



**Seventh Day Adventist Church (East Africa) Limited v Ochom (Environment and Land Case Civil Suit E002 of 2023) [2024] KEELC 1258 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1258 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E002 OF 2023  
SO OKONG'O, J  
MARCH 4, 2024**

**BETWEEN  
SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED PLAINTIFF  
AND  
AGAI OCHOM ALIAS ANGAI OCHOM ..... DEFENDANT**

**RULING**

1. The Plaintiff brought this suit against the Defendant on 10<sup>th</sup> January 2023. The Plaintiff averred that it was at all material times the registered proprietor of all those parcels of land known as L.R Nos. 15037/2, 3, 4, 5, 6 and 7 (hereinafter referred to as “the suit properties”). The Plaintiff averred that the Defendant had been harassing it while developing the suit properties claiming that the same were part of the Defendant’s parcel of land known as Title No. East Kisumu/Kanyakwar “B”/483 (hereinafter referred to as “the Defendant’s land”). The Plaintiff averred that the suit properties were leasehold and did not share a boundary with the Defendant’s land. The Plaintiff sought judgment against the Defendant for among others; a permanent injunction restraining the Defendant from encroaching or trespassing onto the suit properties or in any other way harassing or interfering with the Plaintiff’s peaceful use and occupation of the suit properties, special damages of Kshs. 3,018, 040/- and general damages. The Defendant filed a defence and a counter-claim on 28<sup>th</sup> February 2023. In his defence, the Defendant averred that the suit properties were part of the Defendant’s land which he inherited from his ancestors and which he had occupied for over 50 years. The Defendant averred that it was the Plaintiff which had encroached and trespassed on the Defendant’s land. In his counter-claim, the Defendant contended that the suit properties were created fraudulently and that the acquisition of the same by the Plaintiff from the purported original owners was equally fraudulent. The Defendant sought judgment against the Plaintiff for among others; a permanent injunction restraining the Plaintiff from encroaching, trespassing upon, erecting a fence or interfering with the Defendant’s use and enjoyment of the Defendant’s land, vacant possession of the Defendant’s land and general damages for trespass.



2. The advocates for the parties appeared before the court on 12<sup>th</sup> July 2023 when the suit was fixed for hearing on 9<sup>th</sup> November 2023 in the open court. When the matter came up for hearing on 9<sup>th</sup> November 2023, only the advocate for the Plaintiff turned up in court. The Defendant and his advocates were absent. Since there was no explanation for the Defendant's absence, the hearing of the suit proceeded the absence of the Defendant and his advocates notwithstanding. The Plaintiff called one witness and closed its case. The court thereafter closed the Defendant's case and directed the parties to make closing submissions in writing.
3. What is now before the court is the Defendant's Notice of Motion application dated 13<sup>th</sup> December 2023 brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 12 Rules 2 and 7 and Order 51 Rule 22 of the Civil Procedure Rules and all enabling provisions of the law. In the application, the Defendant has sought an order that the ex parte proceedings of 9<sup>th</sup> November 2023 together with all consequential orders be set aside. The application that is supported by the affidavit of the Defendant's advocate David Rioba Omboto sworn on 13<sup>th</sup> December 2023 is brought on the grounds that when the suit came up for hearing on 9<sup>th</sup> November 2023, the Defendant's advocate attended court virtually but due to internet connectivity challenges he could not address the court. The Defendant has contended that he has a good defence to the Plaintiff's claim, and a counter-claim against the Plaintiff. The Defendant has averred that mistakes and omissions of an advocate should not be visited against his client. The Defendant has contended that he stands to suffer great loss and damage if the orders sought are not granted.
4. The application is opposed by the Plaintiff through a replying affidavit sworn by the Plaintiff's advocate Geoffrey O. Okoth on 22<sup>nd</sup> January 2024. The Plaintiff has averred that the Defendant's application had no basis. The Plaintiff has averred that when the court gave the hearing date of 9<sup>th</sup> November 2023, the court directed that the hearing would take place physically in open court. The Plaintiff has averred that the Defendant's advocate did not attend court virtually and that in any event, the direction by the court was that the suit was to be heard physically in open court. The Plaintiff has averred that if at all the Defendant's advocate attempted to join the court virtually and faced some challenges, the advocate would have contacted the Plaintiff's advocate through a text message or mobile phone. The Plaintiff has averred that the application has been brought after an unreasonable delay of more than one month after the proceedings sought to be set aside. The Plaintiff has urged the court to dismiss the application.

