



**Seke & another v Waswa Investment Company Ltd & another;
Nyakwada & 49 others (Interested Parties) (Environment & Land Case
172 of 2010) [2022] KEELC 13432 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 172 OF 2010
A NYUKURI, J
OCTOBER 5, 2022**

BETWEEN

SAMUEL KALOVOTO SEKE 1ST PLAINTIFF

FRANCIS NGIGE WAWERU 2ND PLAINTIFF

AND

WASWA INVESTMENT COMPANY LTD 1ST DEFENDANT

LAND REGISTRAR MACHAKOS 2ND DEFENDANT

AND

WILLIAM NYAKWADA & 49 OTHERS INTERESTED PARTY

RULING

1. *Vide* a notice of motion application dated August 17, 2022, the 1st defendant sought for the following orders;
 - a. Spent
 - b. Spent
 - c. That the proceedings, interim orders and/or consequential orders issued on July 21, 2022 by Hon Lady Justice A Nyukuri delivered on July 21, 2022 be set aside and the respondents be allowed to defend and/or prosecute the claim.
 - d. Spent
 - e. That this honourable court be pleased to re-open the Plaintiffs case and recall the plaintiff one Samuel Kalovoto, witnesses of the interested party and the respondent's witnesses Vincent



Ogillobe allowed to give evidence in chief and for further cross-examination respectively for purposes of adducing evidence of the documents found statement or reply and referred to in the witness statement herein.

- f. That in the alternative, the plaintiff and the interested party be recalled for purposes of examination.
 - g. That the costs of this application be in the cause.
2. The application is supported by the supporting affidavit of Vincent Ogillo and Kennedy Otieno Arum both which were sworn on August 17, 2022. The applicant's case is that the 1st defendant filed their witness statement and list of documents by one James Mwangi dated February 3, 2012. That James Mwangi was a director of the 1st defendant but was removed in an election which he contested *vide* High Court Civil Suit No 462 of 2011 and thereafter upon determination of that suit fresh elections were held pursuant to a court order and Vincent Onyango Ogillo was elected as chairman director/ shareholder.
 3. The 1st defendant further averred that at all material times, the firm of Otieno Arum & Co Advocate had conduct of this matter until January 12, 2017 when they were served with a notice of change of advocates in this case and in ELC 91 of 2010. According to Vincent Onyango Ogillo, the former director's newly appointed Advocates Ms Wandugi & Co Advocates have been in attendance during the mentions for directions and hearing of the two matters whereof the plaintiff sought to consolidate them *vide* an application dated November 15, 2016. The 1st defendant assert that the court records in ELC 191 of 2010 contain directions asking the 1st defendant's directors and their advocates to sort out the issue of representation. Mr Ogillo maintained that despite filing fresh list of documents and witness statements, the issue of the advocates costs and representation has never been sorted owing to the conflicting interests.
 4. Mr Ogillo stated further that on July 21, 2022, he was engaged in official duties at his place of work in Nairobi City Council and that his counsel who was unwell logged into court online with intention to adjourn the matter but his application for adjournment was disallowed at 11.15 am and hearing set for 12.00 noon making it impossible for both counsel and Mr Ogillo to travel to court on time.
 5. The 1st defendant pleads that if the application is not allowed, they will have been denied a chance to cross examine the plaintiff and the witnesses for the interested party, and that will be tantamount to shutting them out of the justice system when they are not to be blamed.
 6. On his part Mr Arum advocate for the 1st defendant deponed that he has the conduct of ELC 191 of 2010 and this suit since inception at Machakos Law Court and has been attending court without fail save for the occasion when he sought for adjournment for reasons on the court record.
 7. Counsel further deponed that the 1st defendant's Directors have had leadership wrangles in court over the years which were resolved in Nairobi High Court Civil Case No 462 of 2012 and a fresh election was ordered, which was done and current directors gave him instructions to act on their behalf.
 8. Further that a different set of directors have given instructions to Mr Arum Advocate while another set of Directors had instructed Ms Wandugi & Co Advocates, which led to the confusion in representation as shown in the notices of change of advocates filed in 2017.
 9. Counsel complained that the hearing date was fixed by the plaintiff *ex parte* and the same was received under protest as indicated in the memorandum of appearance. Mr Arum further stated that on the hearing date he sought for adjournment for reasons he explained to court orally but his application was declined, since he did not have the office files to demonstrate the same as he was under house rest.



