



Garden Hotel Limited v Maingi & 2 others (As the legal representatives of the Estate of Laban Maingi Kitele - Deceased) (Environment and Land Case Civil Suit 15 of 2020) [2025] KEELC 1256 (KLR) (11 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT 15 OF 2020
AY KOROSS, J
MARCH 11, 2025**

BETWEEN

GARDEN HOTEL LIMITED PLAINTIFF

AND

ELIZABETH NGII MAINGI, ROY MAKOMA MAINGI & DERRICK MUTWII MAINGI (AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF LABAN MAINGI KITELE - DECEASED) DEFENDANT

RULING

Plaintiff's case

1. The notice of motion filed by the plaintiff dated 24/01/2024, which is the subject of determination, is brought under several provisions of the law, and in it, the plaintiff sought the following reliefs from this court:
 - a. Spent.
 - b. That the honourable court be pleased to set aside its ex parte orders issued on 18/10/2023 dismissing the plaintiff's suit and reinstate it and further, the court be pleased to set aside the subsequent proceedings on the defendant's counterclaim and order that this matter proceeds denovo.
 - c. That in the alternative, the honourable court does issue orders reinstating the defendant's witnesses for purposes of cross-examination on the counterclaim.
 - d. That such other, further, incidental and/or alternative order (s) as the honourable court may deem just and expedient.
 - e. That the costs of the notice of motion be in the cause.



2. The motion is premised on the grounds set out on its face and on the supporting affidavits of the plaintiff's director, Mr. Oscar Ndambuki and of its previous counsel, Mr. Victor Olewe. These affidavits were all deposed on 24/01/2024.
3. Briefly, it was stated that though this matter was slated for hearing on 18/10/2023, Mr Owele was engaged in several other matters, including Kakamega ELRC No. E012 of 2021, which he attended physically on 17/10/2023 and at the same time, COA E079 of 2023 which he attended virtually.
4. It was alleged for these reasons; counsel was unable to attend the physical hearing of this matter and all attempts to attend the court virtually were unsuccessful.
5. Mr.Ndambuki asserts that indeed, Mr. Owele informed him of the challenges he encountered and requested him to attend court physically and explain his predicament.
6. He averred upon this request; he attended court physically, but since the cause list was being mentioned virtually and not physically, he concluded the matter would not kick off.
7. It was stated that the counsel's mistake should not be visited on the client, the non-attendance in court was not deliberate, and the motion had not been filed with unreasonable delay.

Defendant's case

8. The defendant opposed the motion by the undated replying affidavit of Elizabeth Ngii Maingi, who is one of the legal representatives of the deceased defendant's estate and in swearing it, she had the authority of her co-legal representatives.
9. In it, she stated the plaintiff was not deserving of the orders sought as no justifiable reasons had been presented that would warrant the grant of such orders.
10. According to her, the fateful hearing date of 18/10/2023 was taken by consent of all parties on 4/5/2023. It was her view that it was reckless and negligent for Mr. Owele not to attend court, and the argument that there was a mistake could not suffice.
11. She stated that on the fateful hearing date, she was present in court physically, and she never saw Mr. Ndambuki in court.
12. Furthermore, she argued Mr. Owele had not proffered any evidence showing he had challenges on the hearing date and that if had he been diligent, he would have called her counsel to explain his circumstances.
13. She contended the plaintiff had been using the court process to forestall his vacation of the suit premises at the defendant's expense and had not been keen to prosecute the suit and that it was only after her counsel had served the defence counsel with submissions that the plaintiff woke up 3 months later, and filed the instant motion. She urged the court to dismiss the motion.

Parties' submissions

14. The court directed parties to file written submissions arguing their respective cases.
15. In compliance, the plaintiff's law firm on record M/s. B.M. Mung'ata & Company Advocates did file written submissions dated 29/04/2024, and in them, the counsel framed one issue for determination: whether a case had been made to warrant setting aside the orders issued on 18/10/2023.



16. The defendant's law firm on record M/s. Manthi Masika & Company Advocates filed written submissions dated 9/05/2024 and submitted that the plaintiff had not met the threshold to warrant the grant of the orders sought.
17. Therefore, upon identifying and considering the issues for determination, this ruling shall, later on in its analysis and determination, consider the counsels' arguments on the particular issue and also bear in mind the law and judicial precedents.

Issues for determination

18. I have carefully considered the motion, grounds in support, and affidavits either in support or in opposition to the motion together with rival submissions, and the issues arising for determination which shall be dealt with separately are: -
 - a. Whether at the time of filing the motion, the law firm of B.M. Mung'ata & Co. Advocates was properly on record.
 - b. Whether the plaintiff has met the threshold to warrant the setting aside of the orders issued on 13/10/2023.
 - c. What orders should this court issue, including an order as to costs?

Analysis and Determination

Whether at the time of filing the motion, the law firm of B.M. Mung'ata & Co. Advocates was properly on record.

