



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 97 OF 2014

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

LEKYO TOURS LIMITED.....1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA.....2ND DEFENDANT

RULING

(Application to set aside proceedings and judgment; matter having been fixed for hearing and counsel for the defendants seeking adjournment which was denied; counsel failing to appear at the hearing; applicant (1st defendant) urging court to set aside the proceedings and judgment on grounds that its counsel was never served with the hearing notice and that counsel never informed the applicant of the date; ample evidence that counsel was served and he was in fact represented at the hearing; application therefore based on a false narrative; court not moved to exercise its discretion to a party who deliberately seeks to mislead court with false statements of fact; applicant's credibility shattered and court unable to believe her statement that she was not aware of the hearing date; 2nd defendant being director of applicant and not complaining that he was not aware of the hearing date; knowledge of director imputed to be knowledge of the company; application also coming 8 months after the proceedings which would mean that applicant has been indolent; application dismissed)

1. The application before me is that dated 25 June 2020 filed by the 1st defendant. The application seeks the setting aside of the orders made on 16 October 2019 and the subsequent judgment delivered on 27 February 2020 and for the suit to be re-opened for hearing on merits. The application is opposed.

2. The subject of this suit is the land parcel MN/I/3074. On it, stands a house which the plaintiff avers was developed by the Government to house Government staff. It is the contention of the plaintiff, that the 2nd defendant, who served as Commissioner of Lands, in the year 1998, wrongfully allotted this land to the 1st defendant/applicant, a limited liability company. The 2nd defendant was a director of the 1st defendant/applicant at the material time. The plaintiff through its plaint filed on 29 April 2014, contended that this allocation of land to the applicant was done fraudulently, inter alia, that the 2nd defendant alienated the property to himself through the applicant, in the knowledge that the land was intended to house Government staff. It was further urged by the plaintiff that the process for allotting public land was not followed. In the suit, the plaintiff sought orders to cancel the title of the applicant and to permanently injunct the defendants from the suit property.

3. The applicant and 2nd defendant entered appearance through the law firm of M/s Tarus & Company Advocates on 20 May 2014 and subsequently filed a joint statement of defence. Their defence basically asserted that the suit property was properly allotted to the applicant.

4. On 28 March 2019, the matter came up for hearing, when Mrs. Abdulrahim, counsel for the plaintiff was ready to proceed, but Mr. Kangongo, who held brief for Mr. Tarus for the defendants, applied for adjournment on the ground that the defendants had intimated that they would wish to instruct another advocate. It was said that Mr. Tarus no longer had instructions in the matter. This application for adjournment was opposed by Mrs. Abdulrahim, who inter alia submitted that the hearing notice was served well in time, and if Mr. Tarus did not have instructions, he ought to have filed an application to cease acting. She had four witnesses in court and ready to proceed. Mr. Kangongo, in response, submitted that no application to cease acting had been filed as the defendants had stated that they would appoint another advocate. The Court (Omollo J) considered that this was the first application for adjournment and allowed it. The matter was then given 10 July 2019 for hearing. It again came up before Omollo J, but given that she was on transfer, and this was a new case, she adjourned it to be heard before me, as the incoming judge, and fixed the case for hearing on 16 October 2019.

5. On 14 October 2019, the law firm of M/s T.K Rutto & Company filed a Notice of Appointment of Advocates in respect of the 2nd defendant.

6. The matter came up before me for hearing, as scheduled, on 16 October 2019. Mr. Makori, learned counsel, was present for the plaintiff, and Mr. Kangogo, learned counsel holding brief for Mr. Tarus was present for the applicant as 1st defendant, whereas Mr. Mwenja, learned counsel, was present holding brief for Mr. Rutto for the 2nd defendant. Mr. Makori indicated that he was ready to proceed. Mr. Kangogo stated that he was not ready, for the reason that they no longer have instructions in the matter. He intimated that another law firm (Birir & Company) was to come on record for the applicant. Mr. Mwenja, on his part, stated that Mr. Rutto had just come on record and he was asking for 21 days to peruse the pleadings thus seeking an adjournment. That application for adjournment was vehemently opposed by Mr. Makori who submitted that when they went to serve the hearing notice, they were directed to serve the office of Mr. Rutto, and they did serve that office on 14 August 2019. I considered the application for adjournment and saw no merit in it. I found that out of abundance of caution, the law firms of Mr. Rutto and Mr. Birir had been served in very good time and there was ample time to seek instructions. I placed the file aside for the matter to proceed.