10. Mr Arum also stated that on the material day he also informed the court that he was sick and could not attend court or secure the attendance of the witness who was on official duties as an officer of the City Council of Nairobi. He further averred that the court should not punish the Applicant for the mistakes as they have been willing to prosecute their case which involves proprietary interest in land valued at a colossal amount.
11. The application was opposed. Mr David Karanja Thuo, Counsel for the plaintiff swore a replying affidavit dated September 2022 in opposition to the application. He averred that the application is vexatious, frivolous and an abuse of the process of the court.
12. Mr Thuo deponed that on July 21, 2022 Ms Musa Advocate for the interested parties confirmed that the hearing notice had been served on all the counsel and that Mr Arum Advocate sought for an adjournment which was declined, and the hearing of the suit proceeded and thereafter a date for mention was fixed for November 23, 2022.
13. Counsel pointed out that the instant application was the written version of the one made by Mr Arum on the hearing date, which the court already pronounced itself on, hence the court is functus officio. His view was that the 1st defendant's recourse was in filing an appeal.
14. Besides, in further opposition to the instant application, Ms Eva Musa, advocate for the Interested Party also filed a replying affidavit sworn on September 19, 2022. She averred that the application is defective, devoid of merit and brought in bad faith.
15. Ms Musa advocate asserted that the application is mischievous and a contemptuous attempt by the applicant to embroil the plaintiff and the interested parties in an illusory dispute created with the sole aim of frustrating the two parties and dragging this matter.
16. Counsel pointed out that this matter came up for hearing on July 21, 2022 and that it is common knowledge that hearing in ELC court at Machakos proceed physically, unless otherwise communicated. She stated that prior to the matter being heard physically, the matter was mentioned virtually and both counsel for the plaintiff and the interested parties intimated their readiness to proceed and sought for time allocation. That counsel for the applicant sought for an adjournment which was opposed by both counsel for the plaintiff and the interested parties.
17. On the issue of the 1st defendant's representation, counsel stated that the 1st defendant was untruthful as the court ordered the 1st defendant to sort out the issue of representation on June 15, 2021 at the hearing of the interested party's application for joinder, and therefore that it is unfair for the 1st defendants' counsel to raise the issue of representation one year thereafter, when this matter had come up in court severally.
18. Further, she deponed that the court denied the prayer for adjournment and that had counsel been keen to proceed, he would have sought assistance of counsel in Machakos to take the plaintiff's evidence. According to her, the applicant's failure to attend court on July 21, 2022, was deliberate as counsel never bothered to reach out to opposing counsel to notify them of his intention to adjourn or communicate the representation quagmire.
19. Counsel for the interested parties asserted that the applicant was mischievous as they filed the instant application on August 17, 2022 but held onto it until September 16, 2022 when they served the same on her, which was only six days before the hearing date.



20. The application was canvassed by way of written submissions. On record are the 1st defendants/ applicants submissions dated September 15, 2022, the plaintiff's submissions dated October 2, 2022 and the interested parties submissions dated September 30, 2022.
21. Counsel for the 1st defendant submitted that the 1st defendant had given sufficient reasons for their non attendance of court on the hearing date and therefore that the applicant deserves the discretionary orders of this court. Counsel relied on the case of *Shah v Mbogo & another* (1967) EA 116 for the proposition that the court's discretion ought to be exercised to avoid injustice and hardships from inadvertence or excusable mistakes or error and not to assist a person who deliberately seeks to obstruct or delay justice.
22. Counsel argued that although the applicant had complied with pre-trial directions and was ready to prosecute this matter, he had sought for an adjournment on plausible grounds, hence they were not accorded an opportunity to cross -examine the plaintiff or rebut the evidence on record. Counsel contended that a court need not be moved to correct an irregularity. Reliance was placed in order 18 rule 10 of the *Civil Procedure Rules* for the proposition that the court has power to recall any witness for cross-examination.
23. According to the 1st defendant, section 3A of the *Civil Procedure Act* granted inherent power to this court to make orders necessary for the ends of justice. It was the position of the 1st defendant that they had a good defence that ought to proceed to hearing as their pleadings which included a counter claim were to the effect that they acquired the suit land as bona fide purchasers for value.
24. Counsel also submitted that order 12 rule 7 granted this court the discretion to set aside ex parte judgment. Reliance was placed on the case of *Philip Kepto Chemmolo and Mumias Sugar Co Ltd v Augustine Kubende*(1982-88) 1 KAR for the proposition that the main concern of the court ought to be to do justice to the parties.
25. It was contended for the 1st defendant that the 1st defendants non-attendance was inadvertent as they logged in but were denied an adjournment which led them to promptly file the instant application as well as a notice of appeal to the order denying adjournment. Counsel pointed out that although they denied having committed any mistakes, such mistakes, ought not be visited on the applicants. Counsel was of the view that the responses filed did not answer the instant application.

