



**Masaza v Gosi & 2 others (Environment & Land Case 85 of 2021)
[2023] KEELC 17797 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 17797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 85 OF 2021**

AE DENA, J

FEBRUARY 9, 2023

BETWEEN

MOHAMED ABDALLA MASAZA PLAINTIFF

AND

LAND REGISTRAR KWALE 1ST DEFENDANT

MOHAMED ABDALLA GOSI 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1 This case was instituted vide a plaint dated March 8, 2017. The case proceeded for hearing on October 3, 2022 where the plaintiff testified and closed his case. Counsel for the Defendant did not appear for the hearing though aware of the said date. The defence case was therefore also marked as closed. The 1st defendant in a bid to have his case heard has filed the application subject of this ruling seeking to stay the *ex parte* proceedings of October 3, 2022 and to have the matter heard *de novo*.

The Application

2 The application is filed under the provisions of Order 12 Rule 7, Order 51 Rule 1 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The following prayers are sought;

1. Spent
2. That pending interparties hearing and determination of this application, the honourable court be pleased to order stay of *ex parte* proceedings in this matter
3. That the *ex parte* proceedings entered on October 3, 2022 and all the consequential orders be set aside



4. That the Defendants/Applicants be granted leave to open the plaintiff and defence case and an order do issue that the suit start de novo.
 5. That the costs of this application be in the cause.
- 3 The application is premised on the grounds that the Plaintiff failed to serve the Defendants advocate with a hearing notice and proceeded with the case ex parte even after being served with a notice letter dated August 24, 2022 by the Defence Counsel that the date of October 3, 2022 was not convenient for the defence. The applicants state that they are determined to defend themselves and have a good defense which raises triable issues. The application is further supported by an affidavit sworn by Joyce Chesaro Advocate for the applicants.
- 4 It is averred that the matter had been scheduled for hearing on June 28, 2022. That on the said hearing Ms Chesaro was indisposed and sought for Mr Magolo to hold her brief in the matter. That Counsel holding brief erroneously took a hearing date of October 3, 2022 without knowledge of the Applicant's counsel diary. That upon confirmation with her diary, Ms Chesaro realised that the said date was not convenient as she had scheduled another hearing in case No HCC No 275 of 2005 in Mombasa. That she immediately wrote a letter to the Plaintiff's Counsel herein and copied the same to the Deputy Registrar Kwale notifying them of her position and that she would not be able to proceed with the hearing on October 3, 2022. That upon service of the letter, counsel for the plaintiff still went ahead and invited the deponent to pick a date for mention. The invite was vide a mention notice dated October 4, 2022 and indicated that the mention would take place on October 27, 2022. That upon receiving submissions on October 24, 2022 Ms Chesaro realised that the mention date was intended to be for confirmation of filed submissions hence the instant application.
- 5 According to Ms Chesaro, the Plaintiffs' Counsel did not act in good faith but hurriedly proceeded with the case in the absence of counsel for the defendants and proceeded to close the case. It is averred that the application herein has been brought without undue delay and that the Defendant has a good case and should be allowed to defend the same. Further that mistakes of counsel should not be visited upon the client and hence the application should be allowed as prayed.

Response

- 6 The Plaintiff/Respondent opposed the application through a replying affidavit dated November 3, 2022 sworn by the Plaintiff. It is stated that the Applicant is hesitant in admitting the hearing notice dated June 30, 2022 which clearly indicated October 3, 2022 as the hearing date. That the hearing notice was therefore duly served. The deponent states that as a result of adjournment of this suit, on June 28, 2022 the court pronounced a last adjournment over the matter. It is further stated that counsel for the applicant did not seek to find out on the progress of the suit from the court file or the Plaintiffs' Counsel offices while she was being served with correspondence over the matter. That the same demonstrates that the Applicant was deliberate in delaying justice. That the applicant owes their client due diligence. That the matter was filed in 2017 and the delay in finalising the same is injurious to the Plaintiff's quest for justice. That the application is entirely an afterthought and made in bad faith.
- 7 In response to the Respondents replying affidavit, the Applicant filed a supplementary affidavit on November 14, 2022. The Applicant denies having received a hearing notice indicating October 3, 2022 as the hearing date. That the eventuality of her ill health was not deliberate. It is stated that the applicant has been ready to defend his case despite his old age of 87 years. That it is only fair that the applicant is accorded the opportunity to be heard by the court.



