Mworia (Suing as the personal representative of the Estate of Francis Ariithi Mworia) v Principal Secretary Ministry of Land, Housing and Urban Development & 3 others (Environment & Land Case 63 of 2015) [2023] KEELC 20456 (KLR) (4 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20456 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT & LAND CASE 63 OF 2015

A NYUKURI, J

OCTOBER 4, 2023

BETWEEN

RONALD GITOBU MWORIA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS ARIITHI MWORIA) ..... PLAINTIFF

AND

PRINCIPAL SECRETARY MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT ..... 1ST DEFENDANT

PRINCIPAL SECRETARY MINISTRY OF FINANCE ..... 2ND DEFENDANT

THE CHIEF LAND REGISTRAR ..... 3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. Before court is the notice of motion dated June 21, 2022 filed by the the 4th defendant/applicant. The application seeks the following orders;

    a. Spent

    b. Spent

    c. Spent

    d. That upon the hearing of this application, the honorable court be pleased to set aside, vary and vacate the proceedings of October 1, 2020, the exparte judgment delivered on 26th February 2021 and any consequential orders issued thereto and order the hearing of this suit de novo and allow the parties an opportunity to tender and test the veracity of each other's evidence for fair and just determination.

e. That no prejudice will be suffered if the application is allowed and the proceedings of 1st October 2020, the exparte judgment delivered on 26th February 2021 and any consequential orders issued thereto and if it is ordered the hearing of this suit de novo and allow the parties an opportunity to tender and test the veracity of each other's evidence for fair and just determination.

f. That without knowledge of the exparte proceeding and the judgment, this application could not be brought on time and hence delay herein is not inordinate.

g. That the cost of the application be in cause.

2. The Application is supported by the affidavit of one Charles Mwangi Hinga, the Principal Secretary for the Ministry of Transport, Infrastructure, Housing, Urban Development and Public Works, State Department of Infrastructure. He stated that the Government is the registered owner of land known as LR 27644 Survey Plan number 294522 bearing letter of allotment number ref 244041/31 measuring 22.26 Hectares, while the Plaintiff has in his possession other titles being LR 21991 (IR 72055) and L.R 21990 (IR 72054) inside the public land LR 27644.

3. He further stated that the plaintiff set down this suit for hearing and proceeded on October 1, 2020 exparte at the height of the Covid-19 pandemic without notice of the hearing date to the Defendant's counsel nor judgment date and hence proceeded Exparte; that Exparte judgment was entered on February 26, 2021; that if service was done, then the same was not brought to the attention of counsel handling the matter; that the defendant was denied opportunity to tender their evidence and challenge the Plaintiff's acquisition of the public land; that if the Exparte judgment is not set aside, the same is prejudicial to the applicant and public interest; that there is imminent danger for the Government to lose the suit property which was reserved for the purpose of low cost housing under the UN HABITAT programme for the benefit of slum upgrading program and that unless this court intervenes, the applicant will suffer immense loss of public land.

4. He also deponed that without knowledge of the exparte proceedings and the judgment, this application could not be brought on time and hence the delay herein is not inordinate and that there is overwhelming evidence in the defence and hence the need for granting the Defendant an opportunity to be heard and tender evidence in relation to the suit land for a just and fair determination. He attached a copy of the PDP, letter of allotment, title and the judgment.

5. The Application was opposed. In response to the application, the Plaintiff, Ronald Gitobu Mworia, filed a replying affidavit sworn by himself on 14th July 2022. He deposed that the application was mischievous and an abuse of the court process. It was his position that the application was incompetent as it had been brought under wrong provisions of law, the same having been brought under section 3A of the *Civil Procedure Act* and order 4o and order 45 rule 11 of the *Civil Procedure Rules*. He stated that section 3A and order 40 are inapplicable while order 45 rule 11 is non-existent. He stated that the exparte judgment could only be set aside under order 12 rule 7 and stay of execution granted under order 22 rule 22.

6. The Respondent averred that stay of execution should not be granted since the Applicant had not met the mandatory requirements to warrant stay of execution as provided under order 22 rule 22 of the *Civil Procedure Rules,* and that should the court allow the same prayer, the Applicants should be required to deposit security for costs.

