Kuhunya & 2 others v Kimani (Environment & Land Case 708 of 2017)
[2023] KEELC 19895 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19895 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 708 OF 2017

JG KEMEI, J

SEPTEMBER 19, 2023

BETWEEN

DAVID GITAU KUHUNYA ..... 1ST PLAINTIFF

SIMON MUTURI MWANGI ..... 2ND PLAINTIFF

JOEL IRUNGU GITAU (SUING ON BEHALF OF ACK CHURCH GOOD SAMARITAN – KIAIREGI) ..... 3RD PLAINTIFF

AND

JOSEPH MWANGI KIMANI ..... DEFENDANT

RULING

1. The Defendant/Applicant filed the instant application dated 12/10/2022 seeking Orders that;
    a. Spent.
    b. An order of stay of execution be granted staying the execution of the Judgement entered on the 15/9/2022.
    c. The exparte proceedings since the 16/3/2022, the Judgment dated the 15/9/2022 and all other consequential orders thereto be set aside and the main suit be fixed for hearing at the earliest possible instance.
    d. The costs of the application be provided.
2. The Application is based on the grounds that; due to the non-attendance of the advocate of the Applicant on the 13/3/2022, the hearing proceeded exparte and the case closed without the Applicant being heard; thereafter the Court proceeded to render an unfair Judgement on the 15/9/2022; the Applicant is not at fault for the non-attendance and will suffer prejudice if mistake of Counsel is visited on him as he will have been condemned unheard against the tenets of natural justice which demands

that no one should be condemned unheard; the application has been filed timeously and in good faith; this Court is empowered to grant the orders sought and is just that the suit be heard on its merits as it has a high chance of success given the triable issues in his defence.

3. Further and in support of the application, the Applicant reiterated the grounds above in his Supporting Affidavit sworn on the 22/10/2022. In addition, he added that he instructed the firm of Kirubi Mwangi Ben Co Advocates who filed a defence on his behalf but failed to appear at the hearing and that they have since become unresponsive to him. That it is unfair to punish the Applicant on a mistake of Counsel in the manner in which he conducted the matter. That the defence raises triable issues and so an arguable case with high chances of success.

4. The application is opposed by the Respondents vide the Replying Affidavit deposed by their learned Counsel on record, Mr D C Mwangi sworn on the 14/11/2022. That the hearing notice was served upon the Applicant's advocates Kirubi Mwangi Ben as well as the Applicant via his mobile phone WhatsApp no [particulars withheld]. That the said advocates have always had conduct of the Applicant's case, received notices and even participated in an attempted settlement which collapsed. That the Applicant should not hide behind the alleged mistake of Counsel to deny them the fruits of their Judgment. That there are no triable issues in the defense nor any demonstration of success.

5. In addition, that they stand to be prejudiced given the time the case has taken to be concluded and that their plans to develop a church on the suit land will be jeopardized by more delay. That the application is nothing but a delaying tactic to defeat the ends of justice.

The written submissions.

6. On whether the Applicant has satisfied the requirements to reopen the case, the Applicant submitted that under the provisions of Article 50 (1) of the *Constitution of Kenya*, every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or if applicable another independent and impartial tribunal or body.

7. The Applicant cited the case of *Sangram Singh v Election Tribunal Koteh*, AIR 1955 SC 664, where the Court held as follows;

> " There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

8. It was submitted that the Court has discretion to grant the application. That the exercise of discretion is guided by the case of *Shah v Mbogo & Anor* 1967 EA 1116 where the Court was categorical that discretion should be exercised to avoid injustice and hardship but not to assist a person guilty of deliberate conduct, intended to obstruct or delay the course of justice. That the Court should be satisfied that the Applicant has shown sufficient cause or reason to warrant the setting aside of the exparte Judgement. And in considering whether there is sufficient cause or not the Court must bear in mind the object of doing substantial justice to all parties concerned and that the technicalities of the law should not prevent the Court from doing substantive justice and doing away with the illegality perpetuated on the basis of the Judgement impugned before it. That 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. It was submitted that the Applicant was prevented from attending the hearing by a sufficient cause. That he was not aware why his then advocates refused to attend the hearing to represent him.