The Plaintiffs' Submissions

26. On their part, the plaintiffs submitted that there are only two ways of challenging an order; namely by way of appeal or review. And that the application for review is limited to instances where the applicant can prove discovery of new matters that were not in his knowledge at the time the matter was being heard.
27. Counsel pointed out that it was not clear why the 1st defendant had come back to court, having earlier sought for an adjournment which was declined. It was argued for the 1st defendant that the reasons given for this application are the same as those in the earlier oral application for adjournment. Counsel was therefore of the view that this court was functus officio having pronounced itself on the matter, and that the court cannot re-open a matter that it had earlier decided on.

The Interested Parties Submissions

28. For the interested party, it was submitted that the 1st defendant's counsel was duly served with the hearing notice as required by law, and that when the 1st defendant's counsel appeared in court online



- on July 21, 2022, he had full knowledge that hearing before ELC court at Machakos proceed in open court. That the hearing proceeded after the court declined to adjourn the matter.
29. Counsel argued that order 12 rule 2 of the *Civil Procedure Rules* provided that where on a date fixed for hearing, upon the suit being called for hearing, only the Plaintiff attends and the court is satisfied that a hearing notice was duly served, it may proceed ex parte.
 30. On behalf of the interested parties, it was emphasized that the court record shows that the interested parties served all the parties with the hearing notice for July 21, 2022, months before that date and when the matter was called virtually on July 21, 2022 for directions on time allocation, the plaintiff and interested parties counsel were in physical attendance and intimated to court their readiness to proceed with the hearing.
 31. It was further submitted that the 1st defendant's advocate was duty bound to ensure that he availed himself and his client in Machakos ELC court on the hearing date if he wished to participate in the suit. That instead, counsel for the 1st defendant chose to appear online to seek an adjournment while other counsel were already in the court premises.
 32. In addition, counsel emphasized that the issue of representation as raised in the instant application, was raised by the same counsel on June 15, 2021 before court and the court directed counsel and parties involved to sort out the issue. According to counsel, it was unfair for the 1st defendant to premise his reason for adjournment on an issue settled over a year before the matter came up for hearing.
 33. It was counsel's position that a party must be vigilant at all times, exhibiting prudence of a person having a pending suit in court, to ensure he is apprised of everything in the suit, as the case belongs to the litigant and not his counsel. It was also argued that a party who has been accorded an opportunity to be heard and failed to utilize such opportunity cannot turn around to argue that he has been condemned unheard.
 34. It was also submitted that although the court has discretion to grant the orders sought, the said discretion ought to be exercised judiciously to avoid causing an injustice to innocent parties. Placing reliance on the case of *Savings & Loan Kenya Limited v Onyancha Bromole* (2014) eKLR, counsel argued that the 1st defendant was bound to demonstrate a sufficient cause which he failed to do.

Analysis and Determination

35. I have carefully considered the application, the supporting affidavit, the replying affidavits as well as submissions and authorities cited. In my considered view the sole issue that arise for determination is whether the Applicant has demonstrated sufficient cause to warrant the grant of the orders sought.
36. The discretion of the court to set aside exparte proceedings is unfettered. However, it must be exercised judiciously for the interests of justice. In the case of *Shah v Mbogo & Another* (1967) EA 116, the East African Court of Appeal stated as follows;

“This discretion (to set aside exparte proceedings) 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 out whether by evasion or otherwise, to obstruct or delay the course of justice.”
37. Therefore, the discretion to set aside exparte proceedings ought to be exercised for purposes of furthering justice and not to obstruct or delay justice. Hence, it behooves an applicant for such orders to demonstrate the justification for such application by showing that there is sufficient cause why they



failed to attend court and that their application is made in good faith and not meant to delay the course of justice.

