Odotte v Atin Kumar Aggarwal t/a Far & Transport Technical Services & 3 others (Environment & Land Case 172 of 2015) [2024] KEELC 6455 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6455 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND CASE 172 OF 2015

E ASATI, J

OCTOBER 3, 2024

BETWEEN

MICHAEL KOJIEM ODOTTE ..... PLAINTIFF

AND

ATIN KUMAR AGGARWAL T/A FARM & TRANSPORT TECHNICAL SERVICES ..... 1ST DEFENDANT

GAURI METHA ..... 2ND DEFENDANT

DISTRICT LAND REGISTRAR, KISUMU ..... 3RD DEFENDANT

ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion application dated 12th September, 2023 brought by the 1st and 2nd Defendants pursuant to provisions of section 63(c) of the *Civil Procedure Act*, Order 12 Rule 7 of the *Civil Procedure Rules* and Articles 50 and 159(2) of the *Constitution* of Kenya. The application seeks for an order setting aside the proceedings of 29th September, 2021 and the subsequent judgement delivered by the court on 23rd February, 2023 and that the Applicants be granted a chance to give evidence in support of their defence.

2. The grounds upon which the application was brought as shown on the face of the Notice of Motion are that the Applicants were condemned unheard and judgement declared against them. That the Applicants have a good defence and ought to be given a chance to be heard.

3. That the Applicants' failure to attend court and give evidence was not a misstate of their own making as they were not informed by their previous Counsel that their matter was due for defence hearing on the due date. That the Applicants should not be condemned for a misstate not of their own making. That the rules of natural justice require that the Applicants be given a chance to be heard.

4. The application was supported by the contents of the Supporting Affidavit of Atin Kuma Aggárwal, Gauri Mehta and Gilbert Oguso Advocate.

5. The Plaintiff opposed the application vide the ground of opposition dated 17th October, 2023 and the contents of the Replying Affidavit of even date. The Plaintiffs case is that the application is misconceived, lacks merit hence sought to be dismissed with costs. That the application is a disguised application for review belatedly lodged and that the same is an afterthought. That the 1st and 2nd Defendants are guilty of laches hence are not entitled to the equitable relief sought. That the application is an abuse of the process of the court tailored to defeat justice and deny the judgement-creditor the right to enjoyment of the fruits of the litigation.

6. The application was argued by way of written submissions. Written submissions dated 16th October, 2023 were filed by the firm of Odongo Awino & Company Advocates on behalf of the 1st and 2nd Defendants/Applicants.

7. Counsel submitted that vide his Affidavit Gilbert Oguso Advocate takes full responsibility for his failure to appraise the applicant of the progress of the case and inform them that the matter had been fixed for hearing.

8. That the negligence and/or inadvertent mistake by Mr. Oguso Advocate was aggravated by the fact that no submissions were filed by him in response to the submissions filed by the Plaintiff in support of his claim and that even at the time of taxation of party and party Bill of Costs Counsel Oguso did not attend. That no steps were taken by Counsel to handle the matter in the best way and to the best interest of his client.

9. That an Advocate representing a party in terms of Order 9 Rules 1 and 2 of the Civil Procedure Rules is not a party to the proceedings and any damages undertaken to a party seeking relief in the suit.

10. Counsel relied on the case of *Belinda Muras & 6 Others v Amos Wainania* (1978) KLR. Counsel submitted further that the Applicant have a good defence to the Plaintiff's claim.

11. That what was remaining was for them (Applicants) to articulate the defence by way of testimony.

12. That the Applicants have a right to be heard. Counsel relied on the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No.1 of 2017 where the Court of Appeal held that the Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be. That as a result of not being heard, judgement to the sum of Kshs.2,246,723 was entered against the applicants. That the application tilts in favour of the Applicants. Counsel urged the court to allow the application.

13. On behalf of the Plaintiff/Respondent, written submissions dated 20th December, 2023 were filed. Counsel submitted that this matter first proceeded to hearing of the Plaintiff's case on 29th October, 2020. That Counsel for the 1st and 2nd Defendant was not in attendance on the said date of hearing despite having been served with a hearing notice dated 19th June, 2020. That an Affidavit of Service was filed to that effect. That the Plaintiff's case was heard and closed.