7. At the latter time, when the matter was to proceed, only Mr. Makori was present for the plaintiff, with counsel who were present earlier in the morning appearing for the defendants, being absent. I directed the matter to proceed for hearing and it did. Three witnesses testified and the plaintiff closed its case. The defendants were absent and I had no option but to close their case and I subsequently directed counsel to file his written submissions in 14 days and the defendants' counsel were to file their submissions 14 days thereafter. I gave 14 November 2019 for mention.

8. On 14 November 2019, only Mr. Makori, counsel for the plaintiff appeared with no appearance being made on behalf of counsel for the defendants despite service being effected. Mr. Makori had filed his submissions but the defendants' counsel had filed none. I fixed the matter for judgment on 27 February 2020 and directed that counsel for the defendants be served. On that day, Mrs. Abdulrahim appeared for the plaintiff and Mr. Kihara held brief for Mr. Rutto and I duly delivered the judgment.

9. On 29 June 2020, a consent was filed between the law firms of M/s Tarus & Company and T.K Rutto & Company, allowing the latter to come on record on behalf of the applicant. That consent was filed alongside this application.

10. The application is based on the following grounds :-

(i) The hearing notice were (sic) never served upon the 1st defendant.

(ii) The court proceeded ex-parte for hearing on 16th October, 2019 without according the 1st defendant an opportunity to be heard on merit.

(iii) That the applicant was never notified of the hearing date to enable attend court (sic).

(iv) That the applicant/1st defendant is desirous to prosecute this case and ought to be granted an opportunity to be heard on merit and cross-examine the evidence of the plaintiff.

(v) That this application is made in good faith and in the interest of justice.

(vi) That the non-attendance to court for hearing was not deliberate on the part of the applicant.

(vii) That no prejudice shall be occasioned to the plaintiff/respondent if the orders prayed for are granted.

(viii) That the applicant gives undertaking as to damages (if any) pursuant to the court granting the orders.

11. The supporting affidavit is sworn by one Dinah Jelimo Chelal, who has stated that she is one of the directors of the applicant. She has deposed that on 5 June 2020, she was shocked to be notified that through a judgment delivered on 27 February 2020, the court had ruled in favour of the plaintiff. She has deposed that the 1st defendant immediately appointed the firm of M/s T.K Rutto & Company Advocates to represent it. She was then informed that the case proceeded ex parte on 16 October 2019. She has deposed that there was no representation on the part of the applicant as they were never served with any hearing notice nor were they informed of the case by their erstwhile advocates, M/s Tarus & Company Advocates. She has stated that her non-attendance was therefore not deliberate and failure by her advocates should not be visited on an innocent litigant.

12. The application is opposed by the plaintiff who has filed a replying affidavit sworn by Elias Kipyego, an investigator with the plaintiff. He has deposed that on 23 July 2019 and 7 August 2019 respectively, the firm of Tarus & Company and Birir & Company were served with hearing notices, and that the firm of M/s Tarus & Company accepted the notice, though the firm of Marende Birir & Company declined service, on account that they had not been appointed but only held brief for M/s Tarus & Company. He has further deposed that M/s T.K Rutto & Company were also served with the hearing notice of 16 October 2019. He has deposed that subsequently the defendants' law firms were served with mention notices of 14 November 2019, the written submissions of the plaintiff's counsel, and the judgment notice of 27 February 2020. He has deposed that the 2nd defendant is co-director of the applicant and the applicant is thus misleading the court by stating that it was not notified nor aware of the hearing dates. He has stated that on several occasions, the defendants had tried to obstruct the dispensation of justice by delaying the proceedings of this case on the pretext of appointment of new counsel or change of representation at the eleventh hour. He has deposed that the applicant is misdirecting the court by using the name of Dinah Jelimo Chelal as co-director and has annexed a certificate of incorporation of the company which does not bear her name as director.

13. A further supporting affidavit was filed by Dinah Jelimo Chelal. She has now deposed that her former advocates Tarus & Company did not notify her of the hearing date. She has added that parties had not complied with Order 11 thus the proceedings of 16 October 2019 were irregular. She has reiterated that there was mistake of counsel who failed to notify her.

14. I invited counsel to file submissions, which they did, and I have taken note of them before arriving at my decision. I observe that Mr. Rutto, who now appears for both defendants, also made submissions on behalf of the 2nd defendant, supporting the application.

