



Giturwa & another v Cittimark Investment Limited (Environment & Land Case 23 of 2020) [2024] KEELC 3699 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 23 OF 2020
CA OCHIENG, J
MAY 8, 2024
(FORMERLY NAIROBI ELC. CASE NO. 1298 OF 2016)**

BETWEEN

JACK MATHENGE GITURWA 1ST PLAINTIFF

MARY MAKUNGU OKANGA 2ND PLAINTIFF

AND

CITTIMARK INVESTMENT LIMITED DEFENDANT

RULING

1. What is before Court for determination is the Defendant's Notice of Motion Application dated the 13th September, 2023, where it seeks the following Orders:-
 1. Spent
 2. That the law firm of Kipng'etich & Kamonya Advocates be granted leave to appear for the Defendant after Judgment has been entered.
 3. Spent
 4. That this Honourable Court be pleased to set aside the *ex-parte* Judgment delivered on 1st November, 2022 and any other consequential orders therein and the matter be set down for hearing.
 5. That upon granting prayer 4 above, leave be hereby granted to the Defendant/Applicant to file their list of documents, list of witnesses and witness statements within fourteen (14) days from the date of the order.
 6. Costs of this Application be provided for.



2. The Application is premised on grounds on the face of it and supported with the Affidavit of one Hassan Nyamai Mula, a Director of the Defendant company. He deposes that he was keen on defending the suit but his Advocate did not inform the Defendant that the matter had been set for hearing and Judgment was entered in its absence on 1st November, 2022. He contends that he recently learnt of the Judgment and should it be set aside, he will be very keen in prosecuting the matter to the logical conclusion. Further, that its defence raises triable issues. He states that unless the Judgment is set aside, the Defendant stands to suffer immensely.
3. The Plaintiffs' opposed the instant Application by filing a Replying Affidavit sworn by Jack Giturwa where he deposes that the Defendant was not being honest since its officials stopped attending court, despite being personally served and he attached Affidavits of Service to that effect. He explains that the matter had been set down for hearing on 23rd February, 2021 and a hearing notice thereof served upon the Defendant personally but when the matter came up for hearing on 15th July, 2021, the same could not proceed since the Defendant had filed an Application dated the 21st December, 2020 seeking leave to issue a Third-Party notice. He avers that, their advocates filed a response and submissions to the said Application, without any action from the Defendant's Advocate who was severally served, with all notices. Further, that the Defendant's Application was allowed wherein it was directed to serve the Third-Party Notice but it failed to take any action despite being severally served with the court's directions, culminating in a hearing date being granted on 17th March, 2022. He reaffirms that they served the Defendant's advocates with the hearing notice but the Defendant failed to attend court and the hearing proceeded. He reiterates that the Defendant did not attend the mention on submissions or even the Judgment, despite being served. He insists that the Defendant cannot blame his advocate for failure to attend court, from the 4th March, 2020 to the 1st November, 2022. He challenges the fact that the Defendant had not stated how its representatives learnt of the Judgment, almost a year after the same was delivered. He insists that the advocate was not being truthful that the Defendant was dealing with sickness of the 'unmentioned director' who later passed away, as Hassan Nyamai Mula is the only director who had been appointed to act on behalf of the Defendant. He claims the Defendant lost interest in the case in 2020. Further, that the Defendant should pursue its alleged monetary claim against the Third Party, in a separate suit but not delay this matter. He insists that the prayers sought will highly prejudice them as the matter was filed in 2016 and has taken over six (6) years, of which period, they have not been able to utilise the suit land.
3. The Notice of Motion Application was canvassed by way of written submissions.

Submissions

4. The Defendant in its submissions explained that under Order 10 Rule 11 of the *Civil Procedure Rules*, the court can set aside a Judgment upon such terms as are just. It argued that the Judgment delivered on 1st November 2022, was irregular and ought to be set aside together with any consequential orders against it, as it denied alleged service by the Plaintiff's via a shared church postal address. It claimed that it never received the said notices. Further, that it had relied on their appointed advocates' to update them of the case. It further submitted that one of the directors' had been diagnosed with cancer and the Defendant company was thrown in a state of trying to get her treatment, but the said director died, in the year 2022 sending the company again into a state of mourning until she was laid to rest, hence it was until 2023 when a meeting was held to replace her. Further, that Hassan was tasked to follow up on this matter. It was its further submission that attempts to reach their advocates were unsuccessful and it appointed another advocate whom upon perusal, discovered Judgment had been entered against. Further, it instructed the said Advocate to file the instant Application. It sought for the Advocate who filed the instant Application to be allowed to come on record for it. It reaffirmed



that mistake to Counsel should not be visited upon it. It further argued that even though the instant Application has been brought late, its Defence raises triable issues. To buttress its averments, it relied on Article 50 of the *Constitution* of Kenya and several decisions including *Elizabeth Kavere & Another v Lilian Atho & Another* [2020] eKLR; *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* (2016) eKLR; *Wachira Karani v Bildad Wachira* (2016) eKLR; *S. K Tarwadi v Veronica Mueblemann* (2019) eKLR; *Haji Ahmed Hauliers t/a Hasa Hauliers v Highway Carriers Ltd* (1982 – 880 1 KAR; *Belinda Muras & 6 Others v Amos Wainaina* (1978); *Continental Butchery Limited v Nthiwa* [1978] KLR and *Phillip Chemwolo & Anor vs Augustine Kubede* [1982-88] KLR 103 at 1040.

