Ngunjiri & another v Karanja (Environment & Land Case 458 of 2007) [2023] KEELC 20767 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20767 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 458 OF 2007

AA OMOLLO, J

OCTOBER 12, 2023

BETWEEN

NJUGUNA NGUNJIRI ..... 1ST PLAINTIFF

AGNES MUMBI NJUGUNA ..... 2ND PLAINTIFF

AND

JOYCE NYAKERU KARANJA ..... DEFENDANT

RULING

1. The Plaintiffs filed a Notice of Motion dated 29th March 2023 brought under the provisions of section 25 of the *Civil Procedure Act*, seeking for the following orders;
    1. Spent
    2. Spent
    3. Spent
    4. Spent
    5. That the Decree herein issued on the 7th November 2003 and the subsequent Orders be set aside.
    6. That time within which the Defendant should file defense be enlarged and the Defendant be allowed to defend the suit herein.
    7. That the costs of the application be provided for.
2. The application was supported by the affidavit of Joyce Nyakeru Karanja sworn on 29th March 2023. She deposed that she had been in a peaceful occupation of the suit premises since 1954 until the year

2001 when the Plaintiffs filed the suit herein for an order to evict whereas no declarations had been made to form the basis of such eviction.

3. She further deposed that an interlocutory judgement was entered on 12th March 2002 in default of defence and costs reserved for trial and assessment. She stated that the Plaintiffs filed a chamber summons application dated 22nd July 2002 seeking to strike out her defence which had been filed on 5th March 2002, a day prior to the Interlocutory judgement. That the ruling on the said application was delivered on 24th October 2002 striking out the said defence and a judgement entered as per the plaint.

4. The Defendant further stated that upon striking out her defence, the court is enjoined to conduct an exparte hearing in which the Plaintiffs should have proven their case as set out in the plaint. However, neither of the parties tendered any evidence in court as there was no hearing. Further, that the suit having not gone through a hearing, Section 25 of the *Civil Procedure Act* and all the rules of natural justice were contravened thus the decree has no legal standing or basis.

5. The Applicant contended that the plaint as filed is fatally defective in that it only sought an order of eviction against without first seeking declaration on who is the rightful owner of the suit property. That she has been in occupation of the suit property since 1954 and all her children and grandchildren have settled and developed their lives thereon hence the decree is invalid and should be set aside to allow her a chance to file a defence so that all the issues in controversy can be settled once and all.

6. The Plaintiffs opposed the application vide a replying affidavit sworn by Njuguna Ngunjiri (the 1st Plaintiff) on 19th April 2023. Mr Njuguna stated that the application is a blatant abuse of court process. He deposed that for the purposes of clarity, their suit was filed in the year 2001, and the summons was served upon the defendant who ignored and refused to file a defence and only attempted to file a defence in March 2002.

7. The 1st Plaintiff deposes that interlocutory judgement as a part of courts pronouncing themselves was entered on 6th March 2002. That for 22 years after, the defendant did not attempt to have the interlocutory judgement set aside, varied or file an appeal. Further, that the defendant has filed numerous suits at different courts with same parties, similar facts all aimed at denying the Plaintiffs their right over the suit property.

8. The Plaintiffs averred that the defendant has not been in occupation of the suit property since 1954 neither had she tendered any documents or evidence to support her claims. In addition, the Plaintiffs pointed out that through an application dated 29/6/2022, the defendant on 4/7/2022 sought leave to have the firm of T.M Kuria & Co. Advocates come on record and after the court granted her the prayer, she did not take further steps. Instead, she has come again for the same prayer after the lapse of 10 months period.

9. The Defendant filed submissions dated 9th May 2023 in support of her motion. I have not traced the submission by the Plaintiffs from the court portal.

10. The Defendant submitted that the substantive order in the application is for setting aside the decree on record which was issued on 7th November 2003 on the basis that there is no valid decree or judgment on record. Consequently, the ensuing execution proceedings have no basis. The Defendant relied on the provisions of section 25 of the *Civil Procedure Act* which provides that the court after the case has been heard shall pronounce judgement and, on such Judgement, a decree shall follow. That the exception to this provision is to only instances of a liquidated claim or a tenancy that has come to an end.

11. The Defendant emphasized that the subject matter to this suit relates to possession and ownership of immovable property; eviction and in support cited Justice Sila Munyao in Mombasa ELC 114 of 2014(2019) eKLR where the judge stated at page 1 paragraph 4 thus;

> "it is clear to me that the proceedings leading to the ex parte judgement were irregular. First, there is no provision for entry of interlocutory Judgement in a case such as this. Interlocutory Judgements which are entered when no defence is filed only apply to the matters specified under order 10 Rule 6 of the 2010 Civil Procedure Rules."

12. Further, the Defendant submitted that for one to obtain an order of eviction, it would be because there's proof and declaration of ownership made. In the circumstances, the purpose of a hearing, albeit ex parte would be for the plaintiffs to prove that they are the owners of the suit property.

Analysis

13. After considering the application, the grounds offered in support thereof and the replying affidavit sworn in opposition thereto; I frame the issue for determination as whether the Orders of setting aside the decree should be granted.

14. The law provides that the decision to grant or not to set aside ex parte judgement/decree is discretionary. It is trite that the discretion is intended to be exercised so as to avoid injustice and 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 (holding in the case of *Shah vs. Mbogo & Another* [1967] EA 116).

15. In the instant application, the Applicant has relied on the ground that the interlocutory judgement was arrived at without conducting a hearing contrary to the provisions of section 25 of the *Civil Procedure Act* and rules of natural justice. The Defendant/Applicant urged that once the decree is set aside, time be enlarged for filing defence. The Applicant acknowledges that the Plaintiff/Respondent had moved the court in July 2002 to strike out her statement of defence dated 5th March 2002. The Applicant deposes to a ruling delivered on 24th October 2002 striking out her defence but she does not tell the court what steps she took to challenge the order which struck out the statement of defence.

16. Once the court rendered itself on the defence that was filed by striking it out, there is no provision in law allowing the Defendant/Applicant to file a fresh defence. The issues she is raising through the supporting affidavit that she has been in occupation of the suit premises since 1954 ought to have been raised as a ground against the application which sought to strike out her defence. The present application has not sought the revision of the Court's ruling made on 24th October 2002.

17. Further, it is my opinion and I so hold that the ground raised on whether the decree issued contravenes the provisions of section 25 of the *Civil Procedure Act* delves into questioning the validity of the judgement and decree in force. This court is being invited to determine whether the judge who entered judgement was in error which invitation is equivalent to conducting an appeal on the decision of a judge of concurrent jurisdiction.

18. This court' discretion to set aside a judgement/ruling or a decree is limited to correcting an accident, inadvertence or excusable mistake or error that would cause injustice to a party. The Applicant has not explained the inadvertence or excusable mistake. If in her opinion, the decision rendered contravened the law, then she approached the wrong court for correcting the error as she should have appealed. It is therefore my view that the Applicant is trying to file an appeal in disguise of a motion to set aside a decree.

19. Thirdly, the application has been brought after an inordinate delay thus denying the applicant to enjoy the exercise of discretion. She has pleaded that the impugned decree was entered on 7th November 2003, and the present application has been brought after the lapse of 20 years. The Applicant has not given any reasons for the inordinate delay.

20. In summary, this court finds the application dated March 29, 2023 as unmerited, and an abuse of the court process. It is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF OCTOBER 2023

A. OMOLLO

JUDGE