Ndungu v Mwangi (Environment & Land Case E026 of 2022)
[2024] KEELC 5147 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5147 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE E026 OF 2022

LN GACHERU, J

JULY 4, 2024

BETWEEN

MILKAH KANENE NDUNGU ..... PLAINTIFF

AND

PETER MWAURA MWANGI ..... DEFENDANT

RULING

1. Vide a Notice of Motion Application dated 6th February, 2024, the Defendant/Applicant has sought for the following Orders; -

    a. That the Court be pleased to defer and/or arrest its judgment in this matter slated for the 12th February, 2024, pending the hearing and determination of this application.

    b. That the Court be pleased to issue an order directing that the hearing of this matter be referred for retrial and/or hearing afresh.

    c. That the Court be pleased to issue any other order it may deem fit and/or just to grant.

    d. That the costs of the application be in the cause.

2. The Application is premised on the grounds stated on its face and on the Supporting Affidavit of the Applicant, Peter Mwaura Mwangi, sworn on 2nd February, 2024.

3. The Plaintiff/Respondent is the registered owner of land parcel No. Loc.16/kigoro/712 (the suit property), from which the Defendant/Applicant is allegedly harvesting tea leaves reportedly on the strength of an unexpired lease Agreement executed with the Plaintiff/Respondent's son (deceased), and which the Plaintiff/Respondent disputes.

4. The Defendant/Applicant's case is that the present suit was heard ex parte, and was scheduled for Judgment on 12th February, 2024. He averred that he stands to suffer irreparable loss and damage as

a result of the ex parte proceedings. Further, the Defendant/Applicant contended that during the hearing which took place virtually on 31st January, 2024, his Advocates on record were unable to address this Court due to a technical hitch, which did not allow his Advocates to log into the Court's virtual platform.

5. He further contended that as a litigant, he should not be punished for technical issues arising during the hearing of 31st January, 2024, as the matter was not within his personal control.

6. Further, that no prejudice would be occasioned to the Plaintiff/Respondent were the Court to grant the Orders sought.

7. The Plaintiff/Respondent opposed the application through the Replying Affidavit of Milkah Kanene Ndung'u sworn on 20th February, 2024. She averred that the present Application is meant to delay the determination of the suit; therefore, it is bad in law and ought to be dismissed with costs.

8. The Plaintiff/Respondent contended that the Defendant /Applicant and his two previous Advocates on record have not been attending Court for over a full year yet, he has not provided this Court with reasons for their non-attendance.

9. Further, that the Defendant/Applicant has not disclosed the dates on which he dispensed with the services of the two Firms of Advocates he had retained in this matter namely, Tony Martin LLP Advocates And Gitau Kaigai & Company Advocates, and has not explained to this court why he has not attended to this matter for an entire calendar year.

10. It was the Plaintiff/Respondent's further contention that the Defendant/Applicant is a trespasser onto her parcel of land, from which he is picking tea leaves without her consent.

11. She added that the Defendant/Applicant has been indolent for not being engaged in the suit for a whole year, and as equity aids the vigilant and not the indolent, the Court ought to dismiss the present Application.

12. It was further contended that litigation belongs to Clients and not to their Advocates and therefore, the Court should not grant the orders sought on the grounds of mistake by counsel.

13. The Plaintiff/ Respondent further averred that litigation must come to an end, and that the instant Application is meant to delay the final determination of this suit.

14. The Defendant/Applicant filed a Further Affidavit on 6th March, 2024, in response to the Plaintiff/ Respondent's Replying Affidavit.

15. He contended that the Law Firm of Tony Martin LLP Advocates, whom he had previously retained were not informing him of the progress of the matter, and it only upon visiting the Court's registry in person that he found out about his Advocates' non-attendance.

16. Further, he averred that he started attending Court personally upon finding out that his Advocates were not attending Court. However, he was not in a position to address the Court as he had not formally withdrawn the services of his Advocates.

17. He refuted the Plaintiff/Respondent's claim that he is trespassing onto her parcel of land, and he asserted that there is no lawful Order from any Court barring him from accessing the suit property.

18. The Defendant/Applicant further testified that he withdrew the services of the two Firms of Advocates, whom he had retained due to non-attendance and took up the matter himself, which demonstrates his interest in prosecuting the subject suit.

19. He controverted the Plaintiff/Respondent's contention that he is picking tea leaves from the suit property illegally. It was his contention that he was harvesting tea leaves on the authority of a lease agreement executed between himself and the Plaintiff/Respondent's son, with the knowledge of the Plaintiff/Respondent herein.

20. Further, that he started experiencing problems with Plaintiff/Respondent only after the death of her son, yet the term of the lease agreement executed between himself and Plaintiff/Respondent's son has not lapsed.

21. The Application was canvassed by way of written submissions.

Defendant/applicant's Submissions

22. The Applicant filed written submissions in person on 14th March, 2024. He reiterated the averments contained in his Supporting Affidavit dated 2nd February, 2024, and his Further Affidavit dated 5th March 2024.

23. He identified three issues for determination, reproduced verbatim below:

    a. Whether the Applicant/Defendant will be prejudiced by the fact that the matter proceeded ex parte.

    b. Whether the Applicant/Defendant and/or his legal Representative occasioned the technical hitch experienced at the time of the hearing.

    c. Whether the Plaintiff/Respondent will be occasioned any prejudice if the matter is heard inter partes.

24. The Plaintiff/Respondent did not file written submissions; and therefore, the Court will rely on her Replying Affidavit dated 20th February, 2024.

25. Having considered the instant Application, the Reply by the Plaintiff/ Respondent, the written submissions and the pleadings generally, the court finds the issues for determination are as follows:

    I. Did the Court's virtual platform encounter a technical hitch during the hearing on 31st January 2024?

    II. Is the Applicant entitled to the Orders sought?

    III. Who shall bear the costs of the Application?

I. Is the Applicant entitled to the Orders sought?

26. The Defendant/Applicant is acting-in-person in this matter consequent to a Notice of Withdrawal of Advocate dated 2nd February, 2024, through which he dispensed with the services of the Law Firm of Gitau Kaigai & Co Advocates.

27. The Defendant/Applicant filed a Defense on 26th January, 2024, wherein he denied the Plaintiff/ Respondent's claim contained in the Plaint dated 10th November, 2022, which claim challenged his right to harvest tea leaves from the suit land on the basis of a lease agreement dated 8th March 2021, and executed between the Defendant/Applicant and the Plaintiff/Respondent's son.

28. The Defendant/Applicant contended that the matter has proceeded ex parte and he stands to suffer irreparable loss and damage unless this Court's defers its Judgment and directs that the suit be heard afresh.

29. From the court record, there is correspondence dated 11th July, 2023, from the Law Firm of Mbiyu Kamau & Co Advocates, who are acting for the Plaintiff/Respondent addressed to the Law Firm of Tony Martin LLP Advocates , who at the time were on record Defendant/Applicant, wherein, the following statement appears:

> " We note that you have not been appearing in the matter despite service upon you. We request that you do the needful if you do not have instructions to act for the defendant so that the matter may proceed as your non-appearance has been delaying this matter".

30. The preceding statement appears to confirm the Defendant/Applicant's contention that the Law Firm of Tony Martin LLP, were not prosecuting the matter on his behalf according to his instructions. The Defendant/Applicant stated that he took up the matter himself upon withdrawing the services of the Law Firm of Tony Martin LLP.

31. However, he alleged that he failed to file a Notice of Withdrawal of Advocate, and hence he could not address the Court following the aforesaid withdrawal. Through his Advocates, the Defendant/Applicant opposed the Plaintiff/Respondent's Application dated 10th November, 2022, by a filing a Replying Affidavit and Statement of Defence, both dated 28th November, 2022.

32. The Court has observed that the Defendant/Applicant subsequently filed a Notice of Withdrawal of Advocate dated 2nd February, 2024, through which he terminated the services of a different Firm of Advocates namely, Gitau Kaigai & Co Advocates. It is through the latter Firm of Advocates that the Defendant/Applicant filed his Defence dated 26th January, 2024.

33. The Court is satisfied that the Defendant/Applicant has demonstrated through his Notice of Withdrawal of Advocate dated 2nd February, 2024, that he is familiar with the applicable procedure for terminating the services of an Advocate. The Court holds and finds that Defendant/Applicant was well aware that he was not entitled to address the Court without a formal withdrawal of the services of the Firm of Tony Martin LLP.

34. For the avoidance of doubt, the Defendant/Applicant was only required to file a Notice of Withdrawal of Advocate similar to the aforesaid notice dated 2nd February, 2024, to be in a position to prosecute the suit personally.

35. The Defendant/Applicant filed a Defence 26th January, 2024, in the suit through the Law Firm Gitau Kaigai & Co Advocates, whom he appointed as his Legal Representatives through a Notice of Change of Advocate filed before the Court on 4th December, 2023.

