



Maweu v Mwangi & another (Environment & Land Miscellaneous Case E175 of 2021) [2023] KEELC 804 (KLR) (7 February 2023) (Ruling)

Neutral citation: [2023] KEELC 804 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E175 OF 2021**

JA MOGENI, J

FEBRUARY 7, 2023

BETWEEN

PURITY KATHOKI MAWEU APPLICANT

AND

HEZEKIAH NJUKI MWANGI 1ST RESPONDENT

HYPAC INVESTMENT LIMITED 2ND RESPONDENT

RULING

1. Before this Court for determination is a notice of motion application dated 7/07/2022 filed under articles 50 (1), and 159 (2) (a), (b), (d) & (e) of the Constitution, 2010, order 40 rules (1) & (2), order 12 rule 7, order 51 rule (1) & (15) of the Civil Procedure Rules 2010, sections 1A, B, 3A, 63 (e) of the Civil Procedure Act, and all other enabling provisions of the Law. The applicant/respondent is seeking for the following orders:
 1. Spent.
 2. That this court be pleased to reinstate the applicant's notice of motion application dated 23.06.2022 and 30.06.2022 respectively herein and set aside the ruling, the dismissal order and all consequential Orders issued on 07.07.2022 by Hon. Lady Justice J.A. Mogeni.
 3. That pending the hearing and determination of this application inter-partes, the respondents, their agents, assigns, servants and any other persons howsoever under their instructions be hereby restrained from evicting the applicant and or in any other way dealing in any manner whatsoever with all that property known as matrimonial home Nairobi / Block 115/1192.
 4. That pending the hearing and determination of this application inter-partes, the respondents, their agents, assigns, servants and any other persons howsoever under their instructions be



hereby restrained from evicting the Applicant and or in any other way dealing in any manner whatsoever with all that property known as matrimonial home Nairobi / Block 115/1192.

5. That costs of this application be in the cause.
2. The motion is premised on the supporting affidavit of Paul Mwangi Ndung'u, the applicant/respondent's counsel and grounds (a) to (g) set out on its face.
3. The application is opposed. The respondent/applicant filed its grounds of opposition dated 15/07/2022.
4. On 26/09/2022, the court gave directions on filing of written submissions and a ruling date was reserved. By the time of writing this ruling, only the respondent/applicant had filed written submissions dated 24/10/2022, which I have considered.
5. I have considered the motion, supporting affidavit, grounds of opposition and the respondent/applicant's submissions. I in turn have had time to analyze the emerging issues therein and this court is of the considered view that the germane issue falling for consideration is whether the applicant has established a case to reinstate the dismissed applications.
6. The integral prayers are review and setting aside of this Court dismissal order issued on 7/07/2022 and reinstating the applicant/respondent's motions dated 23/06/2022 and 30/06/2022 forthwith. The other order is for the court to restrain the Respondent/applicant's from evicting the Applicant/Respondent pending the hearing and determination of this application.
7. In a nutshell, the Applicant/ Respondent's counsel concedes that the dismissal order issued on 7/7/2022 was as a result of his failure to attend court for the hearing of the applications. It is his case that he was ready to prosecute the applicant's Notice of Motion applications dated 23.06.2022 and 30.06.2022 on 07.07.2022 and he joined the link of the Honorable Court before 9.00am.
8. He further deponed that this matter was listed as number 1 in the daily cause list of 7/07/2022 and that the started by mentioning this matter and she indicated that she had no physical file in respect to this matter to give court's directions and hence the Honorable judge proceeded to hear other matters. That shortly after his phone which he was using to access the court experienced network challenges such that he could not manage to access the court for a few minutes.
9. He avers that he later discovered that all matters that were to take place online were done and court proceeded for full hearing in open from 10.am. He contends that he managed to contact the Court assistant who informed him that the court had dismissed the two applications with costs for non-appearance. It is his case that after he came to realize about the dismissal orders, he decided to file this application immediately.
10. He also deponed that his client, Hezekiah Njuki Mwangi, had informed him that auctioneers have been coming to his matrimonial home threatening to evict him and his family and that when they heard the matter had a date of 07/07/2022, they said they would wait for that day, so that they may evict him if no orders will be issued by this honorable court.
11. Conversely, it is the respondent/applicant's case that the applicant/respondent has not advanced any justifiable reasons for his failure to prosecute the motion applications dated 23/06/2022 and 30/06/2022 which were properly dismissed on 7/07/2022 by this honorable court. That without prejudice to the foregoing, the respondent/applicant shall pray for thrown away costs of Kshs. 20,000.00 to be paid as a precondition for the reinstatement of the aforementioned applications. Counsel also deponed that the applicant/respondent has failed to comply with the orders issued on



23/03/2022 requiring him to deposit the sum of Kshs. 1,000,000.00 in an escrow account and thus deserves no audience before this Court.

12. The court is empowered under order 12 rule 7 Civil Procedure Rules where a suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just. Section 3A of the Civil Procedure Act gives this court inherent power to make such orders as may be necessary for the ends of justice to be met. Order 51 rule 15 Civil Procedure Rules gives the Court power to set aside any order made ex parte.
13. Additionally, Section 80 of the Civil Procedure Act confers upon the court the necessary authority to review a decree or order it has made. Further, Order 45 of the Civil Procedure Rules sets out the rules for setting aside a judgment or order made by a court. See the case of Stephen Gathua Kimani –Vs- Nancy Wanjira Waruingi / Providence Auctioneers (2016) eKLR and Republic –Vs- Public Procurement Administrative Review Board & 2 others (2018) eKLR where it was held as follows:-

“That the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:

