Othim v Dande (Environment and Land Appeal E011 of 2020)
[2023] KEELC 17397 (KLR) (8 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17397 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT AND LAND APPEAL E011 OF 2020

MN KULLOW, J

MAY 8, 2023

BETWEEN

CHARLES OTHIM ..... APPELLANT

AND

FANUEL ORONY DANDE ..... RESPONDENT

RULING

1. By Notice of Motion dated July 8, 2022 and filed under Certificate of Urgency, the Applicant sought the following Orders: -

   a. Spent.

   b. THAT this honourable court be pleased to issue an Order to set aside the dismissal order made on June 23, 2022 to strike out and dismiss the matter herein for want of prosecution and non-attendance.

   c. THAT the honorable court be pleased to re-instate the Appellant/ Applicant's Application dated March 11, 2022 for hearing and determination.

   d. THAT there may be a temporary stay of execution of the Decree and Judgment in respect of Rongo ELC No 2 of 2018 pending the hearing and determination of the Application herein.

   e. THAT in the alternative, the honorable court be pleased to grant an Order for *Status Quo* pending hearing and determination of the Application herein.

   f. THAT the honourable court be pleased to grant any other remedy and/or relief that the honourable court may deem fit and just to grant in the circumstances.

   g. Costs of this Application be in the cause.

2. The application is based on the 12 grounds thereof and the Applicant's Supporting Affidavit sworn on 08.07.2022. He contends that he instructed the firm of Cheboi Ouma & Associates Advocates To Come On Record In Place Of Nyagesoa & Co Advocates and file an Application for Stay of Execution. It is however his claim that he was not informed of the hearing date by his advocate on record, neither did the advocate attend court on the material day nor has he ever received any communication from his said advocate.

3. As a result thereof, the Application dated March 11, 2022 was dismissed with costs for want of prosecution and non-attendance on June 23, 2022. It is his claim that he is ready to have the matter prosecuted to its logical conclusion and urged the court not to visit the mistakes of the advocate upon him since the failure to attend court was not intentional but due to the aforesaid reasons.

4. It was further his claim that an eviction order had since been issued and auctioneers were about to demolish the suit premises. He maintained that he stands to suffer irreparable loss and damage if the orders sought are not granted and that the judgment is in respect of Plot NO 10 whereas the suit premises is built on Plot No 10B. He thus urged the court to allow the Application.

5. The application was opposed. The Respondent filed a Replying Affidavit sworn on March 17, 2023. It is his contention that the Applicant having instructed his advocate to file the Application dated March 11, 2022; he was bound to follow up on the same and note the progress and outcome thereof and cannot shift blame on his advocate. He accused the Applicant for neither proceeding with the Application nor serving them with the said Application despite numerous intervention by the court for them to serve the same and the same is evidenced from the court record.

6. It is his claim that he has a right to equal treatment before the court and the right to fair and expeditious hearing and the Applicant cannot be allowed to violate the same by dragging the matter in court forever.

7. On the orders sought of *status quo*, he deposed that the same was an attempt at obtaining orders of stay of execution backdoor whereas the Applicant had not demonstrated any compelling reasons to necessitate the grant of the stay of execution as sought. Further, he had neither demonstrated the substantial loss that he is likely to suffer nor offered any security for the due performance of the decree so as to warrant the grant of the orders sought.

8. He maintained that the Applicant has not given any valid reasons for setting aside the earlier proceedings and the Application is aimed at preventing him from enjoying the fruits of the of the judgment issued in his favor. He thus urged the court to dismiss the Application with costs.

9. The Application was canvassed by way of written submissions, both parties filed their rival submission which I have read and taken into account in arriving at my decision.

Analysis And Determination

10. This court is of the considered opinion that the sole issue arising for determination is: -

    a. Whether the Applicants have made out a case for setting aside the dismissal Order made on June 23, 2022 and all the consequential orders.

11. The grounds for setting aside an ex-parte judgment or order are now well settled. The court in determining whether or not to grant such orders ought to take into account the circumstances of each case. In *Mbogo Vs Shah* 1968 EA 93 the court held that: -

> " This discretion is intended so 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"

See also: *CMC Holdings Limited vs Nzioki* [2004]1 KLR 173)

12. As stated above, an order for setting aside is discretionary in nature and such discretion ought not to be exercised in favor of an undeserving party. An Applicant must demonstrate sufficient cause to warrant the exercise of the said discretion in his favor. Sufficient cause was defined in the case of The *Hon Attorney General vs the Law Society of Kenya & Another*, Civil Appeal (Application) No 133 of 2011 sufficient cause was defined as: -

> " Sufficient cause" or "good cause" in law means: .....the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused". See *Black's Law Dictionary*, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

13. The Applicant contends that he instructed the firm of Cheboi Ouma Advocates to come on record in place of Nyagesoa Advocates and to file the Application dated March 11, 2022. It is his claim that the said Advocate upon filing the Application neither attended court on the material date nor informed him of the said hearing date. He thus maintains that the mistake of his advocate on record should not be visited on him and that he is ready and willing to prosecute the matter to its logical conclusion.

14. The Respondent dismissed the said claims by the Applicant and maintained that the applicant was duty bound to follow up on the progress of his matter and cannot shift the blame solely on his advocate. He urged the court to protect his right to fair and expeditious hearing and the right to equal treatment before the law by dismissing the Application.

15. I have carefully looked at the court record and I note that the matter was scheduled for mention on several occasions, whereupon the Applicant has always been directed to serve the Application dated March 11, 2022 upon the Respondent and fix the same for interpartes hearing. There is no doubt that despite the several interventions by the court and the directions issued on the service of the said Application, the Applicant neither served the same nor fixed the Application for interpartes hearing, hence the orders of June 23, 2022.

16. I have also noted that the Applicant herein contends that eviction orders have been issued and auctioneers are about to demolish the suit premises which would as a result render the subject matter of the Appeal nugatory.

17. The right to fair hearing must equally be exercised between all the parties to litigation and Article 159 (2) (b) is clear in this regard, justice delayed is justice denied. Section 1B of the *Civil Procedure Act* equally provides that there should be a just, efficient and timely disposal of the disputes presented in court. To this end, I agree with the Respondent that his right to fair and expeditious hearing must equally be protected.

18. However, I do also acknowledge the Applicant's right to be given an opportunity and not be condemned unheard. It is his case that he was not informed of the hearing date of the Application hence his nonattendance. While it is true that a client is duty bound to follow up on the progress of his case, it is also true that the failure of an advocate should not entirely be visited upon the client. I have considered the circumstances of the case in totality and I am inclined to give the Applicant the benefit of the doubt. There is also a need to preserve the substratum of the Appeal.

Conclusion

19. In the upshot, I accordingly find that the Application dated July 8, 2022 is merited and I accordingly allow the same with strict terms as follows;

    a. The dismissal orders issued on June 23, 2022 and all the consequential orders thereto be and are hereby set aside.

    b. The Application dated March 11, 2022 is hereby reinstated for hearing and determination. The Applicant is hereby directed to serve the Respondent with the said Application within 14 days from the date of this Ruling.

    c. An Order of *Status Quo* is hereby issued pending the hearing and determination of the Application dated March 11, 2022.

    d. Failure to comply with order (b) above, Order (a) and (c) shall be deemed vacated.

    e. The Applicant is hereby ordered to pay the Respondent Throw-away costs of Kshs 8,000/= before the hearing date.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 8TH DAY OF MAY, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Non-attendance for the Applicant

Non-attendance for the Respondent

Court Assistant- Tom Maurice/ Victor