14. That sometimes on 11th November, 2020, the 1st and 2nd Defendant put in a Notice of Change of Advocate whereby the firm of Oguso & Okungu Advocates came on record on their behalf.

15. That on 1st December, 2020, Mr. Oguso sought time to peruse the court file. That on 29th September, 2021 when the matter came up for defence hearing Counsel for the 1st and 2nd Defendant sought

adjournment on the grounds that his clients were indisposed. That Counsel closed the case of the 1st and 2nd Defendants on his own volition.

16. That to date, no witness statement or Defendant's documents have been filed by the 1st and 2nd Defendants. That consequently, the matter proceeded to hearing of 3rd and 4th Defendant's witness namely the Land Registrar who testified as DW1 upon conclusion of which the defence case was marked as closed.

17. The Applicants' Counsel then sought for 14 days to file submissions in opposition to the Plaintiff's suit. That the submissions have never been filed to date.

18. That on 24th February, 2022, the honourable court gave a determination that the Plaintiff had proved his case on a balance of probabilities. That the 1st and 2nd Defendants were served with Notice to Show Cause on 22nd August, 2023 and filed the present application herein dated 12th September, 2023.

19. On whether or not the application meets the threshold for setting aside the judgment, Counsel relied on the case of *Pithon Waweru Maina v Thuku Mugira* (1982-88)l KAR 171 , the case of *Patel v EA. Cargo Handling Services Ltd* (1974)EA 75 and *Peter Ngigi Kigira v Fredrick Nganga Kigira* [2022]eKLR on the principles applicable in handling of an application to set aside a judgement.

20. On whether the 1st and 2nd Defendants were given a chance to be heard, Counsel submitted that they were given opportunity to be heard which they squandered by failing to attend court. Counsel submitted that once an opportunity to be heard is accorded to a litigant and the same is squandered then the right to be heard is presumed to have been wasted by the litigant and the court cannot be impeded from proceeding with litigating the matter at the expense of another litigant. Counsel relied on the case of Union Insurace Co. of Kenya Ltd v Ramzan Abdul Dhanji Civil Application No. Nai 179 of 1998 where the Court of appeal held that the law is that parties must be given a reasonable opportunity of being heard and that once that opportunity is given and is not utilized, then the only point on which the party can be heard is why he did not utilize it.

21. On whether a mistake of Counsel previously on record for the 1st and 2nd Defendants is excusable and ought to be relied upon as a plausible explanation why the 1st and2nd Defendants did not utilize their right to be heard, Counsel submitted that the admission on oath by Counsel previously acting for the applicants that he deliberately and consciously misled the applicants and routinely omitted to inform them of the various hearing dates constitutes gross professional negligence on the part of the advocate which does not constitute a ground for setting aside the judgement but might be relevant in an action by the client against the said errant Advocate.

22. On whether 1st and 2nd Defendants ought to be given leave to testify/give evidence in the proceedings, Counsel cited the provisions of Order 7 rule 5 and Order 11 of the *Civil Procedure Rules 2010* and submitted that the 1st and 2nd Defendants failed to comply with the provisions of Order 7 rule 5 of the *Civil Procedure Rules* the consequence of which is that leave of the court may be sought to file the witness statements at least 15 days before directions being given under Order 11 of the *Civil Procedure Rules.*

23. Counsel relied on the case of *Rupa Savings & Credit Co-operative Society v Violet Shidogo (2*022)eKLR where the court held that

> "it is legally unacceptable that the mistake of an advocate to be allowed as an excuse for violation of express provisions of a statute. The defence of mistake of Counsel unless proven

by cogent and credible evidence should not be used as a tool to influence the judicial discretion of the court."

24. Counsel submitted that the failure by the 1st and 2nd Defendants to file list of witnesses, witness statements and documents within the time stipulated by statute constituted an inexcusable mistake and was meant to occasion delay of justice.

25. On whether or not the plaintiff/Respondent will be prejudiced should the application be allowed, Counsel relied on the case of *Rayat Trading Co. Limited v Bank of Baroda & Teteze House Ltd* [2018]eKLR where it was held that as mush as the court is obligated to promote the provisions of article 159 (2) (d) of the *constitution* of Kenya 2010 and uphold Substantive justice against technicalities the law must protect both the applicant and the judgement creditor for justice to be seen to be done. Counsel submitted that the plaintiff will suffer prejudice if the application was to be allowed. That the plaintiff will be delayed from enjoying the fruits of the judgement and be dragged into protracted litigation. That the plaintiff shall not have the opportunity to give rebuttal evidence since the actual plaintiff, Michael Odotte Kojiem, is deceased. That this is a suit that has been pending in court since 2015. Counsel urged the court to disallow the application and award costs to the plaintiff.