Submissions

8 The application was canvassed by way of written submissions which counsels filed and exchanged.

Applicants Submissions

9 It is submitted that the instant suit and Mombasa HCC No 275 of 2005 were scheduled for hearing on the same day and time October 3, 2022. That for that reason the Applicants counsel was not able to attend court for hearing of the matter. The matter proceeded ex parte and was closed. The defence case was thus not heard. The Applicant submits that he stands to suffer great injustice as his right to fair hearing will be severely impaired as he will not have been afforded a fair hearing in the event that this application is not allowed. That the error made by the Applicant's counsel should not be visited upon the Applicant who was not aware of the status of counsel's diary. Counsel for the Applicant submits that the case is a land matter and ought to be determined on merit. The Respondent will not suffer any prejudice in the event that the orders sought are granted. The applicant relied on *Pithon Waweru Maina Versus Thuka Mugira Civil Appeal No 27 of 1982* and *Shabir Din Versus Ram Parash Anand Civil Appeal 72 of 1952* to buttress her arguments.

Respondent's submissions

- 10 It is submitted on behalf of the Respondent that the legal threshold to consider before exercising the courts discretion is whether the applicant has demonstrated sufficient cause warranting setting aside the ex parte decision or proceedings. Referring to the threshold set in the case of *Wachira Karani Versus Bildad Wachira [2016] eKLR* it was pointed that the reasons afforded by counsel for the applicant were insufficient to warrant exercise of the court's discretionary powers. It is stated that as per the record the matter was adjourned at the instance of the Applicant's Counsel and the date of October 3, 2022 taken by consent and the same was marked as a last adjournment. That for a last adjournment to be granted sufficient reason has to be availed as observed in *Okaka & Another Versus Wesonga [2022]*. That there was no attendance by the 1st Defendant in person for hearing nor by their advocates. It is submitted that the court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel.
- 11 Counsel for the Plaintiff/Respondent submits that counsel for the 1st Defendant has on various occasions absented herself from proceedings without any notice, apology or reasonable cause mostly for which the court has exercised restraint and discretion to give adjournments. That the court closed the 1st Defendants case on October 3, 2022 and the instant application was prompted by the plaintiff's service of final submissions. The Respondent finally submits that the decision to proceed with the hearing ex parte and subsequent close of both the Plaintiffs and Defendants' case is reasonable in light of the record. The court is urged to dismiss the application.

Determination

12 The application is brought under Order 12 Rule 7 of the Civil Procedure Rules as hereunder; -

'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'

Additionally, Order 51 Rule 15 of the Civil Procedure Rules also mandates 'The court may set aside an order made ex parte'.

13 It is the Applicant's case that they were not aware of the hearing date of the suit. Ms Chesaro states that on the date when the hearing date was fixed, she was indisposed and had Mr Magolo hold her brief as



she could not proceed. That it was during that time that Mr Magolo and counsel for the respondent fixed the matter for hearing without consulting her or having the knowledge of her diary. It is stated that on October 3, 2022, she had already set up another hearing before the court in Mombasa. The court has perused the exhibits in the affidavit in support of the application, a copy of an extract of a page from the diary is attached. It is noted that several matters are listed as proceeding before court on October 3, 2022. It is also noted that HCC No 275 of 2005 was listed as intended to proceed at the same time with the instant suit. Clearly there is absolutely no way counsel would have proceeded with two different matters in two separate courts at the same time. I also recognize while both suits are filed in courts of concurrent jurisdiction the suit filed in Mombasa is older by far compared to the present suit and deserves the priority.

- 14 The court has also taken note of the second exhibit to the affidavit in support of the application. It is a letter dated August 24, 2022 from the Applicants counsel addressed to the Plaintiff/Respondents Counsel. The same intimates that Ms Chesaro was indisposed at the time of fixing this suit for hearing and hence the fixed date was not convenient for the applicant. The letter bears a receiving stamp from the Respondents counsel office with the date of August 1, 2022. This letter is clear evidence of the fact that counsel for the Applicant had indicated her unavailability on the date set for hearing the matter.
- 15 The Court of Appeal in the case of *James Kanyिता Nderitu & Another [2016] eKLR*, stated that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.
- 16 In view of the foregoing discussions this court finds and holds that the 1st Defendant/ Applicant has met the threshold for setting aside of the ex Parte proceedings of October 3, 2022. The proceedings are hereby set aside. Costs of the application be in the cause.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 9TH DAY OF FEBRUARY, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Umara for the Plaintiff/Respondent

Ms. Chesaro for Applicant

Mrs Waswa for AG

Mr. Denis – Court Assistant