19. When a party seeks to change advocates as the case herein whereby the plaintiff sought to change the previous law firm of M/s. Mbugua Mureithi & Co. Advocates, who were representing him to the current law firm on record, the legal framework that usually governs such a process is found in Order 9 Rule 5 of the Civil Procedure Rules (CPR) which provides: -

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
20. On scrutinizing the record, it emerges the instant motion as evidenced by the court stamp and court receipt, was filed on 24/01/2024 at 4:28 pm by the current law firm on record yet they had not filed a notice of change of advocates as envisaged by Order 9 Rule 5 of the Civil Procedure Rules.
21. Probably, and on realizing their oversight, they hastily filed a notice of appointment on 25/01/2024 at 8:50 am. This court has taken time to elaborate on the timing of the filing of these documents, as there appears to have been mischief on the part of the registry as it backstamped this notice to read it was filed on 24/01/2024.
22. In my view, having failed to file the notice of appointment before or contemporaneously with the motion, it follows that at the time of filing the instant motion, the law firm of M/s. Mbugua Mureithi & Co. Advocates was on record.



23. Thus, it follows that I find the instant motion is incompetent. Nevertheless, even if the consideration of issue (b) is an academic exercise, it is paramount that I deal with it.

Whether the plaintiff has met the threshold to warrant the setting aside of the orders issued on 13/10/2023.

24. My invitation to intervene is moved under Order 12 Rule 7 of the Civil Procedure Rules, which provides as follows: -

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

25. When rendering its decision, this court has to consider the provisions of Sections 1A and 1B of the *Civil Procedure Act*, which call on this court to determine disputes in a just manner.

26. By the same thread, the provision requires court business to be expedited. These provisions give life to Article 159 (2)(b) of *the Constitution*. It must also be borne in mind that a right to a fair hearing is a cornerstone of the rule of law.

27. When faced with such a motion, the court exercises its discretion, and applicants have to tender sufficient cause as to why judicial discretion should be exercised in their favour. The persuasive decision of *Wachira Karani v Bildad Wachira* [2016] eKLR defined sufficient cause as follows;

“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.”

28. This was further explicated in the Court of Appeal decision of *Simon Thuo Mwangi v Unga Feeds Limited* [2015] eKLR as thus: -

“On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.”

29. The principles that guide this court on the reinstatement of a suit are settled, and this was well summarized in the case of *Shah v Mbogo and Another* [1967] EA 116 Limited [2020] eKLR, which has been relied upon by the defendant’s counsel.

30. In the case of *Shah v Mbogo*, which was cited with approval in the case of *John Waweru Njenga & 5 others v Motor Botique*, the Court of Appeal of East Africa summarised the guiding principles as follows: -

“This discretion (to set aside ex parte Court decisions) is intended 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.”



31. Back to this case, in advancing reasons why he did not attend court, Mr. Owele proffered 2 reasons one of them being he was engaged in other court cases and secondly, he had challenges in accessing virtual court sessions.
32. However, and as rightfully submitted by the defence counsel, these reasons have not been substantiated as Mr. Owele has not tendered copies of the cause lists of those other courts to demonstrate they interfered with his court attendance on the hearing date of 18/10/2023.
33. Further, as for the virtual court sessions, the court sat long into the day and the hearing of this matter took off at 2:20 pm yet, he has not explained why he did not make attempts to secure a better connection in the interlude between 9 am to 2:20 pm or at least, call the defence counsel.
34. Turning to Mr. Ndambuki, as evidenced by the record and as pointed out by the defendant's representatives, he never attended court on the hearing date.
35. His contention that he attended court on the hearing date and when he realised the matters were being mentioned virtually, he walked away on the assumption it would not take off is nothing but a smokescreen. In this court's humble opinion, he is not truthful.
36. To this court's mind, being the plaintiff, one would have expected him to be keen to prosecute his case, including personally attending the virtual court session which was not so.
37. If indeed they were both constrained on 18/10/2023 as they asserted, one would have expected them to promptly move this court which was not so.
38. As rightfully pointed out by the defendant's representative, the plaintiff and his counsel were only jolted from their slumber 3 months later when submissions were served upon his erstwhile counsel.
39. This is an old case, and if the orders sought are granted, the defendant will obviously be prejudiced. Therefore, had this court not found the motion incompetent, it would have dismissed it for not being merited.
40. Utmost and for the reasons stated and in dealing with issue (c), I find the motion dated 24/01/2024 is incompetent and hereby strike it out. Since it is trite law that costs follow the event, I award costs to the defendant. In the end, I hereby issue the following final disposal orders;
 - a. The notice of motion dated 24/01/2024 is hereby struck out with costs to the defendant.
 - b. The plaintiff is hereby directed to file and serve his written submissions of not more than 10 pages within 21 days hereof.
 - c. Directions shall be issued on 27/5/2025

Orders accordingly.

DATED AT MACHAKOS THIS 11TH DAY OF MARCH, 2025

HON A. Y. KOROSS

JUDGE

11. 03.2025

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In the presence of;



Mr. Masika for defendant

Miss Nzili holding brief for Mr. Muema for plaintiff

Ms Kanja- Court Assistant

