



Owiti & another v Owiti & another (Environment and Land Miscellaneous Application E008 of 2022) [2022] KEELC 15412 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E008 OF 2022
MN KULLOW, J
NOVEMBER 15, 2022**

BETWEEN

JUSTINA AUMA OWITI 1ST APPLICANT

SUSAN OKETCH OWITI 2ND APPLICANT

AND

PETER NG'OLA OWITI 1ST RESPONDENT

JACOB OGILA OWITI 2ND RESPONDENT

RULING

1. By notice of motion dated July 19, 2022, the applicants sought the following orders: -
 - a) Spent.
 - b) That the proceedings of the honourable court of the July 19, 2022 together with consequential orders be set aside pending the hearing and the determination of the instant application.
 - c) That upon setting aside of the orders of this honourable court issued on the July 19, 2022, the applicant be allowed to canvas the respondents' application dated May 11, 2022.
 - d) That the costs of the application be provided for.
 - e) Any other relief that the honourable court deems fit and appropriate to grant.
2. The application is based on the 12 grounds thereof and the supporting affidavit sworn by Boaz Pius Agutuon even date, an advocate of the High Court of Kenya having conduct of the matter on behalf of the applicant.
3. The applicant avers that the matter had been scheduled for mention on the July 19, 2022 for purposes of taking directions on the hearing of the application dated May 11, 2022. It is his contention that on



the July 18, 2022, he did an email to the court, requesting that the matter be handled virtually in light of the directives issued by the Honourable Chief Justice.

4. It is his claim that on the morning of July 19, 2022; he contacted the Court Assistant, Tom Maurice through his cell and he was informed that the matter would virtually at 10.00am, which was later changed to 11.00am. However, when they were admitted for the virtual session, the court assistant further informed them that the application dated 11/5/2022 was allowed and a mention date was issued for September 8, 2022 before the deputy registrar.
5. He further deponed that the non-attendance on his part was not deliberate as he was waiting in the lobby to be admitted in the session. He stated that they had filed a replying affidavit in response to the application dated May 11, 2022.
6. He urged the court to grant them an opportunity to canvas the notice of motion dated May 11, 2022 by allowing the application and maintained that no prejudice would be caused to the appellant/respondent.
7. The application was opposed. The respondents filed a replying affidavit sworn by the 1st respondent on her own behalf and on behalf of the 2nd respondent, on August 10, 2022 and filed on August 15, 2022 in response to the instant application. It was her contention that the applicants' counsel on record failed to copy the email requesting to be heard virtually to her counsel on record and informing her that he would proceed virtually as required and further that they were not privy to the communications between the applicants' counsel and the court assistant over the same.
8. She further avers that the court had already pronounced itself on the filing of appeal out of time and thus having filed their memorandum of appeal, the court has become *functus officio* on the matter.
9. She maintained that they would be highly prejudiced if the application is granted while on the contrary, the applicants will not be prejudiced if parties are allowed to canvass the appeal. She therefore urged the court to dismiss the application.
10. The application was disposed of by way of written submissions. Both parties filed their respective submissions together with authorities, which I have read and taken into account in arriving at my decision.

B. Analysis and Determination

11. The following issues arise for determination: -
 - a) Whether the court is *functus officio* in determining the matter.
 - b) Whether the applicant has made out a case for setting aside the proceedings and orders made on July 19, 2022 and all the consequential proceedings thereafter.

I. Whether the court is *functus officio* in determining the matter

12. The respondent herein contends that the court having pronounced itself on the application dated May 11, 2022 on the July 19, 2022, it has become *functus officio* and therefore lacks the jurisdiction to entertain the instant application. Respectfully, I disagree with the said position.
13. Order 51 rule 15 of the [Civil Procedure Rules](#) provides that a court may set aside an order made *ex-parte*. Guided by the said statutory provision, I find that this court is not *functus officio* and is vested with the requisite jurisdiction to determine the instant application and will proceed to determine the merits thereof as hereunder;



II. Whether the applicant has made out a case for setting aside the proceedings and orders made on July 19, 2022 and all the consequential proceedings thereafter

14. The grounds for setting aside an *ex-parte* judgment are now well settled. The court in determining whether or not to grant such orders ought to exercise such powers judicially taking into account the circumstances of each case.
15. 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”
16. The applicant explained the circumstances leading to his failure to attend court on the 19/7/2022 and contends that the non-attendance on his part was not deliberate as he was waiting in the lobby to be admitted to the virtual session. He further maintained that he had filed his replying affidavit in response to the application May 11, 2022 and urged the court to set aside the proceedings of July 19, 2022 and all the consequential orders.
17. The respondent on the other hand stated that while they would be highly prejudiced should the application be allowed; the applicants would suffer no prejudice since the parties would be allowed to canvass the appeal on merit.
18. I have anxiously looked at the court record and the application dated May 11, 2022 and I note that the same sought orders of stay of execution of the orders of Hon Munguti issued on the and leave to file the appeal out of time. I do note that the respondent herein has since lodged an appeal *vide* Migori ELC Appeal No E020 Of 2022 which is pending for directions on the filing of the record of appeal. It is therefore my considered view that the instant application has been overtaken by events.
19. I have also considered the rival positions taken by both parties herein; while I do acknowledge that the applicant has sufficiently demonstrated his non-attendance on the date in question July 19, 2022, I wish to reiterate that applications of this nature calls for the exercise of the court’s discretion. As mentioned above, the reliefs sought by the applicants have been overtaken by events, the memorandum of appeal has since been filed. Consequently, I direct the parties herein to canvass the substantive appeal in order to determine the issues in dispute with finality.

Conclusion

20. In the upshot, I accordingly find that the application dated July 19, 2022 is not merited and the same is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 15TH DAY OF NOVEMBER, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

**for the Applicant

**for the Respondent



