



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC Misc App No. 11 OF 2019

FLORENCE KIRUI.....PLAINTIFF/RESPONDENT

VERSUS

EMILY NGETICH.....1st DEFENDANT/APPLICANT

DAVID NGETICH.....2nd DEFENDANT/APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 7th June 2019 brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules as well as all other enabling provisions of the law in which the Applicant seeks that the court re-instates their application dated the 25th February 2019 wherein they had sought leave to file their intended Appeal out of time to the ruling of the Senior Resident Magistrate's court sitting in Kericho in Civil Suit No 6 of 2008 and thereafter stay of execution pending the hearing of the intended Appeal. The said application had been dismissed for want of prosecution.

2. The application is supported on the grounds on the face of it as well as on the supporting affidavit sworn by the M/s Francesca Chepkoech Advocate on the 7th June 2019.

3. The application was opposed by the Respondents' replying affidavit dated the 23rd September 2019 to the effect that the Applicants were bent on delaying justice and the fruits of her judgment. That the Application was also made in bad faith and meant to frustrate her.

4. By consent, parties agreed to dispose of the Application through written submissions to which the Court obliged them and they filed their respective submissions.

Applicants' submissions.

5. The Applicants, in support of their application submitted that the issue for determination by the court was whether there was a reasonable excuse as to why their Counsel did not attend court and whether they would be prejudiced if the order sought was not granted.

6. The Applicants further submitted that when the application dated 25th February 2019 came up for hearing on the 20th May 2019 their Counsel had been held up in another court in Bomet but had given instructions to another Counsel to hold her brief and which Counsel had arrived late in court when the matter had been called out thus leading to the dismissal of their application for non-attendance.

7. That Counsel's excuse and reasons for non-attendance was reasonable as the events of the fateful day were beyond her control. That she did not deliberately fail to attend court.

8. That secondly, it was an important land matter which is emotive in nature and on the ground and therefore the court should give them a chance to be heard on merit in order to fully settle the same. That they had not lost interest in the matter and were desirous of prosecuting the same. That it was desirous of them to have the matter heard and determined as they would suffer irreparable loss should the Appeal not be heard on merit since the parcel of land in dispute had been home to them and their children for many years and therefore they sought for the court to exercise its discretion in their favour.

9. That the matter had only come once before the court for hearing wherein the court ought to have given them a benefit of doubt and placed the same aside or grant them an adjournment. That it had not been true as deponed by the Respondents that the Applicants were out to delay the matter. That the present application had been filed without undue delay and the mistakes of Counsel should not be meted out to an innocent party who was free from error and who should not be condemned unheard. Reliance was placed on the decided case of **James**

Respondent's Submissions.

10. In opposing the Applicants' application, the Respondent construed the issues for determination as follows;

- i. Whether the Applicants' Advocate gave reasonable excuse for non-attendance.
- ii. Whether the Defendant/Applicants are entitled to the orders sought in the application.

11. The Respondent proceeded to submit that the Applicants application sought to re-instate an application dated 25th February 2019 which was dismissed for non-attendance when it came up for hearing in court on 20th May 2019. The Respondent further submitted that the Applicant's excuse that on that day their Counsel had another matter in the Bomet Court was just but another way to delay the finalization of the matter and deny her the fruits of the judgment which had been entered in her favour.

12. That it had been more than one year after judgment had been entered in her favour that the Applicants filed an application which was dismissed on 24th July 2018. The Applicants then filed yet another application dated 25th February 2019 eight months after the ruling had been delivered which application was again dismissed on 20th May 2019 for non-attendance for which the present application arose.

13. That there was no good reason advanced as to why the Applicants failed to prosecute the impugned application considering that the same had been filed under certificate of urgency. That the reasons given by the Applicant's Counsel that she had another matter in Bomet wherein she had instructed another Counsel to hold her brief but which Counsel was not in court when the matter had been called out because s(he) was also attending another matter, was not plausible. That there was no cause list for both the matters Counsel were attending to, annexed to the affidavit in support of the preset application, and therefore there was no proof to support their allegations. Reliance was placed on the decided case in **Peter Kiplangat Rono vs Family Bank Limited [2018] eKLR**

14. The Respondent, while relying on the **Peter Kiplangat Rono** case (Supra) proceeded to submit that the Defendant/Applicants' were not entitled to orders sought in their application because they were guilty of inordinate delay and further that the order being sought to stay having been issued in the year 2008, the same had already been executed and the court would be acting in vain if it granted them the said prayers since they had already been overtaken by events. The Respondents sought for the application to be dismissed with costs.

Determination.

15. I have considered the Application herein as well as the submissions and authorities submitted by Counsel herein. The sole issue before me is whether the court should re-instate the Applicants' application dated the 25th February 2019, which was dismissed for want of prosecution and wherein they had sought for stay of execution and leave to file an Appeal out of time to the ruling of the Senior Resident Magistrate's court sitting in Kericho in Civil Suit No 6 of 2008.

16. The court's exercise of its discretion to set aside its order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.

17. In the case of **Shah vs Mbogo & Another (1967) EA 116** it was held;

"The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

18. In this instance, it is not denied that judgment had been entered in this matter in favour of the Respondent herein wherein a decree had been issued on the 13th October 2016 for eviction of the Respondents from the suit land being L.R No. Kericho/ Kiptere/3638. The Applicants filed an application dated the 24th July 2018 one year and nine months later seeking to set aside the said Judgment. The Application was dismissed via a ruling of 24th July 2018 and an order dated 11th February 2019 issued in execution. The Applicants filed yet another application dated the 25th February 2019 seeking leave to appeal the court's ruling of 24th July 2018 out of time which Application was dismissed on the 20th May 2019 for non-attendance and for which the present application arose. Given the above set of facts, the question for determination is whether the reasons advanced by the Applicants amount to 'sufficient reason' to justify the exercise of the court's discretion in their favour.

19. It has been submitted that the cause of the turn of events in this matter was that the when the matter had come up for hearing, the Applicants' Counsel had another matter in the Bomet court wherein she had instructed another Counsel to hold her brief, but when the matter was called out neither of the Counsel were present, the subsequent Counsel having had another matter before another court. The matter was thus dismissed for non-attendance.

20. It is to be noted that no cause list nor mention of the parties thereto of the matters for which both Counsel were attending and/or engaged in had been attached to the Applicants' affidavit in support. The view that this court takes is that the Applicants are not being honest, and have deposed to matters that are not true and therefore the explanation was not plausible.

21. The conduct in the prosecution of this matter right from its inception does not warrant the exercise of the court's discretion in favour of the Applicants. Indeed while it is true that the objective of the court is to do justice, such justice must cut both ways. *In the case of Bains*

Construction Co. Ltd. vs John Mzare Ogowe [2011] eKLR the Court observed as follows:-

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences”.

22. In the case of **The Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others [2015] eKLR**, the Court of Appeal held:

“In this case, however, the Applicant’s advocates simply plead ignorance and consequential inaction which cannot avail them’.

23. The Court of Appeal further held in **Rajesh Rughani vs Fifty Investment Ltd. & Another [2005] eKLR** that:-

“If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy”.

24. The end result is and I find that the application before me is not merited and is hereby dismissed with costs to the Respondent.

Dated and delivered via Microsoft Teams this 29th day of April 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE