Onga & 26 others v Mbukoni Holdings Limited & 2 others (Environment & Land Case 208 of 2011) [2022] KEELC 14828 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14828 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 208 OF 2011

CA OCHIENG, J

NOVEMBER 15, 2022

BETWEEN

GABRIEL ONGA ..... 1ST PLAINTIFF

MEDI ADAM MEDI ..... 2ND PLAINTIFF

GRACE WANJIRU WAMBUI ..... 3RD PLAINTIFF

MUSA MOHAMED MEDI ..... 4TH PLAINTIFF

EVA KAKEKYE NDAMBUKU ..... 5TH PLAINTIFF

MOHAMED SULEIMAN MEDI ..... 6TH PLAINTIFF

DAVID NJENGA KURIA ..... 7TH PLAINTIFF

JOHN HINGA KIMANI ..... 8TH PLAINTIFF

SAMUEL OKOTH OTIENO ..... 9TH PLAINTIFF

YAHYA OMAR ..... 10TH PLAINTIFF

JOSEPH MUIRURI NGANGA ..... 11TH PLAINTIFF

JOSEPH GITAU NGIGI ..... 12TH PLAINTIFF

KARAMA IBRAHIM FARAJ ..... 13TH PLAINTIFF

NYANDUKO NYAMWAYA ..... 14TH PLAINTIFF

SOPHIA LESA AMBETSA ..... 15TH PLAINTIFF

ARAFA ABDALLA WAMBUI ..... 16TH PLAINTIFF

TWALIB SULEIMAN ..... 17TH PLAINTIFF

JOSEPH NGANGA ..... 18TH PLAINTIFF

AJIRAH NJOKI KARIUKI ..... 19TH PLAINTIFF

ADINAN MAHMUD RIZIKI ..... 20TH PLAINTIFF

ERASTUS MWANGI MACHARIA ..... 21ST PLAINTIFF

JOSEPH M. MBUTHIA ..... 22ND PLAINTIFF

MOHAMED JILLO BANTE ..... 23RD PLAINTIFF

NEIMA ABDALLA ..... 24TH PLAINTIFF

ASHA HASSAN SAID ..... 25TH PLAINTIFF

MASJID NUR ..... 26TH PLAINTIFF

SCOLASTICA MACHISU ..... 27TH PLAINTIFF

AND

MBUKONI HOLDINGS LIMITED ..... 1ST DEFENDANT

ANGELA NZISA KITOSI ..... 2ND DEFENDANT

MULI KOLI ..... 3RD DEFENDANT

RULING

1. What is before court for determination is the 2nd defendant's notice of motion application dated the March 18, 2022 brought pursuant to article 159(2) (d) of *the Constitution*; order 12 rule 7 and order 51 rule 1 of the *Civil Procedure Rules* as well as sections 1A, 1B and 3A of the *Civil Procedure Act*. The 2nd defendant seeks the following orders:

    a. Spent

    b. Spent

    c. That this honourable court be pleased to set aside its judgment, decree and all other consequential orders issued on February 16, 2022 arising from this matter.

    d. That an order do issue granting the 2nd defendant/applicant leave to reopen her defence and counter-claim and to be heard on merit.

    e. That the costs of this application be in the cause.

2. The application is premised on the grounds on the face of it and the supporting affidavit of Phanuel Omondi, an advocate handling the matter on her behalf. The deponent avers that failure to physically attend court on October 6, 2021 was inadvertent and the same is highly regretted by counsel. He explains that the advocate who was assigned the matter failed to appropriately move the court to have the 2nd defendant tender evidence yet she has an arguable case including a counter-claim. Further, that mistake to counsel cannot be visited upon the innocent litigant. He explains the proceedings of October 6, 2021 and claims the counsel for the applicant was not able to attend court at 11:30am. Further, Mr Mulei Advocate held their brief but the respondent's counsel opposed the adjournment and the matter proceeded and judgment was delivered on February 16, 2022. He claims he was unaware that the matters are handled in open court. He reiterates that the 2nd defendant has always been keen in prosecuting her defense and the respondent's will not suffer prejudice if the instant application is allowed.

