Mara North Holding Company Limited v Ole Masek & 4 others (Environment & Land Case 403 of 2017) [2022] KEELC 2517 (KLR) (11 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2517 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 403 OF 2017

MN KULLOW, J

JULY 11, 2022

BETWEEN

MARA NORTH HOLDING COMPANY LIMITED ..... PLAINTIFF

AND

SANAT OLE MASEK ..... RESPONDENT

AND

PARSEEN OLE RAKWA ..... 1ST DEFENDANT

MONARCHS LODGE SAFARI LIMITED ..... 2ND DEFENDANT

DISTRICT LAND REGISTRAR, NAROK COUNTY ..... 3RD DEFENDANT

MARA NORTH CONSERVANCY ..... 4TH DEFENDANT

RULING

A. Introduction

1. By Notice of Motion dated 3rd February, 2021, the Applicant sought the following orders: -

    a) Spent.

    b) That the honourable court be pleased to set aside the ex-parte proceedings taken and orders issued on the 5th October 2020 and all consequential proceedings thereafter.

    c) That the Applicant be afforded a chance to be heard.

    d) That the costs of this Application to be in the cause.

2. The application is based on the 12 grounds thereof and the Supporting Affidavit sworn by Lynn W. Ngugion February 3, 2021, an Advocate of the High Court of Kenya having conduct of the matter on behalf of the Applicant.

3. The Applicant avers that when the matter previously came up for hearing, counsel who had been requested to hold brief for the Applicant erroneously recorded and informed them that the matter was scheduled for further hearing on 8th October, 2020 which was not the correct position and relying on the said set of facts, the Applicant was unable to attend court on the correctly scheduled date.

4. It is her claim that the non-attendance of the Applicant's counsel on the 05.10.2020 was not intentional or occasioned by the Applicant's own doing and thus urged the court to invoke the powers under Article 159 (2) (d) of *the Constitution* and section 3A of the *Civil Procedure Act* in allowing the Application and giving the Applicant an opportunity to be heard.

5. She further urged the court not to apportion blame on the Applicant and deny them an opportunity to be heard on merit for the non-attendance by the Applicant's counsel as the same would immensely infringe on the rights of the Applicant.

6. She did also contend that erroneously diarizing the incorrect date was an administrative error and that the mistakes of the counsel should not be visited on their clients who did not participate in the making of the mistake and who stands to suffer if the mistake is not excused. She therefore urged the court to allow the Application and grant the Applicant an opportunity to be heard on merit.

7. The application was opposed. The Plaintiff/ Respondent filed a Replying Affidavit sworn by Daniel Muli on March 3, 2021 in response to the instant Application. It is his assertion that the 3rd Defendant/ Applicant has not given any plausible explanation for its failure to attend court on the October 5, 2020 during the hearing date of the suit to warrant the grant of the orders sought which are discretionary in nature.

8. It is his claim that when the matter was mentioned on the July 1, 2020, one Ms. Obondo was holding brief for the Applicant's counsel and thus the Applicant's counsel was fully aware of the hearing date scheduled for the October 5, 2020.

9. The Respondent thus contends that the averments by the Applicants contained in the Supporting Affidavit are made from the bar, by an Advocate of the High Court without any evidence whatsoever and the same cannot therefore form the basis upon which the court is called upon to exercise its discretionary remedy to set aside proceedings.

10. It is further his claim that upon close of the case, directions on the filing of final submissions were issued by the court; the Plaintiff/ Respondent filed and served its final written submissions upon the Applicant on November 19, 2020 who then acknowledged receipt by stamping and signing. Therefore, the Applicant upon receipt of the final submissions was made aware that judgment was due for delivery, he however continued to ignore and neglect the matter and only chose to file the instant application after 3 months thus deliberately choosing to neglect its duty to take steps to prosecute its case in a timely manner.

11. The Respondent also dismissed the Applicant's Application and averments as nothing more than a delaying tactic intended to impede the conclusion of the suit and to prevent the ends of justice from being met. That it is in the interest of justice that litigation must be concluded in an expeditious and less costly manner. He therefore urged the court to dismiss the Application with cost and to proceed to deliver its judgment in the matter.

12. This court issued directions that the Application be disposed of by way of written submissions on February 23, 2021. The Applicant's counsel filed their submissions dated May 20, 2021 whilst the Respondent's counsel filed their submissions dated September 8, 2021, which I have taken into account in arriving at my decision.

