Kongani (Suing as the Administrator of the Estate of Mzee Aineah Wawire Kongani) v Wanyama & 12 others (Environment & Land Case 90 of 2017) [2023] KEELC 20554 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20554 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 90 OF 2017

EC CHERONO, J

OCTOBER 5, 2023

BETWEEN

PETRONILA NEKOYE KONGANI ..... PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF MZEE AINEAH WAWIRE KONGANI

AND

JOHN BARASA WANYAMA & 12 OTHERS ..... RESPONDENT

RULING

1. This Honourable Court has been called upon to determine the Notice of motion application dated 2nd May, 2023 seeking the following orders;

   a. (Spent)

   b. That this Honourable Court do grant leave to the Firm of Masiga, Wainaina & Associates Advocates to be placed on record in place of Malala & Company Advocates, on behalf of the Applicants; and that the draft copy of the Notice of Appointment of Advocate annexed herein be deemed to have been properly filed and served upon payment of requisite fees.

   c. That there be a stay of execution of the interlocutory Judgment delivered on 03/06/2021 and all consequential orders pending hearing and determination of this application inter-partes.

   d. That the interlocutory Judgment delivered on 03/06/2021 and all consequential orders be set aside.

   e. That upon grant of prayer (4) above, the Defendants/Applicants be granted leave to be heard in defence of this suit.

f. That the Costs of this application be provided for and be borne by the Respondent.

2. The application is supported by the affidavit sworn by the Applicants herein as well as grounds apparent on the face of the said application. The said application is further supported by annexures thereto.

3. By way of a response, the plaintiff/Respondent filed a Replying affidavit and a Notice of Preliminary Objection in opposition to the said application sworn and dated 8th June 2023.

1st Defendant/Applicant's summary of facts

4. The 1st defendant/applicant John Barasa Wanyama in his supporting affidavit deposed that this Honourable Court entered an interlocutory Judgment in favour of the plaintiff/respondent on 03/06/2021. He stated that the said interlocutory Judgment was a product of an ex-parte hearing that proceeded on 16/02/2021 as a result of non-attendance on their side. The 1st Applicant further deposed that he learnt of the existence of the alleged interlocutory Judgment upon being served with a copy of the decree and on perusal of the court file.

5. He also stated that he was not aware of any hearing including the hearing of 16/02/2021 since he was never served with the hearing Notice nor was he notified of the scheduled hearing by his Advocate on record.

6. The 1st Plaintiff/applicant also deposed that they had instructed the Firm of Malala & Company Advocates to handle the suit on their behalf and fully placed their reliance on their services including on notification of Court proceedings. He stated that it was on the basis of his own efforts that he learnt that the suit came up for hearing on 16/02/2021 and there was no attendance by their advocate and yet they were not informed of the hearing date by the advocate despite there being indication from the court record that their advocate was aware of the hearing date.

7. The 1st defendant/applicant further stated that he had visited their Advocate's office at Kakamega several times alongside his co-applicant to inquire about the status of the case including scheduled hearing dates in the period between October, 2020 and June, 2021 but was never notified that the case was coming up on 16/02/2021. He said that the non-attendance that led to the ex-parte hearing of this should be solely be blamed on their advocate and that the mistake of the advocate should not be visited on them, innocent litigants. He said that the mistake was not deliberate and wilful on his part and that of his co-applicant but rather an oversight on the part of their advocate who was in conduct of this matter on their behalf.

8. He stated that he deserves a second chance to argue and redeem his case as a defendant and that he had even filed a defence which he believes is a good and arguable and should be allowed to present at the hearing and a decision is made based on merit. In conclusion, the 1st defendant/applicant deposed that he is aware that it is against the principles of natural justice to be condemned unheard and that he is desirous of being heard.

10th Defendant's/Applicant's summary of facts

9. The facts deposed by the 10th Defendant/Applicant in support of this application are similar to those deposed by the 1st defendant/Applicant. I therefore find it unnecessary to duplicate the same herein.