38. In the Indian case of *Parimal v Veena Bharti* (2011), the Supreme Court of India had the following to say;

“Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently-----”

39. Similarly, in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR, the court stated as follows:

“Sufficient cause is thus the 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 jacked formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

40. It is not in dispute that when this matter came up for hearing on July 21, 2022, Mr Arum Advocate for the 1st defendant attended court virtually, well aware that the same was coming up for hearing of the main suit. It is also on record that he sought for adjournment on grounds that the 1st defendant’s directors were embroiled in squabbles, which were yet to be resolved and that he needed more time to resolve the same.

41. Upon consideration of the application, the court declined to grant an adjournment and directed that this matter proceed for hearing at 12 noon that day. The reasons for declining the adjournment were that service of the hearing notices for hearing on July 21, 2022 had been done in April 2022 and a return of service filed on April 25, 2022 and therefore the court was not persuaded by the reasons for adjournment given by the 1st defendant.

42. I have considered the instant application and I note that the main grounds upon which the application is anchored are the same grounds given as justification for the oral adjournment application made on July 21, 2022, save that the applicant has now added two more reasons; namely that on the hearing date, he was on official duty at his place of work at Nairobi City County and further that his counsel was unwell. However, no evidence was attached to prove those allegations.

43. To persuade this court that there were squabbles between the 1st defendant’s directors, the applicant produced notice of change filed on January 13, 2017 by the firm of Wandugi & Co Advocates. I am surprised that since January 2017, the 1st defendant directors have not bothered to settle their differences and sort out the issue of representation. That is a period of over five years.

44. I also note that on June 15, 2021, Mr Arum advocate raised the issue of the 1st defendant representation in court. The 1st defendant stated that the squabbles the 1st defendant’s directors have been there for years and that in fact the question of advocates costs have never been sorted out to this date. In my considered view, the issue of squabbles between the 1st defendant’s directors has nothing to do with this matter and cannot be the reason to keep this matter which was filed twelve years ago, pending in court.

45. It is the view of this court that the issue of excusing the applicant’s non attendance of court on July 21, 2022 on account of the 1st defendants directors squabbles was already determined and rejected on July 21, 2022 and therefore this court has no jurisdiction to determine that issue as the same is res judicata by dint of section 7 of the *Civil Procedure Act*, which bars this court from determining an issue that has already been determined, between the same parties.



46. It appears the applicant is cognizant of this position, which is why on August 19, 2022, he filed a notice of appeal dated August 17, 2022 against the decision of this court made on July 21, 2022, which rejected his application for adjournment.
47. For the court to exercise its discretion in favour of setting aside *ex parte* proceedings, the applicant must not only show sufficient cause that prevented his attendance, but also demonstrate good faith in that his application is not geared towards derailing the course of justice. He who comes to equity must do so with clean hands.
48. The applicant has laid the blame for his non attendance everywhere except on himself. They insist that they should not be blamed for the squabbles of their directors. They state that they received the hearing notice under protest and to prove that allegation, they referred to a memorandum of appearance filed by the Attorney General and insist that they received the same under protest. Further they also stated that the matter was pending hearing of an application for consolidation filed in 2016.
49. Having considered the record, I note that all the allegations above are not correct. To begin with, the record shows that the 1st defendant's counsel was served with an invitation or mention notice to take a mutually acceptable hearing date. The mention was slated for March 28, 2022. Counsel for the 1st defendant did not attend court or sent another counsel to hold his brief and take a suitable date. Therefore, a hearing date of July 21, 2022 was fixed.
50. The record further shows that on April 19, 2022, Mr Arum advocate was served with the hearing notice for July 21, 2022. Contrary to what is stated in the application, there was no protest, as seen from the return of service filed on April 25, 2022. Besides the record shows that on June 20, 2019, this court ordered that the two cases, namely ELC 91 of 2010 and 172 of 2010 were to proceed separately and the court declined to consolidate the suits. This order was made in the presence of Mr Arum Advocate, therefore the allegation that the 1st defendant is still waiting the determination of the application for consolidation is erroneous.
51. In the premises I do not find any demonstration of sufficient cause and/or good faith on the part of the applicant to warrant grant of orders setting aside the orders of July 21, 2022. In my view the application is intended to delay the course of justice.
52. The upshot is that the application dated August 17, 2022 lacks merit and the same is dismissed with costs to the respondents.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Arum for 1st Defendant/Applicant

Ms. Karanja for 2nd Defendant

Ms. Musa for Interested Parties

No appearance for the Plaintiffs

Court Assistant - Ashley

