Oteba v EN & 2 others (Environment & Land Case 28 of 2016) [2023] KEELC 20429 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20429 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 28 OF 2016

BN OLAO, J

OCTOBER 5, 2023

BETWEEN

CHRISPINUS EMOIT OTEBA .... PLAINTIFF

AND

EN .... 1ST DEFENDANT

JAMES ORIANG'A OKOROJI .... 2ND DEFENDANT

MOSES OTIANG .... 3RD DEFENDANT

RULING

1. The dispute between Emoit Oteba (the Respondent) and EN (the Applicant) and two others commenced in the Busia Chief Magistrate's Court as Civil Case No 116 of 2012 before being transferred to this Court.

2. The case was over the ownership of the land parcel No South Teso/Angoromo/2422 (the suit land) pitting the Respondent as Plaintiff and the Applicant as well as James Oriang'a Okoroji And Moses Otianga as 1st to 3rd defendants respectively.

3. After several applications for adjournment, the case came up for hearing before Omollo J on July 21, 2021 when the Respondent led by his counsel Mr Ashioya, testified and closed his case.

4. The Applicant's counsel Mr Ipapu then sought an adjournment and was allowed to prosecute the defence case on November 10, 2021.

5. On that day Ms Nabulindo holding brief for Mr Ipapu sought an adjournment citing illness on the part of the Applicant who is the 1st defendant in the matter. It is not clear whether the other two defendants were present. However, Ms Nabulindo told the Court that she could not proceed without the Applicant and sought the Court's indulgence. Omollo J was not persuaded that the application for

adjournment was well merited. She declined to indulge the Applicant's counsel any further and listed the hearing for 10.45am the same day.

6. When the Court resumed at 11.10am the same morning, only Mr Ashioya counsel for the Respondent was present and he asked the Court to mark the defence case as closed. Omollo J agreed, marked the defence case as closed and invited the plaintiff to file submissions which was done.

7. By a judgement delivered on June 22, 2022, Omollo J Found in favour of the Respondent and directed the Applicant and her co-defendants to surrender the suit land to the Respondent within 90 days of being served with the decree or be evicted. The Judge also issued a permanent injunction restraining the Applicant and her co-defendants from interfering with the Respondent's use of the suit land. She also awarded ½ costs to the Respondent which have since been taxed at Kshs 83,602. It is not clear if any appeal was filed against that judgment by the Applicant and her co-defendants.

8. The Applicant has now moved to this Court vide his Notice of Motion dated March 14, 2022 and premised under the provisions of Order 10 Rule 11, Order 22 Rule 25 and Order 51 Rule 3 of the *Civil Procedure Rules*. She seeks the following orders:

   1. Spent

   2. Spent

   3. That the judgement of this Honourable Court together with all consequential orders be and are hereby set aside.

   4. That the defendants be and are hereby granted leave to testify and give evidence in Court.

   5. That Omeri & Associates Advocates be allowed to come on record for the Applicant.

   6. That costs of this application be provided for.

   In the body of the application, it is stated that the application is supported by the affidavit of one Keffa Musumba but infact what is annexed is the affidavit of the Applicant also dated March 14, 2023 and which, together with the grounds set out therein form the crux of the application

9. It is the Applicant's case that having obtained the judgment herein, the Respondent is executing the decree using barbaric means including threatening to kill and raping her. That the Applicant was never invited to the Court by her former counsel about the hearing and has been condemned un-heard yet she is a very old lady and therefore unable to follow the progress of her case. That on March 3, 2023, she was visited by goons who not only raped but also threatened to kill her. She was rescued by her neighbours and taken for treatment. It was then that she was shocked to discover that her case had been concluded and an eviction order had been issued against her. That throughout the case, her former advocate never contacted her and it was only when she instructed her current counsel that she was informed about the decree. That she and her late husband Sylsvester Aleke Otwane have lived on the suit land peacefully from 1959 to-date and she does not know either the Respondent or Vincent Shikanga who was the original plaintiff in this case before being substituted with the Applicant. That if she had been served with the suit papers, she would have filed a good defence to the claim against her.

10. The Applicant has annexed the following documents to her supporting affidavit:

    1. Medical Examination Report P3 showing a complaint of assault and rape.

    2. Medical notes.

    3. Post rape care form.

11. The Respondent filed grounds of opposition to the application describing it as frivolous, belated, an afterthought and misconceived. He added that it lack, merit and should be dismissed with costs.

12. When the application was placed before me on March 15, 2023, I directed that it be canvassed by way of written submissions to be filed on or before April 6, 2023. But as has now become a notorious habit, none of the parties complied within time.

13. I considered the application, the grounds of opposition and the submissions by Mr Omeri counsel for the Applicant and Mr Ashioya counsel for the Respondent.

14. Prayer No 5 of the application seeking leave for the firm of Omieri & Associates Advocates to come on record for the Applicant is allowed.

15. I have also looked at the grounds of opposition dated May 8, 2023 filed in response to the application. They raise issues which are not really matters of law. Grounds of opposition should address only issues of law and no more – *Kennedy Otieno Odiyo & Others -v- Kenya Electricity* 2010 eKLR.

16. Further, the Respondent did not file any replying affidavit to controvert the Applicant's sworn averments. That means that the Applicant's averments were not rebutted because the grounds of opposition are mere general allegations and therefore cannot amount to a proper or valid denial of allegations made on oath – *Daniel Kibet Mutai & 9 Others -v- Ag* CA Civil Appeal No 95 of 2016 [2019 eKLR].

17. That notwithstanding, this Court must consider whether the application meets the threshold set out in the law and available precedents to warrant setting aside the judgment herein and allowing the Applicant and other co-defendants to testify in their case.