That the advocates were in error in failing to attend the hearing and the same should not be visited upon him.

9. Relying on the case of *Samuel Kiti Lewa v Housing Finance Co Ltd & Anor* (2015) eKLR the Applicant submitted that granting the application will neither embarrass nor prejudice the Respondent. That the application was made without delay. That the Applicant raises triable issues in the defence that ought to be tried on merit.

10. The Respondents submitted that the Applicant never filed a defence in the suit and he therefore cannot have had triable issues in the absence of a defence. That the Applicant failed to attend Court despite being duly served through his whatsup and also through his Counsel on record and as evidenced by the affidavit of service on record. That the Applicant has failed to demonstrate tangible and active steps taken to follow up the prosecution of his application dated the 1/10/2020 as well as attend Court on the hearing of the suit despite being duly served.

11. Citing the case of *Neeta Gohil v Fidelity Commercial Bank Limited* (2019) eKLR, the Respondents submitted that it is not enough for the Applicant to blame his Counsel for non-attendance but he ought as a diligent litigant to have followed the progress of the case.

12. On the issue of a triable issues the Respondents were categorical that having failed to file a defense there is therefore no pleading for the Court to consider to conclude whether or not there is a triable issue.

Analysis and determination.

13. There are two issues for determination in this application, which is whether stay of execution should be granted and whether the Judgement delivered on the 15/9/2022 should be set aside and the suit heard afresh?

14. For obvious reasons I shall start with the second issue because if it succeeds there will be no necessity to determine the first.

15. Order 10 rule 11 [Order 10, rule 11.] Setting aside Judgment.

> " 11. Where Judgment has been entered under this Order the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just."

16. The power to set aside an exparte Judgment is discretional. The case of *Shah v Mbogo* lays down the principles that the Court applies in exercise of its discretion. It states as follows;

> " The 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 the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice."

17. Equally Courts have time and again held that the exercise of discretion depends on the circumstances of each case. This was held in the case of *Mbogo v Shah* [1968] EA 93 and in *Shabir Din v Ram Parkash Anand* (1955) 22 EACA 48 where Briggs JA as he then was said at page 51:

> " I consider that under order 9 rule 20 the discretion of the Court is perfectly free and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellant's legal advisers, even though negligent, may be accepted as a proper ground for granting relief, but whether it will be so accepted must

depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised."

18. Courts have in numerous decisions held that the setting aside an ex parte Judgement is a matter of the discretion of the Court. In the case of *Esther Wamaitha Njihia & two others v Safaricom Ltd* (citation) the Court citing relevant cases on the issue held *inter alia*:-

> " The discretion is free and the main concern of the Courts is to do justice to the parties before it (see *Patel v EA Cargo Handling Services Ltd*). The 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah v Mbogo*). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a Court. (See *Sebei District Administration v Gasyali*.)It also goes without saying that the reason for failure to attend should be considered."

19. In the case of *Patel v E.A. Cargo Handling Services Limited* (1974) EA 75, this Court held as follows:

> " There are no limits or restrictions on the judge's discretion except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced Judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

20. In the case in *James Kanyiita Nderitu & Another* [2016] eKLR, there is little option for a Court but to set aside a Judgment where the defendant was never served with summons in the suit. The Court stated:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default Judgement that is regularly entered and one which is irregularly entered. In a regular default Judgement, the Defendant will have been duly served with summons to enter appearance or to file defence, resulting in default Judgment. Such a Defendant is entitled, under order 10 rule 11 of the *Civil Procedure Rules*, to move the Court to set aside the default Judgement and to grant him leave to defend the suit. In such a scenario, the Court has unfettered discretion in determining whether or not to set aside default Judgment, and will take into account such factors as the reason for failure of the Defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment, among others. See *Mbogo & Another v Shah* (1968) EA 98, *Patel v EA Cargo Handling services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* (1986) KLR 492 and *CMC Holdings v Nzioka* [2004] I KLR 173.
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> In an irregular default Judgment, on the other hand; Judgment will have been entered against a Defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default Judgment is set aside *ex debito justiae*, as a matter of right. The Court does not even have to be moved by a party once it comes to its notice

that the Judgment is irregular; it can set aside the default Judgment on its own motion. In addition, the Court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such Judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

21. Guided by the above, I shall now consider the application. The suit herein was filed on the 18/8/2017. There is an affidavit of service sworn on the 3/10/17 by one Amos Chege Kanoga evidencing service of Summons upon the Applicant on the 13/10/2017.