4. The Plaintiffs' in their submissions insisted that the court ought to be guided by Section 3A of the *Civil Procedure Act* in exercising its discretion to re-open a suit or not. On the issue of non-attendance, they argued that the explanation given by the Defendant was not satisfactory nor legitimate for the reason that both the Defendant and their advocate were served with the relevant hearing notices. They further submitted that the Application for setting aside court orders, was inordinately delayed, since it was brought eleven (11) months after the Judgment was delivered. Further, that the same is an afterthought since the Defendant had even been served with a notice and a party and party Bill of Costs. They reiterated that the defence was not meritorious as it contained mere denials, while blaming a third party. They reaffirmed that they would suffer prejudice if the Application was allowed, since there is no privity of contract between the parties herein and re-opening the suit would occasion them further financial loss. They sought for costs. To support their arguments, they relied on the following decisions: *Nicholas K. Cheruiyot v Kenya Midland Sacco Limited* (2021) eKLR; *Josephat Oginda Sasia v Wycliffe Wabwile Kiiya* (2022) eKLR and Civil Case No. 17 of 2014 *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Credit Reference Bureau Limited*.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivaling submissions, the following are the issues for determination:-
 - a. Whether the firm of messrs Kipngetch & Kamonya Advocates should be granted leave to come on record for the Defendant.
 - b. Whether the Judgment delivered on 1st November, 2022 should be set aside and the Defendant granted leave to reopen the case and defend this suit.
 - c. Who should bear the costs of this Application.
6. As to whether the firm of messrs Kipngetch & Kamonya Advocates should be granted leave to come on record for the Defendant.
7. I note the Defendant's erstwhile advocates messrs Maina Muchiri & Co. Advocates have not objected to the Application to replace them.
8. On Change of Advocates, post Judgment, Order 9 Rule 9 of the Civil Procedure Rules provides that:-

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”



9. Based on these legal provisions, noting that Judgment had already been entered in this matter as against the Defendant, while the firm of messrs Kipngetich & Kamonya Advocates have sought to come on record for it, I will proceed and allow this prayer.
10. As to whether the Judgment delivered on 1st November, 2022 should be set aside and the Defendant granted leave to reopen the case and defend this suit.
11. The Defendants have sought to set aside the Judgment delivered on 1st November, 2022 including any consequential order emanating therefrom. It claims its erstwhile Advocate did not inform it, of the outcome of the suit and that mistake to Counsel should not be visited upon them. Further, that one of its directors died and the defence on record raises triable issues. The Plaintiffs' have opposed the instant Application and insisted that the Defendant's erstwhile advocates were severally served with mention and hearing notices. Further, that despite the fact that Defendant's Application to issue Third Party Notice was allowed, it failed to adhere to the said Order of the Court and has now come seeking to set aside the impugned Judgment.
12. From a perusal of the Court record, I note the Defendant stopped attending Court on 22nd October, 2020. Further, it filed an Application dated the 21st December, 2020 seeking to serve a Third Party Notice against the administrators of the Estate of Mwangangi Muvu Nganga which application was allowed vide a Ruling dated the 10th February, 2022 wherein it was directed to serve the said Third Party Notice in fourteen (14) days, but it failed to do so. I further note that, there are several Affidavits of Service confirming the Defendant's erstwhile Advocate was served by the Plaintiffs' Advocate but he still failed to attend court. I note there is even service via email but the said Advocate failed to attend court, culminating in the matter proceeding for hearing. This is all evident from the annexures marked as 'JMG 1', which includes mention, hearing and Judgment notices. The Defendant despite seeking to blame its erstwhile advocate, has not furnished court with an Affidavit from the said Advocate to present reasons as to why he severally failed to attend, court despite proper service. The Defendant has further not confirmed the exact date, when it became aware of the impugned Judgment.
13. In the case of *Shah v Mbogo and Another* [1967] EA 116 it was held that:-

" This discretion 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."
14. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J (as he then was) 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..."
15. While in the case of *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173, it was held that:-

" In law, the discretion that a Court of law has, in deciding whether or not to set aside *ex-parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a



discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

16. It is trite that setting aside of Judgment is discretionary but the court has to consider sufficient cause proffered by an Applicant, before proceeding to do so. However, based on the facts before me including the Court record, I find that the Defendant including its Advocate intentionally and severally failed to attend court, despite being duly served. Further, it now seeks to deny the Plaintiffs’ the fruits of their Judgment. I opine that the Defendant has failed to provide plausible reasons to demonstrate sufficient cause why together with its Advocate, they severally failed to attend court for mention, hearing and Judgment. It seems to me, the Defendant only realized the seriousness of the matter when he was served with the Party and Party Bill of Costs. It is my considered view that since no plausible reasons has been provided to set aside the impugned Judgment, even if the Defendant seeks to blame the Advocate, I opine that mistake to Counsel is not a cure for all ills, as cases belong to the parties and not the Advocate. It is interesting to note that the Defendant which is a company seeks to have the court believe that since one director was unwell, the other director could not deal with its case. Insofar as I have the discretion to set aside the impugned Judgment, however, at this juncture, I opine that the Defendant’s actions’ only seek to delay the course of justice.
17. In the foregoing while associating myself with the decisions cited, I find the Notice of Motion Application dated the 13th September, 2023 is not meritorious except for prayer No. (2) where I have allowed the firm of messrs Kipngetich & Kamonya Advocates to come on record for the Defendant. I proceed to dismiss the rest of the prayers with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Apollo Muinde for Plaintiffs

Ms. Ozwara for Defendant

Court Assistant – Simon/Ashley