18. I have earlier summarized what happened in Court on November 10, 2021 when the case came up for defence hearing before Omollo J. It is however worth repeating. That morning Ms Nabulindo then holding brief for Mr Ipapu for the Applicant and her co-defendants informed the Court that the Applicant was un-well. Counsel therefore sought an adjournment. Mr Ashioya for the Respondent vehemently objected pointing out that several such applications had been made by the Applicant and her co-defendants who had been given a last adjournment. Further, that although the Applicant and her co-defendants had been given time to file their statements, none had been filed and served in this very old matter filed way back on April 16, 2012 in the subordinate Court before being transferred to this Court in 2016.

19. Omollo J was therefore not persuaded that the application for adjournment had merit. She directed that hearing proceeds at 10.45am. However, when the Court reconvened at 11.10am neither Ms Nabulindo nor Mr Ipapu who had the defendants' brief nor the Applicant or any of the other defendants were in Court. On application by Mr Ashioya, the Judge marked the defence case as closed, invited the plaintiff to file his submissions and thereafter delivered the judgement sought to be set aside.

20. Setting aside ex-parte judgement is a daily occurrence in our Courts. The decision whether or not to set aside an ex-parte judgment is discretionary. And as was held in Shah -v- Mbogo & Another 1967 E.A. 116, that discretion is intended to be exercised so as to avoid injustice and hardship resulting from accident inadvertence or excusable mistake or error. It is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

21. No doubt the *Constitution* under Article 50(1) guarantees the right to a hearing. Similarly, under Section 1A (3) of the *Civil Procedure Act*, parties and their counsel have a duty to assist the Court in achieving the overriding objective of expeditious disposal of cases by, among others, complying with the directions and orders of the Court.

22. It is strange that whereas the Applicant was only one of the three (3) defendants in this case, the other defendants were not in Court on the date of hearing yet they had been granted a last adjournment. When this issue was raised by Mr Ashioya, Ms Nabulindo's response was as follows:

> "It is the 1st defendant who is unwell. We cannot proceed with the evidence of the 2nd and 3rd defendants without the testimony of the 1st defendant. I am here on behalf of the advocate on record. We pray for the Court's indulgence."

Coupled with the fact that there was no evidence to show that the Applicant as the 1st defendant was un-well, there was also no reason why the 2nd and 3rd defendants were not in Court to testify. Ms Nabulindo informed the Court that she could not "proceed with the evidence of the 2nd and 3rd defendants without the testimony of the 1st defendant". There is no legal support for that proposition. Any of the other defendants, indeed any of the defendants' witness could have been called to testify in the absence of the Applicant. The orders of permanent injunction and eviction were being sought against all the defendants and not only as against the Applicant as the 1st defendant. Just as Order 18 Rule 1 of the *Civil Procedure Rules* states that:

> "The plaintiff shall have the right to begin unless the Court otherwise orders."

and whereas sub-rule 2(2) of the same order adds that:

> "The other party shall then start his case and produce his evidence, and may then address the Court generally. Then the party beginning may then reply."

it is not mandatory that either the plaintiff or defendant must testify first. Indeed a party's case can even be proved without calling the party himself. In the case of *Julianne Ulrike Stamm -v- Tiwi Beach Hotels Ltd* 1998 eKLR CA Civil Appeal No 57 of 1996, the Court of Appeal said:

> "There is no reference in this rule to the plaintiff himself giving evidence first or at all. But a plaintiff is bound to produce evidence in support of the issues which he is bound to prove and which evidence can be given by any competent witness not necessarily himself. A plaintiff does not have to be personally present when he is represented by a duly instructed counsel as was the case here. It is for the plaintiff's counsel to decide how to prosecute his case. If a plaintiff can prove his case by the evidence of someone else, he does not have to be present at the hearing of the suit so long as his counsel is present to prosecute his suit."

By the same argument, the 2nd and 3rd defendants ought to have been called to testify in rebuttal of the Applicant's case even if the Applicant was unwell. They were co-defendants and indeed the final disposal orders in the judgment sought to be set aside were made against all of them. It is difficult to understand what the Applicant's counsel sought to achieve by insisting on the Applicant taking the witness stand first. That militates against allowing the application to set aside the exparte judgment.

23. As is also clear from the record, Ms Nabulindo was fully aware on November 10, 2021 that the suit had been listed for hearing at 10.45am on that day. However, neither she nor any of the other defendants turned up at the allocated time. It is of course correct that the 2nd and 3rd defendants are not parties to this application. However, they had been jointly sued by the Applicant herein and in the absence of any explanation as to their absence, this Court can only conclude that this was concerted effort to deliberately obstruct or delay the course of justice. In any event, even if the Applicant was unwell on the hearing date, it behoved her to follow up with her then counsel, once she recovered, to find out what transpired during the hearing and to take appropriate remedial action. Although counsel acts

as an agent of a party, the party is the owner of the litigation in Court. He or she has a responsibility to monitor the progress of the litigation. The Applicant did not have to wait until she was jolted by the execution process to move to this Court seeking to set aside the judgment. This Court is of course sympathetic with the Applicant on account of the very traumatizing incident of rape and assault and hopes that the culprits have been brought to book. It is instructive however that whereas documentary evidence in the form of a medical report have been availed, these only capture the period from March 6, 2023 long after the judgment had already been delivered. No such documents were produced to show that the Applicant was un-well prior to and on the date when the case was heard.

24. It is also instructive to note that this application has been brought nine (9) months after the judgment was delivered.

25. Taking all the above into account, I am not persuaded to exercise my discretion in favour of the Applicant.

26. Ultimately therefore, other than prayer No 5 which is allowed, the Notice of Motion dated March 14, 2023 is dismissed with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 5TH DAY OF OCTOBER 2023.

BOAZ N. OLAO

JUDGE