



General Properties Limited v Saika Two Estate Developers Ltd (Environment & Land Case 209 of 2019) [2022] KEELC 3513 (KLR) (9 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 209 OF 2019**

JA MOGENI, J

MAY 9, 2022

BETWEEN

GENERAL PROPERTIES LIMITED PLAINTIFF

AND

SAIKA TWO ESTATE DEVELOPERS LTD DEFENDANT

RULING

1. What is before court for determination is the plaintiff's Notice of Motion application dated 10/11/2021 brought pursuant to Order 12 Rule 7, Order 10 Rule 11 of the [Civil Procedure Rules](#), section 1A, 1B and Section 63 of the [Civil Procedure Act](#) and all other enabling provisions of the law. The Applicant sought orders:-
 1. *Spent*
 2. *Spent.*
 3. *Spent.*
 4. *Spent.*
 5. This honorable court be pleased to vacate and/or set aside the proceedings of the court hearing and the Judgment given on 1/11/2021 and any and all other consequential orders and this suit be fixed for hearing on 20/06/2022.
 6. Costs to be provided for.
2. The application was supported by the grounds set out in paragraphs (a) to (w) as well as by the affidavits of Ferdinand Ndung'u Waititu Babayao, the defendant/applicant, Jacob Mutia and a further affidavit by Kabui M. Mwangi dated 15/02/2022.



3. The applicant claims that he was never afforded a hearing. That the applicant was not involved by way of invitation to fix a hearing date on the date that this case is alleged to have been conducted. He alleges that he was not notified of the proceedings leading up to vacating the hearing date of 20/06/2022 and the subsequent fixing of another hearing date. That the plaintiff/respondent failed to disclose to this court material facts, viz, the case already had a hearing date on 20/06/2022.
4. That their attempt to bring to the notice of the court their predicament and the fact that they were in court but due to the instability of the internet they were not able to follow the proceedings was not possible since the virtual court ended soon after delivery of the ruling. That there has been no inordinate delay in filing this application and that it is in the interest of justice that the orders sought be granted.
5. He contends that the parties appeared before this court for Pre-Trial Conference on 9/06/2021 and the suit was set down for hearing by consent, to be heard on the 20/06/2022. That on 1/11/2021, judgment was entered in favour of the plaintiff against the defendant and without the knowledge or notice to the defendant of the proceedings leading to the Judgment. He maintains that he neither had knowledge nor notice of the proceedings leading to the impugned Judgment. Further, that the plaintiff/respondent shall suffer no prejudice should the orders sought are granted.
6. The application is opposed. The plaintiff/respondent has filed a Replying Affidavit sworn on 25/11/2021. The plaintiff/respondent contended that the advocates acting for the defendant and the deponents of the two supporting affidavits have deliberately and intentionally placed before the court falsehoods and misleading facts. The plaintiff/respondent stated that they did indeed serve the defendant/applicant with various Notices from 13/04/2021 (PTC Notice) up until 28/10/2021 (Judgment Notice) and adduced evidence of the same. The said notices were received by the defendant/applicant's offices by appending their stamp. It is his case that when they appeared before Justice Eboso, they found that the court diary was only free on 20/06/2022 and the parties had no option but to accept the date by consent. That through a letter to the Deputy Registrar, the plaintiff requested the court if it was possible to re-consider the court's diary and find a nearer date. They were then granted a mention date before her on 7/09/2021 and required the plaintiff to serve the defendants, which they adduced evidence to confirm the same. They aver that the Judgment notice was delivered under protest by the defendant appending their stamp on the same noting that the matter had been fixed for hearing on 20/06/2022. The plaintiff/respondent urges the court to strike out the supporting affidavits by Ferdinand Ndungu Waititu Babayao and Jacob Mutia for propagating perjury.
7. The defendant/applicant filed their submissions dated 16/02/2021, their further submissions dated 7/03/2022, and the Plaintiff/Respondent filed their written submissions dated 4/03/2022 to canvass the instant application.

Analysis and Determination

8. The court has now carefully considered the instant Notice of Motion, the pleadings in general and the written submissions and the replying affidavit, together with the cited authorities. The court has also considered the relevant provisions of law and the issue for determination is whether the Application is merited.
9. I note that the present application has been brought amongst others, under the provisions of section 1A, 1B and section 63 of the [Civil Procedure Act](#), provisions which do not give this Court jurisdiction to grant the prayers sought.



10. Indeed, in the case of *Mumias Out growers Company (1998) Ltd v Mumias Sugar Company Ltd* NRB HCCC No 414 of 2008 the court held that:

‘The applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed’.
11. Bosire J (as he then was) in the case of *Muchiri v Attorney General & 3 others* (1991) KLR 516 stated at page 530 that:-

“Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice.”
12. Also, in *Halburys Laws of England* 5th edition Vol. II, 2009 paragraph 15, it was observed that:-

“... a claim should be dealt with in accordance with the rules of the court and not by exercising the court’s inherent jurisdiction.....and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary. Where it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexations or oppression to do justice between the parties and to secure a fair trial between them.”
13. I have considered the application herein as well as the impugned judgment and the fact that the applicant seeks that the same be set aside as the judgment is expressed to have been resulted from a merit hearing in absence of the defendant.
14. In deciding whether or not to grant the orders sought and exercise its discretion, the court is also guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed.
15. From the record, it is true that the parties appeared before Hon. Eboso J on 30/6/2021 wherein they fixed the matter for hearing on 20/06/2022. However, the plaintiff appeared before the Deputy Registrar on 7/9/2021 wherein they informed the court that they had filed an affidavit of service for the day’s mention, and they requested for indulgences to get a nearer date. The court notes that the Defendant did not appear despite service.
16. The Deputy Registrar set the matter for a mention before this court on 29/9/2021. The court also notes that the defendant did not appear despite service. The plaintiff informed the court that they had a challenge with the matter being set down for hearing on 20/06/2022 as the subject matter of the case was a simple matter whether the Plaintiff should have maintained the deposit. He averred the suit property was advertised for sale, but every buyer interested is not able to proceed due to this pending case. They therefore requested for a nearer date to be able to proceed. The court then set the matter down for hearing on 7/10/2021.
17. When the matter came up for hearing, the defendant did not appear once again, despite service. Evidence adduced indicates that the defendant was aware of the ongoing proceedings in this matter as they appended their stamp on the various notices including the judgment notice wherein, they received the same under protest on 28/10/2021. The Plaintiff was keen on filing their return of service each time.
18. Nevertheless, the impugned judgment was delivered on 1/11/2021. Its subsequent draft decree was served upon the defendant on 8/11/2021 for their approval before the same could be signed by the



Deputy Registrar. In the said Judgment, the court dismissed the Defendant’s counterclaim among other orders. The applicant’s reason as to why he now seeks that the judgment be set aside was because it was delivered in his absence. I find that the application herein seeks to challenge the judgment of the court despite there having been neither an Appeal nor an application for Review filed against the judgment.

19. The applicable law for setting aside a judgment or decree of the court is found in section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). Section 80 of the [Civil Procedure Act](#) provides as follows:

“ Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

20. Order 45 Rule 1 of the [Civil Procedure Rules](#) on the other hand elaborates on the grounds on which a judgment or decree can be set aside, as follows:

“(1) (1) Any person considering himself aggrieved—

- c. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- d. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

21. If the applicant was desirous to have the judgment set aside, the proper cause was either to make an application for the Review of the judgment or to Appeal against the decision. The applicant did neither. The case was heard ex-parte. The applicant was duly served but he never appeared before the court to defend his case before the Judgment was entered. There is no law invoked which allows for a judgment entered after a full trial to be set aside in the manner suggested by the applicant. I find that the applicant herein seeks that this court sits on its own Appeal which is a jurisdictional impediment, and which renders the application a non-starter. I therefore proceed to dismiss the Application dated the 10/11/2021 with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2022.

MOGENI

JUDGE

In the Virtual presence of



Mr. Wanyingi for the Plaintiff/Respondent

Mr. Mwangi K. M for the Defendant/Applicant

Mr. Vincent Owuor : Court clerk.