7. On the prayer for setting aside, varying and vacation of the ex parte proceedings and judgment, the Respondent deposed that the applicant had not advanced any solid ground to warrant granting the

same. It was his position that failure to attend court when they had been served with a hearing notice has not been explained and that it is not true that the applicants were unaware of the proceedings.

8. The Deponent further stated that the suit had been instituted in 2015 and amended in 2016, with the Applicant seeking and being granted leave to file a Defence out of time on 8th December 2017, which they filed without the same being accompanied by List of witnesses, witness statements or copies of documents. It was his averment that on 2nd of July 2020, they sent a letter to the Applicant to send their representative to the registry for purposes of fixing a hearing date but that the Applicants failed to appear so that a hearing date was issued ex parte. He further deposed that on July 17, 2020, the Applicant was issued with a hearing notice for 1st of October 2020 but still failed to attend court. He also deposed that on 19th of October 2020, a mention notice was served upon the applicants for the 22nd of October 2020 but still failed to attend. The Deponent further stated that the Respondent's submissions together with list of authorities were also served upon the Applicants on 27th October 2020. He also deposed that it does not matter whether the notices were served on the counsel handling this matter or not as that was an internal matter of the Applicant's counsel. The Respondent further stated that it has taken 6 years for the suit to be concluded and any further delay would cause him further hardship and prejudice to him.

9. He did attach copies of this court's ruling, aforementioned notices, duly stamped and received by the Attorney General's office and Judgment.

10. In a rejoinder, the Applicant filed a further affidavit dated 22nd November 2022, sworn by the one J. Motari Matunda, a state counsel in the office of the Attorney General. In response to the challenge on the provisions of law under which the application was brought, he stated that various authorities show that the court ought to consider the substance of the matter to ensure that there is just determination of the dispute and the court should always opt for lower rather than higher risk of justice and referred to the cases of *Stephen Boro Gitiha v Family Finance Building Society & 3 other* Court of Appeal C.A No. 263 of 2009 and *Wachira Karani v Bildad Wachira* [2016] eKLR.

11. On the question of the disputed service, the Applicant deposed that the said hearing and mention notices were not brought to his attention at all otherwise the same would have been acted upon.

12. The Application was canvassed by way of written submissions.

Submissions by the Applicant

13. Counsel for the Applicant submitted that the application before court was competent having been brought under article 159 of *the Constitution* of Kenya, sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, and order 40 rule 1 of the *Civil Procedure Rules* and any other enabling provisions. Counsel argued that the court ought to consider the substance of the application and not the form as *the Constitution* provides that justice ought to be administered without undue regard to procedural technicalities. To buttress this argument, they relied on the cases of *Wachira Karani vs Bildad Wachira* [2016] eKLR and *Stephen Boro Gitiha v Family Finance Building Society & 3 Others* Court of Appeal Nairobi C.A No. 263 of 2009.

14. On the issue of service, counsel argued that the particular counsel with the conduct of the matter did not get notice of service as service was necessary to enable counsel to defend the case.

15. As to whether the court can order the hearing denovo and set aside exparte proceedings, they reiterated that the court has discretion under section 1A, 1B and 3A of the *Civil Procedure Act* to issue such orders.

Submissions by the Respondent

16. Counsel for the Respondent submitted that the application before court was incompetent having been based on provisions of the law that are not applicable as order 40 is for injunctions, order 45 is for review, and section 3A only applies where there are no specific provisions of the law. Counsel argued that the application ought to be brought under order 12 rule 7 of the *Civil Procedure Rules.* Reliance was placed on the case of *Kuria v. Kemeli* No. 56 of 2017 [KELC 3648] for the proposition that even though the court has wide powers to set aside Exparte judgment, such orders should be on such terms as are just and the discretion must be exercised judiciously. Counsel argued that the applicant had failed to explain reasons that prevented him from attending court when the matter came up for hearing as there is evidence of service and the failure of counsel to be made aware of service of hearing notices is a matter which ought to be handled internally.

