



Mwende v Kilili & 3 others; Mulwa (Interested Party) (Commercial Case E003 of 2021) [2024] KEHC 108 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
COMMERCIAL CASE E003 OF 2021
FR OLEL, J
JANUARY 17, 2024**

BETWEEN

JACKLINE MWENDE PLAINTIFF

AND

STELLAMARRIS KILILI 1ST RESPONDENT

MICHEAL KILILI 2ND RESPONDENT

PHILIP MULEI KILILI 3RD RESPONDENT

PETER KIOKO 4TH RESPONDENT

AND

ANDREW KILILI MULWA INTERESTED PARTY

RULING

Introduction

1. The application before this court is the Notice of Motion application dated 29th May 2023 brought pursuant to provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 2 and 3 are basically spent as the applicant sought for stay of the order dated 21st February 2022 pending hearing and determination of this application. The said orders were not granted. The only issue thus pending for determination is prayer (4), wherein the 4th Respondent/Applicant seeks to have the court Orders dated 21st February 2022 and 18th May 2022 set aside.
2. This application is supported by the grounds on the face of the said application and the supporting Affidavit of one Philip Mulei Kilili, where he depones that due to the different court orders made in favour of the plaintiff/Respondent, they were residing together on parcel Kangundo/Isinga/2530



{ hereinafter referred to as the suit property }, which position had become untenable, inconducive for the children as they were constantly at loggerheads with the Respondent leading to breach of peace and criminal activities which at various points had been reported to the police. The respondent and her children were untidy and constantly abused the applicants wife and children leading to constant confrontation and wanton damage to the suit property. The respondents action constituted sufficient ground to warrant stay of the court order since failure to do so would prejudice the applicant and his family.

3. The plaintiff/Respondent did file her replying affidavit dated 12th June 2023, wherein she categorically denied all the applicants allegations and further countered the same by alleging that to the contrary it was the applicant who had severally breached the terms of the consent order dated 18th May 2022 by denying her access to the ground floor bathroom and also by severally attempting to lock her out of the suit premises. The applicant was using his influence to intimidate her and had made several reports against her at Kangundo police station, where she had been summoned and/or arrested, but no action had been taken against the applicant, whenever she complained about his criminal Acts.
4. Further the respondent averred that the applicant and his mother one Brenda Masita Mulindi had in bad faith filed a succession cause at Kangundo court, with respect to her husband's estate, without her knowledge, ignoring the fact the she and her deceased husband had resided in the said matrimonial home-the suit property to the exclusion of all other family members before she was unlawfully evicted therefrom by her in laws prompting her to move court and had a ruling delivered in her favour on 21st February 2022 allowing her to access the suit premises and also restraining the respondent from evicting her or interfering with her quiet possession and occupation thereof.
5. There was a consent order dated 18th May 2022, where they had agreed on how to share the suit premises pending determination of the suit and unfortunately it was the 4th Defendant/Applicant who kept on creating scenes and causing wrangles. The respondent averred that she had nowhere else to live with her two children, one whom was disabled and had no means to fend for herself. The respondent thus prayed that the said application be dismissed with costs.
6. The respondent did file a further affidavit where she averred that the applicant had come to court with unclean hands and was therefore underserving of the orders sought. The applicant had threatened to kill her and was charged before Kangundo court where he pleaded guilty and was convicted to serve two (2) year's non-custodial sentence.

Analysis & Determination

7. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and both sets of submission filed. The only issue for determination is whether this court should set aside the orders dated 21st February 2022 and 18th May 2022.
8. The courts are guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. Further the courts powers to set aside any of its orders is discretionary with the main aim being that justice should prevail. In the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA, the Court stated that the main concern of the court is to do justice to the parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.



9. In *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside *ex parte* proceedings or decision) 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.” (emphasis added)

10. The legal threshold to consider before exercising the said discretion is whether the applicant has demonstrated a sufficient cause warranting setting aside of the *ex-parte* decision or proceedings. In *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J held that:

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

11. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011) observed that:

“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 ...’

12. The second order which the applicant seeks to set aside, is the order dated 18th May 2022 is a consent order. In the case of Samson Munikah practicing as *Munikah & Company Advocates v Wedube Estates Limited* Nairobi Civil Appeal No. 126 of 2005 the court stated that:

“This appeal raises the vexed question: (of) what are the circumstances in which a consent judgment may be set aside? In *Broke Bond Liebig (t) Ltd v Mallya* (1975) E.A. 266 the then court of appeal for East Africa set out the circumstances in which a judgment freely entered into by parties to a dispute in court would be set aside:-

“The circumstances in which a consent judgment may be interfered with were considered by this court in *Hirani v Kassin* (1952)19 EACA 131 where the following passage from Section on judgments and orders, 7th Edition vol. 1, P. 124 was approved:

“*Prima Facie*, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”.

For his part Ag. Vice President Mustafa had this to say:

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable the court to set aside or rescind a contract.



In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could have been no mistake or misunderstanding.

13. The protagonists herein are related, being the Son and “wife” of the late Gerald Musau Kilili (Deceased). They are family and should know that they can choose their friends, but not family lineage, which is Ordained by our maker. Endless squabbles such as the one presented through this application do not deserve judicial intervention, for it is a matter which should be resolved by the family through alternative resolution mechanism.
14. The setting aside orders sought, basically intends to disadvantage the respondent and will have the effect of obstruction and delaying the cause of Justice. A such the said order is unmerited and cannot be granted. The applicant also had the option of appealing as against the well-considered ruling dated 21st February 2022, but did not do so. He must hold his peace. Secondly the order dated 18th May 2021 was a consent order. The applicant has not proved any of the prerequisite grounds to have a consent order set aside.
15. The parties herein are tied at the hip and have to share the suit premises until, the Estate of Gerald Musau Kilili {Deceased} is distributed and/or they hope to consent otherwise. They should drink from the cup of wisdom offered in the Good Book at 1 Peter 4:8-11, which proffers that “Above All, love each other deeply, because love covers over a multitude of sins. Offer hospitality to one another without grumbling.”

Disposition

16. The Notice of Motion dated 29th May 2023 lack Merit and the same is dismissed with no orders as to costs.
17. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 17th day of January, 2024.

In the presence of;

Mr. Ngulukyo for Plaintiff

Mr. Nyakundi for Respondents

Susan/Sam - Court Assistant

