay, the plaintiff demolished his storey building after fraudulently obtaining court warrants. That on the June 4, 2014, the court directed the plaintiff's advocates to inform the plaintiff to appear in court on the July 4, 2014, but she did not do so, allegedly because she was sick. That on the April 21, 2016, the court set aside the judgement entered on the February 24, 2014 and ordered the plaintiff to be recalled for cross examination. That on the December 4, 2018 the plaintiff's advocates requested the court to allow her son to continue with the cross examination alleging that the plaintiff was undergoing treatment in Tanzania. The court declined to allow the request and directed that the plaintiff appear in court on the February 28, 2019. She did not appear but her advocates presented some medical documents in the name of Zubeda A.A. Mbarak, and copy of passport in the name of Zubeda Awadh Mbarak Awadh, and sought for adjournment claiming that the plaintiff was unwell. The court declined to grant the application, and dismissed the plaintiff's case and set down the counterclaim for hearing. That the warrant of arrest issued against the plaintiff for contempt of court is still in force and that is what she is avoiding by trying to have her son allowed to prosecute her case. The signature on the initial documents is different from those filed later. That no reasonable case has been made out to allow the application and the same should be dismissed with costs.
3. The 1st defendant then filed the notice of preliminary objection dated the 7th February 2020, raising two grounds that as the plaintiff is in contempt of court of the orders of 4th April 2014, 4th June 2014 and 20th June 2014, she has no right of audience before the court until after she purged the contempt; and that the contempt proceedings should take precedence and be finalized before the plaintiff's application.
4. The court gave directions on filing and exchanging submissions on the November 5, 2019, and on the August 4, 2020 set the application for ruling on the September 17, 2020. That direction was revised on the August 7, 2020 and instead plaintiff directed to file an affidavit explaining when she will be ready to appear in court in compliance to the summons of June 20, 2014, and in default of filing the affidavit she be denied audience and her application dated the 19th June 2019 would be struck out. That the plaintiff then filed the affidavit she swore on the September 21, 2020 deposing among others that she had sworn another affidavit on August 28, 2014 addressing the issue of the summons. That the court set aside the orders of June 20, 2014, after considering the affidavit. That there are no pending contempt proceedings against plaintiff as alleged and that it is the defendant who is yet to comply with the directions that were issued.
5. The leaned counsel for the plaintiff and defendant then filed the submissions dated the January 31, 2020 and February 21, 2020 respectively which the court has considered.
6. The following are the issues for the determinations by the court:



- a. Whether the plaintiff has made out a reasonable case for the orders of February 28, 2019 to be set aside, her case reopened, and her son be allowed to testify and represent her in the case.
 - b. Who pays the costs of the application.
7. The court has carefully considered the grounds on the application and preliminary objection, affidavit evidence, submissions, superior courts decisions thereon, the record and come to the following determinations:
- a. That the court record confirms that on the February 28, 2019, the court heard counsel for both parties on various issues and directed inter alia that the plaintiff's application for adjournment had been declined; the plaintiff's suit had been dismissed for lack of evidence/want of prosecution and that the hearing on the defendant's counterclaim to proceed to hearing.
 - b. That before the above orders were issued, the court had on the May 25, 2015 directed the defendant to file and serve a formal contempt application. It is however not clear whether the application was ever filed and served. Then on April 21, 2016, the court allowed the defendant's application dated the March 31, 2014 and set aside the *ex parte* judgement of February 21, 2014. The court further directed that the plaintiff be recalled for cross examination and defendant be at liberty to present evidence. The record confirms that the plaintiff was never availed for cross examinations on any of the dates fixed for hearing thereafter, and on the February 28, 2019, the orders subject matter of the instant application was made.
 - c. The main basis of the plaintiff's application is that she has been unable to attend court because she has been unwell. That is disputed by the defendant who takes the position that the plaintiff has not been attending court because she had demolished his premises when the 60 days stay of execution of judgement issued on the April 4, 2014 was in force. The record confirms that the court had already been addressed and considered the allegation that the plaintiff had been unwell and after perusing the medical document availed in support of the claim, declined to grant the application for adjournment and instead proceeded to dismiss her suit. I find no new facts have been presented to warrant the court to review that decision by the court.
 - d. That there is also no explanation tendered to explain why the application for the plaintiff's son to be allowed to prosecute this suit on behalf of the plaintiff was not made soon after the power of attorney was granted on the 2nd July 2017. That is especially so if the power of attorney had been granted out of the plaintiff's alleged failing health. The fact that the application was filed only after the plaintiff's suit was dismissed on the 28th February 2019 supports the defendant's claim that the application is not brought in good faith.
 - e. The plaintiff is the one who brought the defendant to court when she commenced this suit and was duty bound, like any other party in a suit to assist the court in furthering the court's overriding objectives of facilitating the just, expeditious, proportionate and affordable resolution of the suit as required by section 1A of the *Civil Procedure Act* chapter 21 of the Laws of Kenya. The court cannot attain the said objectives when the plaintiff deliberately keeps away from the court, by failing to attend the hearings as directed. Accordingly, the court finds no merit in the application.
 - f. That in terms of section 27 of the *Civil Procedure Act*, the plaintiff will pay the defendant's costs.
 - g. That from the above findings, the court orders as follows;



- a. That the plaintiff's application dated the 19th June 2019, is without merit and is hereby dismissed.
- b. The plaintiff to pay the defendant's costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF NOVEMBER, 2022.

S.M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF:

DEFENDANTS:

COUNSEL :

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WILSON .. COURT ASSISTANT.

S.M. KIBUNJA, J.

ELC MOMBASA.