Plaintiff's/Respondent's summary of facts

10. The plaintiff/respondent through her a Replying affidavit in opposition to the said application stated that she is advised by her advocate that the application by the applicants offends the principles of Res-judicata hence this court is devoid of jurisdiction to determine the same. She deposed that the same application has been overtaken by events as the Judgment order No.2 has been executed, which forms the legal basis for prayer/order No.4

11. The plaintiff/respondent further stated that she has been advised by her advocate on record that the impugned judgment of the court is clear and the current application before court is Res-judicata by virtue of the Applicants application dated 30th August, 2021 which was never appealed against within the requisite period.

Legal Analysis and Decision

12. I have considered the application and the supporting affidavits. I have also considered the Replying affidavit and the Notice of Preliminary objection the submissions by counsel for the applicants and the Respondent as well as the applicable law. From the affidavits in support of the said application, the following facts are uncontested;

    1. Summons to Enter Appearance and the plaint were duly served upon all the defendants in this suit.

    2. The 1st, 2nd, 3rd, 9th, 10th, and 12th defendants entered Appearance and filed a joint statement of Defence through the Firm of M/s Wabwile & Company Advocates on 4th & 11th December 2018 respectively.

    3. Vide a Notice of appointment of Advocates dated 27th October 2020, all the defendants herein appointed the Firm of M/s Malalah & Company Advocates to act for them in this case.

    4. This suit was fixed for hearing on 16/2/2021 and after the court was satisfied that the defendants' advocate was served with the hearing Notice, the case was allowed to proceed ex-parte.

    5. Judgment was delivered by this Honourable Court on 3rd June, 2021.

    6. By a Notice of Motion application filed under Certificate of Urgency dated 30/08/2021 seeking for orders of stay of execution of the impugned Judgment and the Decree therein.

    7. That in the said application, the defendants/applicants did not seek to set aside and/or vary the ex-parte judgment of this Honourable Court.

    8. By a Ruling delivered on 20/12/2021, this Honourable Court dismissed the said application dated 30/08/2021 with costs.

13. The first prayer in the present application is for the Firm of Masiga, Wainaina & Company Advocates to be placed on record in place of M/s Malalah & Company Advocates on behalf of the defendants/applicants. Order 9 Rule 9 & 10 of the *Civil Procedure Act* Cap.21 laws of Kenya provide as follows;

    > " 9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

"10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first."

14. It is clear from the provisions of the law that before a party is allowed to change an advocate after judgment has been passed, he/she must serve the hitherto advocate with the application or a consent indicating that he/she has no objection to the change of advocate or intention to act in person. I have looked at the supporting affidavits and the annexures thereto and the affidavits of service and find none has been filed indicating that the outgoing firm of M/s Malalah & Company Advocates was served with this application or a hearing notice thereof. There is also no consent is filed between the outgoing advocate and the proposed incoming advocate.

15. In the absence of any evidence that the outgoing advocate was served with the present application or a consent a consent between the outgoing and the proposed incoming advocate is filed, the first prayer by the firm of M/s Masiga, Wainaina & Associates Advocates becomes a cropper and the same is declined.

16. The second prayer is for stay of execution of the interlocutory Judgment delivered on 03/06/2021 and all consequential orders pending hearing and determination of this application inter-parte. Stay of execution of a Judgment/Decree or order of a Court may be granted where an applicant is likely to suffer irreparable injury or substantial loss while awaiting the determination of a substantive order such as an order for setting aside of an irregular interlocutory judgment. In this case, the defendants/applicants have confirmed in the 1st and 10th applicant's supporting affidavits to this application that their hitherto advocate were aware of the hearing of this suit on 16/02/2021 but failed to notify them. The 1st defendant/applicant at paragraph 6 and 8 of his supporting affidavit deposed as follows;

" 6. That until I was served, I was not aware of any hearing including the hearing of 16/02/2021 since I was never served with the hearing notice nor notified of the scheduled hearing by my Advocate on record."

"8. That it was on the basis of my own efforts that I learnt that the suit came up for hearing on 16/02/2021 and there was no attendance by our Advocate and yet we were not informed of the hearing date by the advocate despite there being indication from the court record that our Advocate was aware of the hearing date."