Analysis and Determination

17. Having considered the application together with affidavits in support thereof, the response thereto, and the rival submissions by the parties; the court is of the view that the issue that arises for determination is whether the Applicant has met the threshold for setting aside exparte judgment entered in this matter. As the prayer for stay of execution had been sought pending determination of the application herein, that prayer is spent and no determination will be made on the same. Besides, it is trite, as provided for under article 159 of *the Constitution* of Kenya that justice shall be administered without undue regard to technicalities, and failure to cite the proper law upon which an application is brought is not fatal as the court should be concerned with substantive rather than technical justice. Therefore, I do not consider the application as being incompetent merely for failure to state that it was based on order 12 rule 7 of the *Civil Procedure Rules*.

18. Order 12 rule 7 of the *civil Procedure Rules* provides for the power of the court to set aside Exparte judgment as follows;

> 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.

19. It is therefore clear that the court has unfettered discretion to set aside an Exparte judgment on just terms to meet the ends of justice. The exercise of discretion must be done judiciously and not capriciously or whimsically. Therefore, in considering whether to set aside Exparte judgment, the court ought to consider the reasons for non-attendance, and even where the judgment is regular for proper service, the court ought to consider whether the defendant has a triable defence. The court's concern should be to administer substantive justice to both parties. In the case of *Thorn PLC -v- Macdonald* [1999] CPLR 660, the Court stipulated the following guiding principles:

    i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;

    ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;

    iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and

    iv) prejudice (or the absence of it) to the claimant also has to be taken into account.

20. Similarly, in the case of *Gerita Nasipondi Bukunya & 2 others v Attorney General* [2019] eKLR the court cited the case Sangram Singh vs. Election Tribunal, Koteh, AIR 1955 SC 664, at 711 where it was 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.

21. In the instant case, the applicant argues that although the hearing notice was served on the office of the Attorney General, the same was not brought to the attention of the counsel seized with the conduct of this matter on behalf of the Applicant. The Respondent argues that the fact that the notice was not brought to the counsel's conduct is an internal management matter which is irrelevant to the matters herein as service was done. Having considered both arguments, my view is that the Respondent having effected service on the Attorney General's office, and the said service having not been denied or faulted, I find that the service by the Respondent was sufficient and done as required by law. A party serving the opponent counsel's office need not hand over the hearing notice personally to the counsel having personal conduct of the matter. It is upon counsel to put in place measures in their office to ensure that once service on their office is done, the same is brought to the attention of the specific counsel with the personal conduct of the matter. I am therefore in agreement with the Respondent's counsel's submission that failure to notify the Applicant's counsel of the hearing notice served on his office is counsel's internal matter which cannot amount to insufficient or lack of service. In the premises, I find that the Defendant's counsel was duly served and therefore the judgment on record is regular.

22. Having found that service was proper and sufficient, and that the exparte judgment was regular, the next question then would be whether there is sufficient cause to set aside the regular judgment on record. In my view the key reason that would be the basis of this court exercising its unfettered discretion in setting aside the regular judgment entered herein would be if the Defendant has demonstrated a triable defence.

23. The court has considered the grounds set out in the supporting affidavit. The Applicant states that land known as LR 27644 Survey Plan number 294522 bearing letter of allotment number ref 244041/31 measuring 22.26 Hectares belongs to the Applicant and that the Respondent obtained title in regard to land belonging to the Applicant, the same being public land. I have considered the annexures filed by the Applicant to support this allegation and among then are a Part Development Plan (PDP), letter of allotment and title in the name of the Permanent Secretary, Treasury. Having considered the response, the Respondent did not discredit documents produced by the Applicant, and neither did he rebut the argument that the defence raised triable issues, therefore the matters raised by the Applicant on ownership of the suit property and the question as to whether the Plaintiff's title is in regard to public land registered in the name of the Permanent Secretary Treasury, is a triable issue that calls for the determination of this matter on merit.

24. For the above reasons, I find and hold that the application dated June 21, 2022 is merited and the same is allowed in the following terms;

    a. The Exparte proceedings and Exparte judgment entered in this matter be and are hereby set aside.

    b. The suit to begin denovo.

c. The costs of the application shall be borne by the Applicant

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF OCTOBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms. Kagoya for Plaintiff

Mr. Motari for Applicant/Defendant

Mr. Abdisalam - Court Assistant