3. The respondents opposed the application and filed an affidavit sworn by the 1st respondent Gabriel Onga where he deposes that, upon closure of the plaintiffs' case, the defence case was set for hearing on October 6, 2021 by consent. He explains that the Environment and Land Court proceeds with the matters in open court given the nature of the evidence and documents which are produced in support. He insists the Applicant and her counsels blatantly refused to attend court. He avers that the applicant's advocates despite seeking an opportunity to move the court appropriately and neglecting to do so after being directed on November 4, 2021 to make a formal application is now crying foul after intentionally disregarding the court's directions. He claims the applicant has always sought for excuses to delay this matter. He contends that the alleged conflict in the diary of the applicant's advocates on the October 6, 2021 was frivolous since the Meru ELRC matter was a mere application before a resident magistrate and the instant suit was a defense hearing, and this matter hence ought to have been given priority. He refers to the annexures in the applicant's affidavit and avers that the image of the applicant's advocate's diary confirms this matter was diarized first and therefore ought to have been given priority. He states that the applicant has a high disregard for the court since in the instant application she seeks to set aside the judgment and on the other hand, she has filed a notice of appeal dated the March 7, 2022. Further, that this application is a mere waste of the court's time.

   The application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the instant notice of motion application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the judgment, decree and all other consequential orders issued on February 16, 2022 arising herein be set aside and the 2nd defendant granted leave to reopen her defence including counter-claim so as to be heard on merit.

5. The 2nd defendant in her submissions avers that there should be a stay of execution of the judgment as the plaintiffs have a judgment in their favour and if she fails to execute the transfer forms, then the Land Registry shall sign the same on her behalf. She argues that the suit land belongs to her deceased husband John Kitosi Kibondo and denies selling it to a third party. Further, that the court should exercise its discretion and set aside the judgment entered herein as she has a reasonable defence including counter-claim that raises triable issues. She reiterates that her failure to attend court was excusable. Further, that there were mistakes made by her counsels' in conduct of this matter. She insists that the plaintiffs will suffer no prejudice if the orders are set aside and they can be compensated by way of damages. To support her arguments, she has relied on order 22 rule 22 of the *Civil Procedure Rules* as well as the following decisions: *Wachira Karani v Bildad Wachira* (2016) eKLR; *Shailesh Patel t/a Energy Company of Africa v Kessels Engineering Works Pvt Limited & 2 others* (2014) eKLR; *Pithon Waweru Maina v Thuka Mugiria* (1983) eKLR; *Shah v Mbogo* (1967) EA 116 at 123B; *Shabir Din vs Ram Parkash Anand* (1955) 22 EACA 48; *Sammy Maina v Stephen Muriuki* (1984) eKLR; *CMC Holdings Limited v Nzioki* (2004) 1EA 23 (CAK); *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR; *Sayaton Ene Mututua Siringet v Philip Amusi & another* (2018) eKLR; *Elizabeth Kavere & another v Lillian Atho & another* (2020) eKLR and *Mukwano Distributors Ltd v Seuri Legusi Sanoye* (2020) eKLR.

6. The plaintiffs in their submissions insists that the applicant's advocate participated in the hearing which was conducted in open court and there were no directions that the defence case would be heard virtually and therefore the excuse of not being aware of the open court hearing does not hold. They argue that it is not clear why the applicant's advocate would subordinate a main hearing coming up before a higher court to an application coming up before a lower court. They submit that no sufficient or justifiable reason has been given by the 2nd defendant to warrant the need for the judgment entered

against her to be varied or set aside. They contend that this is not an issue of *ex parte* judgment but blatant failure to attend court. To buttress their averments, they relied on the following decisions: *Samson Karino Ole Nampasa v Kaana Ka Arume Co Ltd* (2016) eKLR and *Machira t/a Machira & Co Advocates v East Africa Standard* (No 2) (2002) KLR 63.

