



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 775 OF 2017 (O.S)

VERONICAH WAIRIMU NJUGUNA.....1ST PLAINTIFF/RESPONDENT

MARGARET WANJIKU NJAU.....2ND PLAINTIFF/RESPONDENT

VERSUS

PAUL GATUNDU MUTHUMBI.....DEFENDANT/APPLICANT

RULING

By a Notice of Motion Application dated **16th January 2020**, brought under **Order 6, order 10 Rules 6, 10 and 11** of the Civil Procedure Rules the Defendant/Applicant seeks for orders that;

- 1. That the proceedings of the 18th December 2019, be and are hereby set aside.***
- 2. That the Defendant be granted unconditional leave to defend this case in accordance with the Defence, Preliminary objection and documents filed in this case.***
- 3. That the Defendant be granted leave to cross examine the Plaintiffs and call evidence in support of his case.***

The Application is premised on the grounds that the trial proceeded ex parte and a date has been allocated for submissions. That the circumstances of this case justify the setting aside of the proceedings and warrant the Defendant/ Applicant to be given a chance to be heard in his Defence for reasons that; his advocate was unwell on the hearing date, the Defendant/ Applicant was denied a chance to argue a Preliminary Objection on a point of law, the Defendant/ Applicant was not able to attend Court as he had attended a traffic court on the same day, where he is an accused person, that the Defendant/ Applicant acted in good faith and had one witness present in Court, that the Defendant/ Applicant had a valid Defence to the Plaintiffs/ Respondents case and the failure by Defendant/ Applicant to attend court was not deliberate. That the Defendant/ Applicant should not be condemned unheard as he stands to suffer irreparably.

In his supporting Affidavit, **James Torore Makori**, the Defendant's/ Applicant's Advocate on record averred that the matter was listed for hearing on **18th December 2019**. Unfortunately on the evening of **17th December 2019**, he had a severe stomach problem and he was not able to leave his house to attend Court. That he requested his colleague **Mr. David Katee** to attend court and seek indulgence as he was not able to attend at all. Further that he also requested him to seek leave to argue a Preliminary Objection by way of written submissions since the instant case is a duplication of another case that had been heard earlier.

That the Defendant/ Applicant was not present as he had attended a traffic case in Kisumu Law Court and without his attendance, warrants of arrest would have been issued. That the Preliminary Objection is a point of law and the Defendant should be granted leave to argue it. That the Defendant/ Applicant has filed witness statements and documents and should be granted an opportunity to be heard before a final decision is made.

The Application is opposed and the Plaintiffs/ Respondents swore a Replying Affidavit sworn on **3rd March 2020** by **Carolyn Kinuthia** their Advocate on record and averred that the Defendant/ Applicant had sent an Advocate who sat through the entire proceedings and failed to cross examine the Plaintiffs / Respondents. That **Mr. David Katee** being a duly qualified Advocate of the High Court failed to cross examine the Plaintiffs/Respondents while knowing very well the implications of failing to do so. That the Application and the Supporting Affidavit indicate that a Counsel and one witness from the Defence were present throughout the entire hearing of the Plaintiffs/Respondents case. That Counsel has not attached any medical evidence that he was unwell and further it doesn't matter whether he was unwell as he sent a qualified Counsel to represent him. She urged the Court to dismiss the Application.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered. The issue for determination is ***whether the Defendants/ Applicant is entitled to the orders sought.***

The Defendant/ Applicant has sought for the setting aside of the proceedings of **18th December 2019**. Whether or not a Court can set aside its decision, is discretionary and there is no limit as a party needs to show that there is sufficient cause to warrant the Court exercise its discretion. See the case of **Shah ...vs... Mbogo and Another [1967] EA 166** the Court held that;

“This discretion to set aside as ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.

In explaining what sufficient cause may amount to the Court In **Wachira Karani ...Vs...Bildad Wachira [2016] eKLR** held that:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

Has the Defendants/ Applicant shown sufficient cause to warrant the Court exercise its discretion and set aside the said proceedings?

It is the Defendants’/Applicant’s contention that on the said date, he was unable to attend Court as he had a criminal case in which he was the accused person. The Court notes that indeed on the said date **Mr. Katee** Counsel holding brief for the Defendants’ Advocate did indicate that the Defendants/ Applicant was in a traffic case. The Court has seen the receipts for the said traffic case **371 of 2018**. There is no reason to doubt the same. The Court takes cognizance of the fact that in criminal cases, the accused persons are always required to appear in person. Therefore, the Court finds that there is sufficient cause that has been explained as to why the Defendant/ Applicant did not attend Court.

Further it has been contended that the Defendants/ Applicant’s Advocate fell ill on that date and could not attend Court. Though there is no evidence that has been adduced to evidence the illness, the Court finds that in sending an Advocate to hold brief on his behalf and communicate the same to Court, that was a show of good faith and it cannot be said that he had deliberately sought to delay justice.

Consequently, the Court finds and holds that sufficient cause has been shown to warrant it exercise its discretion and set aside the said proceedings for the ends of justice to be met. This is so as the Court notes that when the matter came up for hearing on **10th July 2019**, the Defendant/ Applicant were ready to proceed with two witnesses present and it would be prejudicial not to allow him to have an opportunity to be heard. Further the Court notes that the Application was brought without inordinate delay as the Court’s December vacation begins on **21st December** and ends on **13th January**.

However, in exercising its discretion, the Court is also called upon to be fair to both parties. While the Defendant/ Applicant has shown sufficient cause, it is not in doubt that the Defendants/ Applicant was well aware of the hearing date. That he knew the said hearing date in the instant suit coincided with the Criminal case in which his personal attendance was required. It would have been courteous to give the Plaintiffs/ Respondents Advocates a heads up. The Plaintiffs/ Respondents have testified in this matter. It would mean that the setting aside of the proceedings would be prejudicial to them as they will be called upon to once again come and testify and the same will cause an expense on their part. However, the Respondents have not demonstrated that the inconvenience can not be compensated by way of costs. In this instant, the Court finds that the Plaintiffs/ Respondents are entitled to Kshs. **20,000/=** as throw away costs.

The Upshot of the foregoing is that the Defendant/ Applicant has met the threshold to warrant the Court to exercise its discretion in his favour and consequently the applicant is entitled to the setting aside of the Ex parte Proceedings .

Having now carefully read and considered the Application, the affidavits and annexures thereto together with the written submissions, the Court finds that the Notice of Motion Application dated **16th January 2020**, is merited and the same allowed. The Defendant/ Applicant is condemned to pay the Plaintiffs/ Respondents throw away costs of **Kshs. 20,000/=** before the next hearing date.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 25TH DAY OF MARCH 2021

L. GACHERU

JUDGE

25/3/2021

Court Assistant - Dominic

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have

waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the 1st Plaintiff/Respondent

No appearance for the 2nd Plaintiff/Respondent

Mr. Makori for the Defendant/Applicant

L. GACHERU

JUDGE

25/3/2021