22. The Applicant appeared in person in Court on the 2/9/2020 and informed the Court that he was not aware of the case. It would appear that the Applicant did not file any defence within the stipulated time. On the 1/10/20 the Applicant moved the Court by way of Notice of Motion seeking to file his defence out of time for want of service.

23. On the 14/10/2020 Mr Mwangi Ben acting for the Applicant sought more time to settle the matter out of Court which the Court duly acceded. On subsequent appearances that is on the 14/10/2020, 18/11/2020, 3/2/2020, 3/3/2021, 8/4/2021, 24/5/2021 and 6/7/2021, it is evident that the parties informed the Court that they were still negotiating an out of Court settlement. On the 11/8/21 parties informed the Court that the settlement had not materialized and took a hearing date for the 9/11/21. Come the hearing date the Counsel for the Applicant pleaded with the Court to give negotiations a chance and sought for an adjournment which was allowed. On the 7/12/2021 the Respondents Counsel in the absence of the Applicant's Counsel informed the Court that negotiations had collapsed and fixed the matter for hearing on the 16/3/2022.

24. On the material date of the hearing the Applicant as well as his Counsel were absent despite service. Consequently, the hearing proceeded exparte and the Judgement was delivered on the 15/9/2022.

25. Having failed to file a defense on time, the applicant filed an application seeking orders to be allowed to file a defence out of time. There is no evidence that the application dated the 1/10/2020 was ever prosecuted. It would appear that it was abandoned mid-air. The question the Court must interrogate is whether the Applicant was served with the summons to enter appearance in the first place. The answer is found in the unchallenged affidavit of the process server one Amos Chege Kanoga. I find that the Applicant was duly served and elected not to file defense within the stipulated time and or prosecute his application to have the defence filed out of Court heard.

26. It is also on record that the hearing notice was served upon the Counsel for the Applicant who had earlier on the 6/12/2021 sought orders to cease acting for the reason that;

> " In the cause of the brief the firm of Kirubi Mwangi Ben & Co Advocates has experience first hand frustrations from the Plaintiff's side and have noted and encountered what can be termed as unprofessional and unethical conduct"

27. According to the record this application was also not prosecuted so much so that during the hearing of the suit, the advocate was still on record and was duly served on behalf of his client. The Applicant was served too. This fact has not been challenged.

28. The Applicant has placed his predicament on the shoulders of his previous Counsel for not attending Court. He has not informed the Court the reason why he failed to attend the hearing himself as the case does not belong to the advocate but his.

29. On the 10/5/2022 when the suit came up for mention to confirm filing of the written submissions, the Applicant was represented by a Mr Waweru Advocate holding brief for Mr Juma Advocate who informed the Court that he had just been appointed by the Applicant though he was yet to file his notice of appointment. It is therefore not true that the Applicant came to know about the conclusion of the matter when he received/obtained the Judgment. He knew or ought to have known on the 10/5/2022 that the case was heard exparte. The delay in filing this application from the 10/5/2022 to 12/10/2022 is inordinate. It depicts a litigant who is not diligent in the prosecution of his case.

30. The Court finds that the Applicant failed to place a defence on record despite service. Even if the Court was to consider any triable issues there would not be any pleading on record to rely on.

31. The second issue is now moot. I find that the Applicant for the above reasons is not deserving of the discretion of the Court.

32. The application is dismissed with costs to the Respondents.

33. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Nyamu HB Gachau for 1st, 2nd and 3rd Plaintiffs.

Defendant – Absent but served via email

Court Assistant - Phyliss & Lilian