### **Analysis and determination**

5. When the application came up for hearing on 23<sup>rd</sup> January 2024, the advocates for the parties relied entirely on the affidavits in support of and in opposition to the application. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed in opposition to the application. The application was brought principally under Order 12 Rule 7 of the Civil Procedure Rules. I am of the view that a defendant against whom a hearing of a suit has proceeded ex parte under the provisions of Order 12 Rule 2 of the Civil Procedure Rules need not wait for judgment to be made against him before moving the court to set aside the ex parte proceedings and the consequential orders. Order 12 Rule 7 of the Civil Procedure Rules gives the court discretionary power to set aside ex parte judgments and/or orders made when a suit comes up for hearing and some of the parties fail to attend court. The court also has an inherent power to set aside its orders and proceedings for the ends of justice to be met. Whether the court is exercising its inherent



power or power donated under Order 12 Rule 7 of the Civil Procedure Rules, the power is discretionary. In Patriotic Guards Ltd. v. James Kipchirchir Sambu [2018] eKLR the court stated that:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

6. The principles applied by the court in applications to set aside ex parte judgments and orders were set out in Shah v. Mbogo [1967] E.A 116 as follows:

“...the court’s discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

7. The burden was upon the Defendant to establish sufficient cause to warrant the setting aside of this court’s proceedings and orders made on 9<sup>th</sup> November 2023. I am not convinced that the reason given for the Defendant’s advocate and the Defendant’s failure to attend court on 9<sup>th</sup> November 2023 justifies the exercise of this court’s discretion in favour of granting the orders sought in the application before the court. As correctly pointed out by the Plaintiff’s advocate, the hearing date of 9<sup>th</sup> November 2023 was fixed in court on 13<sup>th</sup> July 2023 in the presence of the advocates for both parties and the court directed that the hearing would take place physically in open court. From the record, the court called out the matter during the call-over on 9<sup>th</sup> November 2023 when only the advocate for the Plaintiff appeared. The court after calling out the matter fixed it for hearing at 10.00 am. At 10.08 am when the matter was called out again in open court neither the Defendant nor his advocate was present. The Defendant and his advocates have not explained why they did not appear in open court at 10.00 am or thereafter on 9<sup>th</sup> November 2023. The Defendant’s advocate’s alleged internet connectivity challenges are not a reasonable excuse for his failure to appear in open court as directed by the court. Even if the Defendant’s advocate had a problem with internet connectivity, what of the Defendant? Why was he not in court? I have said enough to show that the application before me has no merit. I have however taken note of the unique nature of the dispute between the parties. I am of the view that a closure on the dispute that has been raging since 2018 can only be brought about by hearing both parties and delivering a judgment on the merit of each party’s case. In Richard Nchapi Leiyangu v. IEBC & 2 others, Civil Appeal No. 18 of 2013, the court stated that:

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”.

8. It is for the foregoing reasons that I will allow the Defendant’s application. The application shall however be allowed conditionally. The Notice of Motion dated 13<sup>th</sup> December 2023 is allowed on the following terms;

1. The proceedings of 9<sup>th</sup> November 2023 and the consequential orders are set aside.



2. The hearing of the suit shall start afresh.
3. The Defendant shall pay to the Plaintiff thrown away costs assessed at Kshs. 20,000/- within 30 days from the date hereof.
4. If the Defendant fails to pay the said sum of Kshs. 20,000/- within the prescribed period, the orders made herein in (1) and (2) above shall stand discharged automatically without further reference to the court and the parties shall proceed to file submissions as directed by the court on 9<sup>th</sup> November 2023.

**DELIVERED, DATED AND SIGNED AT KISUMU ON THIS 4<sup>TH</sup> DAY OF MARCH 2024**

**S. OKONG'O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mukhongo for the Plaintiff

Ms. Kosgey for the Defendant

Ms. J. Omondi-Court Assistant