15. I will start with an issue in the supplementary affidavit of Ms. Chelal that the matter proceeded without compliance with Order 11. This is clearly an afterthought as it is not among any of the grounds listed in the application. In any event, if it an issue of pre-trial compliance, the matter came up for pre-trial on 17 July 2018, when none of counsel for the defendants appeared. That aside, the applicant, had since 2014 to comply. Whichever way you look at it, the issue of compliance with Order 11 is a red herring.

16. When you look at the grounds in support of this application and when you read the first affidavit in support of the application, you get the impression that this application is based on the ground that counsel for the applicant was not served with the hearing notice. I have gone through the record and the replying affidavit and there is ample evidence that M/s Tarus & Company Advocates, who were on record for the applicant, were indeed served with the hearing notice for 16 October 2019. I have seen the affidavit of service sworn by Patrick Chirongo, a process server of this court, which shows that M/s Tarus & Company were duly served with the hearing notice on 9 August 2018. I have also seen the attached hearing notice duly stamped and received by the law firm of M/s Tarus & Company Advocates on the said date, that is, 9 August 2018. The record of 16 October 2019, also shows that Mr. Kangogo advocate, was present holding brief for Mr. Tarus for the 1st defendant/applicant and Mr. Mwenja was present holding brief for Mr. Rutto for the 2nd defendant.

17. This application is therefore based on a fallacious and deceptive narrative, that counsel for the applicant was never served with a hearing notice. Ms. Chelal was clearly being deceitful by claiming that the applicant's advocate was never served with a hearing notice. I do not see how, a person can come before court asking for a discretionary remedy, while in the same breath, misleading the court with prevaricating statements. When one is coming before court asking for the court to exercise its equitable discretion, you would expect such person to be frank and of full candour, which is not the position here. I personally find it difficult to exercise my discretion in favour of a person who has not fully disclosed the correct factual position of a matter but has tried to curry favour by providing misleading statements of fact.

18. I do however note that, after being confronted with ample proof that the applicant's advocate was indeed served with the hearing notice, Ms. Chelal, in her supplementary affidavit, presented another twist, by stating that the applicant's erstwhile advocates, did not inform her of the hearing date. Now, if Ms. Chelal could not be truthful on the issue of service to her advocate, how does she expect this court to believe her, when she says that she was never informed of the hearing notice? I am afraid that she has completely tarnished her credibility so that she cannot be believed when she states that she was never informed by her advocate of the hearing date.

19. Apart from the above, the record herein does not move me to exercise my discretion in favour of the applicant. Contrary to what the applicant contends, that the hearing was ex-parte, it actually was not ex-parte. On the date of the hearing, her advocate was represented, and so too the advocate for the 2nd defendant. It is just that they failed to appear at the time the matter was scheduled for hearing. Their failure to appear at the time that the matter proceeded for hearing has not been explained in this application and have never been forthcoming to date.

20. Further, the 2nd defendant is a director of the applicant. I have not seen anywhere where it is said that the 2nd defendant was not aware of the hearing date of 16 October 2019 and the assumption therefore is that he was aware of the hearing date. Now, a company is an artificial person, and acts through its directors. The knowledge that a company would have, would be the knowledge that its human directors have. If a director of the company (2nd defendant), was aware of the hearing date, can the company now turn round and say that it was not aware of the hearing date? I find that curious. The 2nd defendant was aware of the hearing date, and he is a director of the applicant, but he has given no explanation as to why he absented himself on the hearing date on his own behalf, and importantly, on behalf of the company.

21. That aside, I observe that this application has been filed more than 8 months since the hearing date of 16 October 2020. I do not believe that it took Ms. Chelal 8 months to discover that the matter had proceeded for hearing. I have already mentioned that the 2nd defendant, a director, appears to have been aware of the hearing date, but this aside, and assuming that Ms. Chelal is the other director and did not know that the matter proceeded, then clearly the applicant has been indolent and has not been keen to follow up on its case. Equity does not aid the indolent but the vigilant.

22. I think I have said enough to demonstrate that I am not persuaded to set aside the proceedings of 16 October 2020 nor the judgment herein. I find no merit in this application and it is hereby dismissed with costs to the plaintiff.

23. Orders accordingly.

DATED AND DELIVERED THIS 17TH DAY OF FEBRUARY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA