GA Life Assurance Limited v St Elizabeth Academy-Karen Limited (Environment & Land Case 715 of 2017) [2024] KEELC 6591 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6591 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 715 OF 2017

LN MBUGUA, J

OCTOBER 3, 2024

BETWEEN

GA LIFE ASSURANCE LIMITED ..... PLAINTIFF

AND

ST ELIZABETH ACADEMY-KAREN LIMITED ..... DEFENDANT

RULING

1. Before me is the Defendant's Notice of Motion dated 29.1.2024 seeking orders that the new advocate be allowed to come on record, that there be a stay of execution of the judgment and that the said judgment be set aside. The application is premised on the grounds on its face and on the supporting affidavit of one Ann Wanjiku Wado, a director of the defendant.

2. The applicants contend that the defence case was marked as closed on 25.4.2022 after a counsel holding brief for defendants' advocate indicated to the court that he could not tell as to why their witness was not in court. They contend that the said averments were false as they were never even informed of the hearing date. They blame their erstwhile advocates for their woes and avers that they have even lodged a complaint with the Advocates Disciplinary Tribunal.

3. In opposition thereof, the plaintiffs filed a Preliminary Objection and a Replying Affidavit sworn on 20.5.2024 by Shania Mukani, their legal officer. It is averred that though the substantive relief sought is that of setting aside the judgment, the law invoked is review under Order 45 rule 1 of the Civil Procedure Rules, and no grounds have been pleaded under the said rule. It is further argued that the defendant was at all material times represented in the matter. Adding that the firm of Mathenge Wambugu & Co. advocates had prosecuted various interlocutory applications in the suit.

4. I have considered all the issues raised herein. As pointed out by the respondent, the substantive issue relates to the setting aside of the judgment delivered on 9.6.2022. The specific law cited by the applicant is on review under order 45 rule 1 of the Civil Procedure rules. The said proviso stipulates that;

> "(1) Any person considering himself aggrieved;-
>
> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

5. The question I pose is; Has the applicant proffered sufficient reasons to warrant a review of the judgment so as to set it aside? The applicant is blaming their advocate for their "no show" during the hearing. Angote J had this to say in Mwangi Gachiengu & 2 Others –Vs- Mwaura Githuku & Another – [2019] eKLR

> "it is trite law that a matter once filed in court does not belong to the advocate but to the litigant. It is the responsibility of the litigant to be in constant touch with his advocate on the position of the matter. Where a litigant goes to sleep after filing a suit, he cannot blame his advocate for having not updated him on the position of the matter ."

6. The applicants have not denounced that their advocate on record was Mathenge Wambugu advocates. They have not demonstrated the steps they were undertaking during the lifespan of the suit to ensure that they kept track of the progress of their case.

7. In the case of Moschion v Mwangi (Environment & Land Case 350 of 2018) [2023] KEELC 17144 (KLR) (27 April 2023) (Ruling) Neutral citation: [2023] KEELC 17144 (KLR), this court while dismissing numerous consolidated matters for failing to uphold the overriding objective set out in the *Civil Procedure Act* and Rules stated thus;

> "The right to be heard is sacrosanct and is embodied in the latin maxim "audi alteram partem". However, a party is only entitled to reasonable opportunity to be heard, See Nginyanga Kavole vs. Mailu Gideon [2019] eKLR. The instant case appears to be one of mere inaction which is not excusable. Thus this is a situation whereby the plaintiff has driven herself from the seat of justice."

8. Similarly, in the case at heard, the defendant applicant appears not to have kept abreast of the progress of their case. This is a situation whereby judgment was delivered two years ago in June 2022. Even the discovery of the delivery of the judgment in January 2024 is a tell tale sign of the lethargic conduct of the applicants.

9. I therefore find that the prayer for review of the judgment is unmerited and is disallowed. The prayer for stay of execution is tied to the review and must therefore fall by the way side. I have no reason to

disallow a new advocate to come on record for the applicants. Thus in the final analysis, the application dated 29.1.2024 is dismissed save prayer 2 which is allowed. The respondent / plaintiff shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Lusi for Plaintiff

M/s Mwangi holding brief for Kiprop for Defendant

Court assistant: Joan