 - (a)
 - (b) On account of some mistake or error apparent on the face of the record, or
 - (c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
14. The Court’s discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. The guiding principle in the court’s exercise of this judicial discretion was laid down in Mbogo & another Vs Shah EALR 1908. The court’s discretion to set aside an ex-parte order of the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, this discretion is not intended to assist a litigant who deliberately seeks to obstruct or delay the course of justice.
15. The applicant/respondent has gone into great lengths to explain the predicament that he found himself due to these technological issues. In my view, this offers satisfactory explanation. I shall give the applicant/respondent’s counsel the benefit of doubt that his client stands to suffer hardship if he is denied the opportunity to agitate his case for reasons that he cannot be blamed for.
16. With regard to prayers 3 and 4, it is clear that the application concerns itself with the granting of an interlocutory injunction. The germane principles on interlocutory injunctions were well settled by the Court of Appeal of East Africa in Giella v Cassman Brown & Co. Ltd (1973) EA. An applicant must establish that he or she has a prima facie case with a probability of success, that he or she is likely to suffer irreparable harm if an injunction is not granted and finally where the balance of convenience tilts if the court is in doubt.
17. Order 40 rules (1) and (2) gives the court powers to grant temporary injunctions to restrain such acts as may waste, alienate, remove and or dispose of the suit parcel as it may deem fit until the disposal of the suit or further orders of the court.
18. I would wish to add that an injunction is equitable and discretionary remedy. Those seeking an order of injunction must therefore demonstrate that they deserve the exercise of the court’s discretion. They must also approach the seat of justice with clean hands. It follows therefore that, even if the necessary conditions are satisfied, an injunction may not issue if it is proved to the satisfaction of the court that the applicant is undeserving of such equitable relief. From the material placed before me, I am not satisfied



that the applicant has established a prima facie case with a probability of success. The Applicant in my view has also approached the seat of justice with unclean hands due to the fact that there is no evidence before me to show that the Applicant/respondent has complied with the orders given on 22/03/2022. Considering that the purpose of an injunction is to maintain the status quo, I am not convinced that the applicant has established and/or demonstrated the aforementioned threshold. I shall therefore not grant prayers 2 and 3.

19. Counsel is aware that the Applicant/respondent has not complied with the orders given on 22/03/2022. The Applicant/Respondent was ordered to provide security for the due performance of the decree in the sum of Kshs. 1 million within 90 days from the date of the ruling. It was directed that if the applicant/respondent failed to comply with the same, the stay lapses. Again, there is no evidence adduced that the ruling delivered on 22/03/2022 was reviewed or set aside or even appealed against. There is no evidence adduced to demonstrate that the applicant/respondent deposited the Kshs. 1 million in a joint escrow account as directed by the court.
20. Counsel for the respondent/applicant's has prayed for throw away costs of Kshs. 20,000.00. He further submitted that security for costs is to be honored as the same acts as an insurance to the inevitable delay in the eviction of the applicant to the detriment of the respondent/applicant herein.
21. This court observes that Kshs. 1 million ought to have been deposited, within 90 days from the date of the Ruling delivered on 22/03/2022, in an interest earning account in the joint names of both advocates of the parties or a bank guarantee of a similar amount, which is long past. The Respondent/Applicant has alleged that the same has not been done. There is no evidence before this court demonstrating that the said order has been complied with. The applicant has also not demonstrated that there has been a threat of execution just yet. It is clear that the applicant is not willing abide by the conditions issued by the court on 22/03/2022.
22. From the foregoing, the court finds that sufficient cause has been advanced seeing that the applications dated 23/06/2022 and 30/06/2022 were dismissed as result of technological issues and that prejudice will not be occasioned to the Respondent. It is however noted that the applicant/respondent is not willing abide by the conditions issued by the court but I wouldn't want to shut any party out, if I can avoid it. Purely out of my discretion.
23. Based on the facts before me and relying on the legal provisions cited above, I am satisfied that the plaintiff/applicant's reasons are sufficient.
24. In the circumstances, I will re-instate the applicant's applications dated 23/06/2022 and 30/06/2022 but this will be subject to some penalty including costs. The applicant does not deserve this grace and will certainly put the respondent/applicant into considerable prejudice, both in terms of time and cost. I will re-instate the two applications, but this will be subject to the applicant paying, throw away costs of Kshs. 20,000/= to the respondent/applicant. The applicant will also deposit Kshs. 1 million as security as per the orders given on 22/03/2022. If these costs are paid, I will give further directions on the hearing of the two applications. However, if the costs are not paid as ordered, the dismissal shall be maintained with no further orders.
25. Ultimately, in the upshot, I am of the view that the applicant has satisfied the conditions for the grant of the orders sought under Section 80 CPA as read with order 45 rule 1 CPR. Accordingly, I allow the Application dated 7/07/2022 in the following terms:-
 - a. The order of this honorable court made on 7/07/2022 dismissing the applicant/respondent's Applications dated 23/06/2022 and 30/06/2022 be and is hereby set aside and/or reviewed.



- b. The applicant/respondent's applications dated 23/06/2022 and 30/06/2022 be and is hereby reinstated.
- c. The applicant/respondent shall pay the respondent/applicant throw away costs in the sum of Kshs. 20,000.00
- d. The applicant/respondent shall provide security for the due performance of the decree in the sum of Kshs. 1,000,000.00 as per the ruling delivered on 22/03/2022 before the applicant is given directions on the hearing and determination of the applications dated 23/06/2022 and 30/06/2022.
- e. If the applicant/respondent defaults to comply with order (c) and (d) above the dismissal shall be maintained with no further orders.
- f. Costs shall be borne by the Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2023.

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MOGENI J

JUDGE

In the virtual presence of :-

Mr Farah for the Applicant

No appearance for the Respondent

C. Sagina : Court Assistant

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MOGENI J

JUDGE