26. I have considered the application and the grounds raised in opposition thereto. The application calls upon the court to exercise its discretion and set aside the judgement and give the applicants a chance to testify. As held in the case of *Shah v Mbogo & another* (1967) EA 470 the court's discretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.

27. The applicants' sole excuse for not participating in the proceedings is that they were not informed by their advocate then on the progress of the case. Counsel previously acting for the applicants Mr Gilbert Oguso swore Affidavit admitting that he did not inform his clients of the hearing dates, he closed their case without calling evidence, he did not file submissions on the case and on the Plaintiff's Bill of Costs. The explanation he gave for this was partly that one of his clients the 1st Defendant was sick and had undergone a medical surgery. Counsel also blamed pressure of work as his partner had left the law firm. The 1st Defendant in his Affidavit in Support of the application deposed that he had undergone a medical surgery in India. He attached documents to the Affidavit to prove this. Perusal of the said documents show that the patient the subject matter of the documents was admitted in hospital on 22. 4. 2022 and discharged on 26. 4. 2022. The date in contention when the 1st and 2nd Defendants failed to produce evince and when their case was closed was on 29.9.2021 about 7 months before the hospitalization. The record shows that the matter was finalized and judgement read before the alleged time of hospitalization. Judgement was delivered on 23. 2. 2022. The record shows that even prior to 29/9/2021, the court had given the Defendants a chance to be heard by adjourning the matter more than once.

28. The suit was filed in 2015. There is no demonstration of the efforts made by the 1st and 2nd Defendants to access their advocate to inquire about the progress of their case. I find no plausible explanation for failure to adduce evidence during the proceedings. In any event, the applicants had not even filed witness statements, and bundle of documents in compliance with the provisions of Order 7 Rule 5 *Civil Procedure Rules.*

29. An Advocate is an agent of the litigant and his/her actions the actions of the principal. This was emphasized in *Clemensia Nyanchoka Kinaro v Joyce Nyansiaboka Onchomba* [2020] eKLR wher the court held That 'It is an established principle that the mistake of an advocate should not be visited on

his client. However, an advocate is the agent of the litigant, and where the advocate is guilty of inaction, as the agent of the litigant, the litigant will bear the consequences of his advocates inaction."

30. And in the case of *Bains Construction Co. Ltd. -v- John Mzare Ogowe* 2011 eKLR this Court also observed: -

> "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".

31. In *Rajesh Rughan v Fifty Investment Ltd & another* [2005] eKLR the court held that "It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not excusable mistake which the court may consider with some sympathy.

32. In *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, the court observed that courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

33. It has been demonstrated that the applicants were given sufficient opportunity to be heard. The record shows that the Plaintiff's case was closed on 29/10/2020 on which date the court gave the defence time and adjourned the hearing to 1/12/2020. On 1/12/2020 Counsel for the Applicants was not ready to proceed and the matter was adjourned to 30/3/2021. On 30/3/2021 it was further rescheduled to 29/9/2021 for hearing of the defence case. On 29/9/2021 the same could not be adjourned anymore and Counsel for the applicants closed their case. Counsel was given an opportunity to file submissions which he did not.

34. On the other hand, it has been demonstrated that prejudice will be occasioned to the Plaintiff/ Respondent if the application was to be allowed. Litigation must come to an end and a successful party in litigation must be allowed to access the success.

35. The Applicants cannot be said to have been denied a chance to be heard. The judgement was entered on 23rd February 2022 and it was not until September, 2023 that the application was made. The Applicants ought to have been following up with his Advocate to find out the progress of the case. The Applicants are not only guilty of laches but were given opportunity to be heard but failed to seize it. The court finds no reason to exercise its discretion in their favour.

36. The court therefore finds no merit in the application. The application is hereby dismissed. Costs to the Respondents.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 3RD DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

Ouma Njoga for the Plaintiff/Respondent.

1st and 2nd Defendants/Applicants.