Kihara v Ithumbi (Environment & Land Case 18 of 2018)
[2024] KEELC 6747 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6747 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 18 OF 2018

EC CHERONO, J

OCTOBER 11, 2024

BETWEEN

JOSEPH MWANIKI KIHARA ..... PLAINTIFF

AND

PETER MWANGI ITHUMBI ..... DEFENDANT

RULING

1. The Applicant filed a Notice of Motion application dated 7th January, 2024, under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 51 Rule 1 and 15 of the Civil Procedure Rules, 2010 and all enabling provisions of the law seeking the following orders –

    a. Spent.

    b. That this Honourable Court be pleased to set aside the ex-parte orders made on the 27th June, 2024 closing the Plaintiff's case pending hearing and determination of this application inter partes.

    c. That this court be pleased to re-open the Plaintiff's case herein and allow Amos Mupalia, the County Surveyor and the Land Registrar to testify and produce documents before this Honourable Court.

    d. That upon this Honourable Court granting orders 'b' and 'c' above, this Court be pleased to issue summons to the land registrar Bungoma County, the Surveyor Bungoma and Amos Mupalia to attend this Honourable Court on the hearing date that will be later fixed.

    e. Costs of this Application be in the cause.

2. The application is premised on the grounds on the face of it and the affidavits sworn by Robert Ommani-the Applicant's Counsel sworn on 7th June, 2024. In the said affidavit, the deponent deposed that this suit was scheduled for hearing on 10th April 2024, a date that was declared a public holiday.

That the matter was then placed before the court on 11th April 2024 in the absence of the Applicant, who claims he was unaware of the new date and directions were taken by the Respondent's counsel for a hearing on 29th May, 2024. On that date, the Applicant's counsel was indisposed and did not attend court but sent a representative who was unable to arrange for another counsel to hold brief. Consequently, the Applicant's case was closed, despite his intention to call the land registrar and the County surveyor as witnesses. The Applicant stated that no prejudice will be occasioned to the Respondents if the orders sought are granted and urged the Court to allow the application.

3. The Respondents opposed the application and filed grounds of opposition dated 14th June, 2024 where they stated that the Applicant has not shown sufficient cause to warrant the issuance of the orders sought and the Applicant's actions and omissions are deliberately aimed at obstructing/delaying the cause of justice.

4. Directions were taken in which the parties agreed to canvass the application by way of written submissions. The firm of Namatsi & Co Advocates filed submissions dated 22nd July, 2024 on behalf of the Applicant while the firm of Omundi Bw'Onchiri & Co Advocates filed submissions dated 14th June, 2024 on behalf of the Respondent.

5. This Court has considered the application, the supporting and grounds of opposition and rival submissions including the various cases cited. The issue that arises for determination is whether the applicant is deserving of the orders sought in the application dated 7th January, 2024.

6. In the said application, the Applicant has sought for the setting aside of the orders made on 27th June, 2021 and for the re-opening of the Plaintiffs case for purposes of calling the Land Registrar Bungoma and the County Surveyor. The Applicant averred that his counsel was indisposed on the 27th June, 2021 when this suit was set down for further hearing. He deposed that although his Counsel had instructed a representative to appear and request a counsel to hold his brief, the said representative was unable to get a counsel on time.

7. On the prayer for setting aside of the orders of 27th May 2024, it is important to note that this date was fixed by the Defendant/Respondent ex-parte and that service for a hearing notice of the date was effected upon the Applicants counsel as per the affidavit of service sworn on 13th April,2024. When dealing with an application seeking to set aside an order made in such circumstances, the court is called upon to exercise the discretion in accordance with the principles laid down in Mbogoh & Another v. Shah [1968] EA 93 which were more recently reiterated as follows in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR:

> From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services

Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173.

11. I therefore find that the court has unfettered discretion on whether or not to grant the orders of setting aside herein. I note that this application was filed on 7th June, 2024 which is about 10 days after the orders sought to be set aside were made. Therefore, the application was made promptly. I also address my mind to the nature of the dispute before the court and in my considered view, I am of the opinion that in the interest of justice, the Applicant can be afforded another chance to be heard.

8. On the issue of re-opening the Applicants case, both the law i.e. the Civil Procedure Rules and the *Evidence Act* do not have clear and express framework on how that jurisdiction is to be exercised. Therefore, in deciding whether or not to re-open an on-going case is purely left to the realm of judicial discretion albeit to be exercised judiciously and in the interest of justice. In Samuel Kiti Lewa v Housing Finance Company Limited & another [2015] eKLR the court held that ;

> " the Court's discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.

9. Out of the primary concern on consideration of such an application to re-open a case is whether the adverse party will suffer prejudice in the legal sense. The ambit of that trial to re-open a case and introduce additional evidence has also to be recognized under the right to a fair which are constitutionally protected under Article 50 of *the Constitution* of Kenya, 2010. The Applicant, just like any other litigant has a right to a fair hearing as enshrined in Article 50 of *the Constitution*. This includes a right to present his case by calling any person to testify as a witness. This right is coupled with the fact that the opposing party will have an opportunity to cross-examine that witness.

10. Notably, the Plaintiff/Applicant had taken out witness summons for the two witnesses, a fact the Respondent was made aware of. Further, I note from the record that the proposed/intended witnesses have prepared reports which both parties wish to have as part of the court record. It is therefore my considered view that re-opening the case will not occasion a miscarriage of justice and no prejudice will be suffered by the Respondent.

11. Article 159 (2) of *the Constitution*, 2010 enjoins this Court to dispense substantive justice without undue regard to procedural technicalities. Essentially, the primary consideration is whether the interests of justice require that the application be allowed. It is my finding that this Court is obligated to consider the evidence sought to be introduced, so as to determine the real issues in controversy and dispense justice to the parties, and any prejudice caused to the Respondent in this regard compensated by an award of costs.

12. In view of the foregoing, I am inclined to exercise my discretion in favour of the applicant. Consequently, the application is allowed on condition that the Applicant will pay the Respondent thrown away costs of Kenya Shillings ten thousand within 7 days from the date of this Ruling.

13. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/S Wanyama H/B for Bwonchiri for the Respondent/Defendant.

2. M/S Mulama H/B for Namatsi for the Applicant/plaintiff.

3.Bett C/A.