7. The 2nd defendant has sought to set aside the judgment delivered on February 16, 2022 and reopen her case so that the defence including counter-claim can be heard on merit. She has explained the circumstances that led to the advocates' failure to attend court on October 6, 2021.

8. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR the court while dealing with the issue of setting aside of a Judgment observed that:

> " The well established principles of setting aside interlocutory judgements were laid out in the case of Patel v East Africa Cargo Handling Services [12] where Duffus, VP 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."
>
> 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 vs Veena 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."
>
> The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it."

9. In the current case, the 2nd defendant blames her counsel in dealing with this matter culminating in the Judgment being entered in favour of the plaintiffs. She contends that her defence including counter-claim is merited and the judgment should be set aside and the defence case reopened. I wish to make reference to the various proceedings in this court dated the September 30, 2020; November 18, 2020; May 5, 2021 and October 6, 2021 respectively. I note on September 30, 2020, the plaintiffs closed their case and the matter was scheduled for defense hearing on November 18, 2020, on which date the counsel sought an adjournment. The court allowed the application for adjournment but marked it as the last adjournment after which the defence hearing was scheduled for May 5, 2021. On May

5, 2021, the matter did not proceed and was mutually rescheduled for defence hearing once more on October 6, 2021. On the October 6, 2021, the 2nd defendant including her counsel failed to attend court and requested another advocate to hold their brief and seek an adjournment again, which the court declined. Further, the 1st defendant's case proceeded for hearing after which the defence case was closed and parties were directed to file written submissions. On November 4, 2021, the 2nd defendant did not file her submissions as directed and opted to file the instant application. From the court records, I find that the 2nd defendant was granted ample time to prepare and participate in her case. I note the 2nd defendant did not swear an affidavit but it is her advocate who did and opted to blame the erstwhile advocate for failing to attend court. The 2nd defendant has relied on several decisions including the case of *Sayaton Ene Mututua Siringet v Philip Amusi & another* (2018) eKLR where this court had set aside an exparte judgment. I wish to distinguish that case with the circumstances at hand; I note in the said suit, the defendant's counsel's was not served with a hearing notice when the matter was set for defense case. Further, the hearing date was not mutually agreed upon and there was a challenge on proof of service. While in the instant case, the 2nd defendant was granted time severally but failed to attend court. Further, the court even granted a last adjournment but the 2nd defendant and her advocate still failed to attend court on October 6, 2021 and claim they were not aware this matter was proceeding in open court, yet the plaintiffs' case had been heard in open court. The 2nd defendant alleged that there was conflict in the diary of her advocates on the October 6, 2021 but I note the said advocate opted to proceed to handle an ELRC application before a resident magistrate instead of coming for the defense hearing. Further, the 2nd defendant has not denied, that from the image in her advocate's diary, which was an annexure, it indeed confirms this matter was diarized first and therefore ought to have been given priority. It is my considered view that except for blaming the advocate, the 2nd defendant did not demonstrate sufficient cause why she failed to severally attend court and why the impugned judgment should be set aside. In the case of *Rose Kaiza v Angelo Mpanju Kaiza* (2009) eKLR the Court while dealing with the issue of setting aside held that:

> " In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

10. In associating myself with the decisions cited above, I find that there was remissness on the part of the 2nd defendant to participate in this matter. Further, from the facts and circumstances of this case, insofar as the 2nd defendant insists the plaintiffs will not be prejudiced, I opine that it is indeed the plaintiffs who stand to be prejudiced as the defence case had been pending for one year after closure of the plaintiffs' case. I opine that no sufficient cause has been demonstrated to warrant the setting aside of the judgment as the 2nd defendant acted in a negligent manner, failed to be diligent and remained inactive in certain instances when she had audience of the court. In this instance, i hold that blaming a counsel will not do. It is against the foregoing that I decline to exercise my discretion to set aside the judgment delivered by this honourable court on the February 16, 2022 and reopen the 2nd defendant's case.

11. In the circumstances, I find the 2nd defendant's notice of motion application dated the 1March 8, 2022 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE