



Rutere & 11 others v Reynolds Construction Company (Nig) Ltd (Environment & Land Case 28 of 2013) [2022] KEELC 3722 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 28 OF 2013**

**CK NZILI, J
MAY 4, 2022**

BETWEEN

**JAPHET MBAE RUTERE 1ST PLAINTIFF
MARY M'MUTWIRI 2ND PLAINTIFF
JAKUBU M'ARIMI M'RUTERE 3RD PLAINTIFF
JAMES GATOBU M'IKIUGU 4TH PLAINTIFF
MONICA MWARIUMWE KITHINJI 5TH PLAINTIFF
GILBERT MBAABU 6TH PLAINTIFF
JOSHUA KABURU 7TH PLAINTIFF
MOSES GITUMA HARUN 8TH PLAINTIFF
PATRICK KINYUA M'IRINGO 9TH PLAINTIFF
MICHAEL MUGAMBI K KABUGO 10TH PLAINTIFF
DOUGLAS MUTUMA MAGANA 11TH PLAINTIFF
FELICIANA MUTHONI RUTERE 12TH PLAINTIFF**

AND

REYNOLDS CONSTRUCTION COMPANY (NIG) LTD DEFENDANT

RULING

1. Through an application dated March 16, 2022 the court is asked to stay further proceedings in this matter, review, set aside and or vacate the ex parte proceedings of March 1, 2022.



2. The application is based on the grounds on the face of it, a supporting affidavit sworn by Prof. Albert Mumma Senior Counsel on the even date. The reasons given for the application are that the suit proceeded *ex parte* out of misrepresentation by the advocate for the plaintiffs, in breach of the defendant's right to fair hearing and in disregard of previous orders made on November 27, 2018.
3. Senior Counsel Prof. Albert Mumma averred the purported hearing notice via email did not disclose either the time or date in which it was sent or its recipient hence misled the court.
4. It is the defendant's contention that during the last time the matter was listed for hearing on November 27, 2018, the court ordered Kshs.10,000/= to be paid before the next hearing but the plaintiffs have not complied with that order.
5. Lastly, Senior Counsel stated the defendant has always participated in the matter, the defence raises triable issues and is keen to defend the suit given the irreparable harm the claim is likely to impact of it and should therefore not be driven from the seat of justice unheard.
6. The application is opposed through a replying affidavit sworn on April 7, 2022, by Gregory Mutuma Muthuri advocate. The first ground is that the email used to serve the mention notice dated September 27, 2021 which the defendant acknowledged receipt was the same email that they have always used to effect service upon the defendant's counsel on record being amumma @amadvocates.com as illustrated in mention notices for March 25, 2020, January 28, 2021, February 2, 2021, February 25, 2021, April 29, 2021, 13.5.2021, July 9, 2021, July 15, 2021, September 30, 2021, October 29, 2021 and November 18, 2021. Counsel therefore averred that in all those instances at no time did the defendant indicate the change of their email address and that they had as it can be seen above, kept the defendant updated of the proceedings in this matter.
7. Counsel deposed on March 15, 2022 the defendant was served with submissions and a mention notice via the same email address used in the past and therefore it would be surprising that the defendant's Senior Counsel on record did not receive see the previous court processes but acknowledge receipt of the one for April 15, 2022 and turn around to say there was no service upon them in the particular email for the hearing date of March 1, 2022.
8. It was averred that the defendant was out to mislead the court by denying service of a hearing notice hence the application lacks merit.
9. On November 12, 2019, a ruling was delivered by the court in the presence of all parties' advocates. Afterwards, the matter came before the Deputy Registrar on February 17, 2020, October 22, 2020, January 20, 2021, February 22, 2021, April 13, 2021, when the defendant's counsel was absent. On April 29, 2021, the record shows the defendant was represented and a date was taken for May 13, 2021, the defendant did not attend. A mention date for July 15, 2021 was taken but the defendant's advocates did not show up. In the next mention for November 18, 2021, again the defendant's advocates did not attend and a hearing date for March 1, 2022 was issued.
10. On March 1, 2022, the defendant and its advocates on record failed to attend court. Given the affidavit of service filed therein, the court was satisfied about the service of the hearing date and ordered that the matter proceeds for hearing. Twelve witnesses testified and the plaintiffs closed their case. The court ordered a mention date be served for March 24, 2022 to confirm the filing of written submissions and to fix a judgment date.
11. The applicant on March 22, 2022 filed the instant application and now urges the court to stay the proceedings and set aside or review the *ex parte* proceedings of March 1, 2022 for non- service of a hearing date, for being condemned unheard and in the interest of justice.



12. Having gone through the application and the replying affidavit, the issues for determination are: -
 - (i) If the applicant has made a case for the setting aside of the ex-parte proceedings,
 - (ii) If non-attendance was at the fault of the plaintiffs or the defendant.
13. Order 12 Rule 2 *Civil Procedure Rules* grants the court the power to proceed with a matter ex-parte where only the plaintiff attends and if the court is satisfied that the notice of the hearing was duly served.
14. Order 45 *Civil Procedure Rules* grants the court the power to review, vary or set aside its orders or decree when there is an error apparent on the face of the record, there are new and important matters or information which was not within the knowledge of the court at the time the order or decree was made and for any other sufficient reasons. The application must also be made without inordinate delay.
15. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo & another* (1967) EA, the court held the discretion to set aside ex-parte proceedings was intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but was not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.
16. In *David Gichebu v Gicheba Farms Ltd & another* (2020) eKLR, the court held its fundamental duty was to do justice between the parties by allowing each party a proper opportunity to put their cases upon the merits of the matter.
17. The plaintiffs have taken the view that there was proper service of the hearing notice with sufficient time through the known email address belonging to defendant's advocates on record, which it has been using throughout these proceedings.
18. On the other hand, the applicant is vehemently denying receipt of the said email, notwithstanding it is the same email which was used to forward previous correspondence in general and in particular, the mention notice for March 24, 2022 and written submissions.
19. Electronic service of court processes is now one of the recognized modes of service. Under Order 5 Rule 22B *Civil Procedure Rules* service on such a digital platform is deemed to have been effected when the sender receives a delivery receipt.
20. The plaintiffs have filed an acknowledgment receipt of the email sent to the known electronic email address of the defendant's advocates on record. I am persuaded that the defendant was properly served with the hearing notice through its last confirmed and used email which is amumma@amadvocates.com. It may as well could be true that once the email was sent to the defendant's advocates on record, it escaped the attention of the said advocates for one reason or the other.
21. In *Union Insurance Co of Kenya Ltd v Ramzan Abdul Dhanji* Civil Appeal No Nai 179 of 1999, the court held whereas a right to be heard is a basic natural justice concept and ought not to be taken away lightly looking at the record before the court, the court was not impressed that the applicant was denied the right to defend itself, since every step of the case had been notified to them but none of the occasions had counsel attended.
22. In this matter, the court record shows that the applicant's counsels on record have been choosing when to attend and when not to attend court. It is the duty of the parties and their advocates to assist the court in attaining the overriding objective of expeditious disposal of their cases and for the dispensation of justice.



23. My finding is that the applicant has a larger share of blame in this matter by not attending court as and when dates for mentions were issued. Similarly, the plaintiffs have the equal duty to ensure that there is adequate notice and diligence in adhering to court timelines.
24. Coming to the issue as to whether there are sufficient reasons to set aside the ex-parte proceedings, notwithstanding there was proper service of the hearing notice, the applicant says it has an arguable defence and would be driven out of the seat of justice if condemned unheard.
25. There is no doubt the plaintiffs were given more than adequate time to amend their pleadings since 2019 until 2021. The defendant was also supposed to amend its defence within the set timelines if need arose. The applicant has not denied it received the amended plaint.
26. It has not been suggested by the respondents that the defendant has deliberately been delaying the finalization of this suit. The record shows the plaintiffs were the ones who sought for an adjournment in 2019 to substitute a deceased party. At that time the defendant was ready to proceed.
27. In *Shah vs Mbogo supra*, the court held the discretion to set aside ex-parte proceedings is exercised to avoid injustice or hardship resulting out of inadvertent mistake or error but not to assist a party who has been deliberate in obstructing or delaying the cause of justice.
28. In this suit the applicant seems not to fit a description of what the learned Court of Appeal judges were alluding to.
29. The court must always take the course with least risk of injustice see *Nesco Services Ltd v CM Construction (EA) Ltd* (2021) eKLR. The matter herein proceeded with only twelve witnesses who come from within the limits of this court's jurisdiction.

The cost and the risk the plaintiffs are likely to incur is less than the risk and injustice the defendant is likely to incur by being denied an opportunity to advance its defence and have its day in court.
30. The mistake and failure to attend court by the defendant together with its counsels on record is pardonable and excusable under the circumstances. On the other hand, the cost of bringing again the witnesses to court for rehearing is capable of being compensated by way of costs as held in *CMC Holdings Ltd v James Mumo Nzioka* (2004) eKLR cited with approval in Wachira *Karani vs Bildad Wachira* (2016) eKLR.
31. In the premises, I allow the application, set aside the proceedings of March 1, 2022 and order the parties to list the matter for hearing on priority basis. The defendant shall pay throw away costs of Kshs.50,000/= all-inclusive to the plaintiffs before next hearing date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 4TH DAY OF MAY, 2022.

In presence of:

Mutuma for plaintiff

Kamande holding brief for S.C Mmuma

HON. C.K. NZILI

ELC JUDGE