B. Analysis And Determination

13. This court is of the considered opinion that the issues arising for determination are as follows: -

    a. Whether the Applicant has made out a case for setting aside the proceedings and Orders made on October 5, 2020 and all the consequential proceedings thereafter.

14. The grounds for setting aside an ex-parte judgment are now well settled. The court in determining whether or not to grant such orders ought to exercise such powers judicially taking into account the circumstances of each case.

15. In *Mbogo vs Shah* 1968 E.A 93 the court held that: -

> " This discretion is intended so to be exercised to avoid injustice or 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"

16. As stated above, an order for setting aside is discretionary in nature and such discretion ought not to be exercised in favor of an undeserving party. The Applicant contends that when the matter came up for mention on 1/7/2020 for purposes of fixing a hearing date, the Applicant's counsel requested someone to hold their brief. The court issued its directions that the matter would proceed for hearing on 5/10/2020 however, the applicant's counsel was informed that the matter would proceed on the 8/10/2020 instead of 5/10/2020.

17. That on 05/10 2020 the matter proceeded in their absence as they were not aware of the said date issued. On 08/10/2020 they attended court and that is when they realized that the matter had already proceeded and was set for judgment hence the instant application seeking to have the proceedings set aside. She attributed the said error and/or miscommunication of the correct date scheduled for hearing as the mistake of the counsel which ought not to be visited on the Applicant and urged the court to set aside the exparte proceedings and orders made on 05/10/2020 and all the consequential proceedings thereafter.

18. I have however noted that despite stating that they found out that the matter proceeded on for hearing ex-parte on 08/10/2020 when the attended court, the Applicants waited for over 3 months to file the instant Appeal. No explanation whatsoever has been tendered for the delay of almost 4 months' before filing the instant application.

19. The Respondent on the other hand has dismissed the averments by the Applicant as a delaying tactic intended to impede the conclusion of the suit and to prevent the ends of justice from being met. It is his claim that the applicant has merely offered an excuse presented from the bar without an iota of evidence to support the said excuse. He further stated that the Applicant's advocate did not produce the extract of the law firm's diary to demonstrate that the matter was indeed erroneously diarized for 08/10/2020 as alleged or at all or produced any evidence of the communication between herself/ her law firm and Ms. Obondo who held brief to demonstrate that she was indeed told that the hearing was scheduled to 8/10/2020. He thus urged the court to dismiss the Application in the absence of any

cogent plausible explanation and evidence for the Applicant's failure to attend court on the scheduled date. He maintained that no sufficient cause has been demonstrated by the Applicant.

20. In defining what amounts to sufficient cause, Mativo J. in the case of *Wachira Karani vs Bildad Wachira* [2016] eKLR held that: -

> " sufficient cause is thus cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.

21. I have critically considered the rival positions taken by both parties herein; while I do acknowledge that the Applicant has not given any evidence to support the assertions from his advocate on record, no explanation whatsoever has been offered for the over 3 months' delay in filing the instant Application despite stating in her Supporting Affidavit and submissions that they found out that the matter had proceeded ex-parte on the 5/10/2020 when they attended court on 08/10/2020; I do also note that the mistake or miscommunication was on the part of the Applicant's counsel on record.

22. In *CMC Holdings Limited -vs- Nzioki* [2004] 1 KLR 173 it was held that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order... was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would ... not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate."

23. This being an Application in which the discretion of the court is sought and the case being a land matter, I will grant the Applicant the benefit of doubt. Further, it is in the interest of justice that a party shall not be condemned unheard and/or visit the mistake of the advocate on the Applicant. The Applicant may not have been aware of the miscommunication between the two advocates; Ms. Obondo and his advocate on record, the erroneous diarisation of the hearing date and the consequent non-attendance by his advocate on record on the scheduled hearing date. Article 50 of *the Constitution* provides the right to have any dispute decided in a fair hearing before a court. I do therefore find that there is need to give the Applicant an opportunity to be heard and ventilate his claim on merit.

Conclusion

24. In the upshot, I accordingly find that the Application dated 3rd February, 2021 is merited and I proceed to allow the same on the following terms;

    a. The ex-parte proceedings and orders issued on 5th October, 2020 and all the consequential proceedings thereafter be and are hereby set aside.

    b. The Applicant herein is hereby directed to fix the matter for hearing on a priority basis.

    c. The Applicant is hereby ordered to pay the Plaintiff/ Respondent Throw-way costs of Kshs 50,000/= before the hearing date.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 11TH DAY OF JULY, 2022.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Gathuri h/b for the Applicant

nonapperence for the Respondent

Tom Maurice - Court Assistant