



**Waweru & 205 others v Bamburi Cement Limited; County Commander,
Machakos & 5 others (Interested Parties) (Environmental and Land Originating
Summons E018 of 2021) [2024] KEELC 6855 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E018 OF 2021
CA OCHIENG, J
OCTOBER 16, 2024**

BETWEEN

GEORGE WAWERU & 205 OTHERS APPLICANT

AND

BAMBURI CEMENT LIMITED RESPONDENT

AND

COUNTY COMMANDER, MACHAKOS INTERESTED PARTY

CCIO, MACHAKOS INTERESTED PARTY

OCPD, ATHI RIVER INTERESTED PARTY

DCIO, ATHI RIVER INTERESTED PARTY

DCC, ATHI RIVER INTERESTED PARTY

OCS, ATHI RIVER INTERESTED PARTY

RULING

1. What is before Court for determination is the Plaintiffs’ Notice of Motion Application dated the 6th December, 2023 where they seek the following Orders:-
 - a. That this Honourable Court be pleased to arrest the Ruling scheduled for the 14th Day of December, 2023 meant for the determination of the Application dated the 29th November, 2023 until the hearing and determination of this Application.
 - b. That this Honourable Court be pleased to order for a stay of execution of the orders of the 23rd October, 2023 and all consequential costs until the hearing and determination of this Application.



- c. That this Honourable Court be pleased to set aside the ex parte orders of the 23rd October, 2023 and grant the Applicants’ a chance to defend the application seeking the eviction filed by the Respondent.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of GEORGE WAWERU, the 1st Plaintiff where he confirms he has instructions to depose the Affidavit on behalf of the other Applicants. He explains that the Respondent had filed an Application seeking to evict them, of which they instructed Francis M. Kalwa Advocate to oppose it and file requisite documents as well as attend court on their behalf. He states that the Court issued directions that the said Application was scheduled to be heard on 23rd October, 2023 where parties were supposed to attend court for further directions. He confirms that the Counsel they had retained did not attend court for hearing of the Application seeking eviction orders but the Counsel for the Respondent was present and asked the Court to allow the said Application as prayed. Further, upon being informed of what had transpired, they instructed their Advocate to file a requisite application seeking to set aside the Orders of 23rd October, 2023 but were surprised having found that their advocate had filed an Application dated the 29th November, 2023 where he indicated that the Plaintiffs’ had decided to abandon the said Application seeking to set aside Orders issued on 23rd October, 2023 and comply with the impugned orders of eviction, which was not the case herein. He denies that they had instructed their Counsel to withdraw the Application seeking to set aside the aforementioned Orders and file the Application dated the 29th November, 2023 seeking for enlargement of time to allow them, comply with Orders issued on 23rd October, 2023. He further denies swearing the Affidavit in respect to the Application dated the 29th November, 2023 and insisted that his signature is a forgery as the said signature is different from the one in his Identity Card. He reiterates that they were condemned unheard since their Advocate failed to attend Court. He avers that they have heavily invested in the suit property, where they have constructed schools registered with the Ministry of Education, hospitals and permanent residential houses. Further that some of them have resided on the suit property for decades and orders of eviction will adversely affect them. He reaffirms that the orders were issued before the matter was concluded. He insists that the Respondent is not in possession nor developed the suit property and it is imperative that their interests are safeguarded. Further, that no prejudice will be suffered by the Respondents should the current status quo prevail and they are allowed to remain in active possession of the suit land.
3. The Defendant/Respondent opposed the instant Application by filing Grounds of Opposition dated the 13th December, 2023.
4. The instant Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, Grounds of Opposition as well as the submissions, the only issue for determination is whether this court should set aside the orders issued on the 23rd October, 2023.
6. On setting aside an order or Judgment, in the case of *Shah v Mbogo and Another* [1967] EA 116 it was held that:-

“This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person



who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

7. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J (as he then was) held that:-

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

8. While in the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173, it was held that:-

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

9. Before I make a determination of this Application I wish to highlight certain proceedings within this matter. On 14th March, 2023, Mr. Kalwa Advocate informed Court that he had been instructed by the Plaintiffs’ who were his clients that they were no longer interested in this matter and sought to withdraw it. Further, the Court granted the Plaintiffs’ leave of fourteen (14) days to file a response to the Application dated the 10th March, 2023 and a mention was fixed on 17th May, 2023. On 17th May, 2023, the Counsel for the Plaintiffs Mr. Kalwa sought a further mention date, which was scheduled on 19th September, 2023. On 19th September, 2023, Mr. Kalwa sought to withdraw this suit but since he had not served the Defendant’s Counsel, the Court fixed a further mention date on 23rd October, 2023. On 23rd October, 2023, Mr. Kalwa did not appear in Court but the Defendant’s Counsel was present. The Court noted that the Plaintiffs’ had not filed any response to oppose the Application dated the 10th March, 2023 and allowed it as prayed. I note the Plaintiffs’ thereafter filed a Notice of Motion Application dated the 29th November, 2023 seeking enlargement of time to comply with the Orders issued by this Court on 23rd October, 2023. I note this Court vide its detailed Ruling dated the 29th October, 2021 had dismissed the Plaintiffs’ Application dated the 28th April, 2021 wherein they were seeking injunctive orders and noted that they had not established a prima facie case to warrant the orders as sought. Further, these Orders were never appealed from.

10. It is trite that setting aside of Judgment or Order is discretionary but the court has to consider sufficient cause proffered by an Applicant, before proceeding to do so. However, from the facts before Court including my analysis above, it seems to me the Plaintiffs were hell bent on bringing confusion in this matter. Further, I note they have not even proffered an Affidavit from their erstwhile Advocate Mr. Kalwa to confirm if he indeed did not have instructions to withdraw the matter nor to defend the Application for eviction. I opine that they have not demonstrated sufficient cause nor offered plausible reasons to warrant the setting aside of the impugned order and the instant Application actually amounts to an abuse of the court process. In the foregoing, I will proceed decline to set aside the orders issued on the 23rd October, 2023.

11. In the circumstances, I find the Notice of Motion Application dated the 6th December, 2023 unmerited and will dismiss it with costs.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF
OCTOBER, 2024**

CHRISTINE OCHIENG

JUDGE

In the presence of:

Impano for Respondent

Kamuya Ng'arua for Applicants

Court Assistant – Simon