36. Having filed a Defence in the suit, the Court holds and finds that the suit herein is opposed and that the Defence as filed by the Defendant/Applicant raises triable issues. Having raised triable issues, it is prudent to allow the Defendant to have his day in court. See the case of *Job Kiloch v Nation Media Group ltd, Salaba Agencies Ltd & Michael Rioro* (2015) eKLR, the court held:

> " what then is a defence that raises triable issues? A bonafide triable issues is any matter raised by the defendant that would require further interrogation by the court during a full trial.....it is therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court"

37. It is the duty of the court to do justice, but not to discipline parties. Though the Defendant claim of technical hitch is not plausible, this court finds that failure to allow the instant application means

the Defendant/ Applicant, will be condemned unheard, though he has a defence on record that raises triable issues.

38. It is evident from the foregoing that a suit which is defended proceeded without the participation of the Defendant/ Applicant, who has alleged that his advocates on record let him down, by failing to attend court, and as a result, the matter proceeded ex parte. Therefore, the Defendant/Applicant is seeking for another chance to have the suit heard a fresh, so that he can participate and advance his case.

39. The present Application contains an alternative prayer for the Court to order for a retrial of the case owing to the technical hitches experienced by his Advocates on record on 31st January, 2024, when the matter was set down for hearing.

40. The admission of parties to the virtual Platform is done by the Court and the admission of parties during the proceedings is done through a big screen. The Court ordinarily sees all parties waiting at the Lobby, and admits them as the proceedings move along. The court is not satisfied that on 31st January, 2024, during the hearing of the case, counsel for the Defendant/Applicant, was waiting at the lobby. Further, the matter was not heard virtually but physically in open court.

41. Indeed, if the said counsel had logged in, as alleged by Defendant/ Applicant, he must have logged in long after the virtual platform session had ended. It is the practice of this court after going through the Cause list of the day, to normally asks whether there is a party remaining unattended, and if there is, the court always give the party/advocate the directions issued, dismissals included.

42. On this particular day, there was no one waiting at the Lobby by the time the Court concluded going through the cause list. Therefore, the Defendant/Applicant should be candid, own up to his mistake, and not place blame upon the Court Assistant and or the court.

43. But as the court stated earlier, its duty is to do justice to the parties, but not to discipline parties. The court finds that the interest of justice herein would dictate in favor of allowing the instant Application, so that the suit can be heard inter-parties, and decided on merit.

44. However, the court will also take note of the objective of the *Civil Procedure Act*, as provided by Sections 1A and 1B, which is to promote expeditious and afford resolution of civil disputes before it. The Applicant should not be allowed to delay resolution of this matter at all. See the case of *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) which quoted with approval the case of *National Union of Mineworkers v Council for Mineral Technology*[1998] ZALAC 22 at para 10, the court held: -

> "The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused."

45. It is trite that it is the duty of the Court, litigants as well as their counsels to ensure that matters are concluded expeditiously and without delay. Sections 1A &1B, of the *Civil Procedure Act* as stated

earlier, implore Courts to facilitate expeditious disposal of matters, before them. See the case of *Shah v Mbogo* (1967) E.A. 166, where the Court held that:

> " This discretion to set aside as exparte 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..... 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.

46. Though the subject suit which the Defendant/Applicant is seeking to be retried afresh had progressed considerably, and the Plaintiff/ Respondent had even filed written submissions, and the next step was delivery of Judgement, it is in the interests of justice for the Court to allow all parties to ventilate their claim and thus order for a fresh trial of this matter on the basis of the material supplied by the Defendant/Applicant in support of the present Application.

47. Section 3A of the *Civil Procedure Act*, donates power to this court to issue orders that are necessary for the end of justice, and to prevent abuse of the court process. Allowing the matter to be heard inter-parties is one of such orders.

48. Consequently, having carefully considered everything in totality, this Court holds and finds that the instant Application is merited and therefore, the said Application dated 6th February 2024, is hereby allowed entirely with costs to the Plaintiff/Respondent.

49. The Defendant Applicant is directed to pay a throw away costs of ksh.5000/= to the Plaintiff/ Respondent before the next hearing date; failure of which, the matter will proceed without audience of the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 4TH DAY OF JULY 2024.

L. GACHERU

JUDGE.

Delivered online in the presence of:

Joel Njonjo - Court Assistant

Ms Mbiyu for the Plaintiff/ Respondent

Peter Mwaura Mwangi - Defendant/ Applicant in person.

L. GACHERU

JUDGE.