17. These two paragraphs are a clear indication that the defendants through their hitherto advocate on record was either invited for fixing of the hearing or served with a hearing notice of this suit when it came up for hearing on 16/02/2021. Where a party appoints an advocate to act for him/her in a suit, any service of court processes upon that advocate in my view is deemed as a regular default Judgment.. The 1st and 10th defendants' admission that despite being aware that this case was coming up for hearing on 16/02/2021, their hitherto advocates on record did not notify them is an unequivocal confirmation that the ex-parte hearing on 16/02/2021 and the subsequent default Judgment delivered by this Honourable Court 20/12/2021 was a regular Judgment

18. This brings me to the next prayer where the applicants are seeking an order to set aside the impugned default judgment entered herein on 20/12/2021.

19. In determining whether good cause has been shown for the exercise of the discretion of the court, it is usually necessary to make a distinction and determine whether the default judgment is a regular one or an irregular judgment. That distinction was clearly brought out in the case of Fidelity Commercial Bank Limited v Owen Amos Nung'u & another, HCCC No. 241 OF 1998(UR) where Njagi J (as he then was) held;

> " A distinction is drawn between regular and irregular judgments. Where Summons to Enter Appearance has been served, and there is default in the entry of appearance, the ex-parte judgment entered in default is regular. But where ex-parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the Summons to enter appearance, such a judgment is irregular, and the affected defendant is entitled to have it set aside as of right."

20. Again in the case of James Kanyitta Nderitu & Another v Marios Philotas Ghikas & another (2016) eKLR, the Court of Appeal held;

> " In a regular default judgment, the defendant will have been duly served with Summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the failure to file his Memorandum of appearance or defence as the case may be, the length of time that has lapsed since the default judgment was entered, whether the intended defence raises triable issues, the respective prejudice each party is likely to suffer, whether on the whole it is in the interest of justice to set aside the default judgment among other."

21. Looking at the facts of this case, it is clear the impugned default judgment in this case was entered in favour of the respondent on 20/12/2021 while the present application for setting aside the impugned default judgment was filed 0n 2nd May, 2023. It took the applicants more than one year to bring the application. A period of more than one year in my view is inordinate, considering that no explanation has been given for the delay. The reasons given by the 1st defendant/applicant for the default judgment are contained at paragraph 7 of his supporting affidavit where he deposed thus;

> " 7. That we had instructed the Firm of Malala & Company AdvocateS to handle the suit on our behalf, and fully placed our reliance on their services including on notification of court proceedings."

22. As to whether mistake/blunders by advocates should be visited upon the client, superior courts have rendered themselves in numerous decisions. In the case of Ketteman & others v Hansel Propeties Limited (1988) 1 All ER 38, Lord Giffin stated as follows;

> " Legal business should be conducted efficiently.
>
> We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice

will be better served by allowing the consequence of lawyers to fall on their own heads rather than allowing an amendment at a very late stage in the proceedings. Needless to say, the application to amend a defence on the basis of an inadvertent mistake by counsel was disallowed..."

23. In the case of Berber Alibhai Mawji v Sultan Hasham Lalji & 2 Others(1990-1994) E.A 337, the court held;

> " Inaction on the part of an advocate as opposed to error of judgment or a slip is not excusable. Therefore, pure and simple inaction by Counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client."

24. In the case of Omwoyo v African Highlands & Produce Co. Ltd (2002)1KLR where Ringera J. held;

> " Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions, like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of the defendant's advocates. This is a proper case where the defendant's remedy is against its erstwhile advocates for professional negligence and not setting the judgment.

25. I agree with the findings of the learned judges in the above decisions. It is trite that cases belong to litigants and not advocates. It was reckless for the applicants to leave their case with their advocate on record and expect him to do everything for them. A litigant is expected to contact his counsel constantly to check the progress of his/her matter.

26. The upshot of my finding is that the Notice of Motion application dated 2nd May, 2023 is without merit and the same is hereby dismissed with costs to the respondent.

READ, DATED, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY THIS 5TH OCTOBER, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Okaka H/B for Masiga for the Applicant

Respondent/Advocate-absent