Trompell v Ochs (Civil Case E30 of 2021) [2023] KEHC 17306 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E30 OF 2021

OA SEWE, J

MAY 10, 2023

BETWEEN

BERND TROMPELL .... PLAINTIFF

AND

KARL HEINZ OCHS .... DEFENDANT

RULING

1. The notice of motion dated June 28, 2022 was filed by J Thongori & Company Advocates on behalf of the defendant, Karl Heinz Ochs. It was filed under article 50 of the *Constitution of Kenya*, sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, and order 10 rule 11, and order 51 of the *Civil Procedure Rules, 2010*, for the following orders:

   (a) That the Court do set aside its orders of June 8, 2022 that allowed the hearing of the plaintiff's case in the absence of the defendant and substitute the same with orders reopening the case for cross-examination of the plaintiff and the witnesses who testified on the material day.

   (b) That the court, in the interest of justice, do stay and set aside all its orders of June 8, 2022 and subsequently facilitate fresh hearing for the plaintiff and his witnesses as well as the defendant and his witnesses.

   (c) That the costs of the application be in the cause.

2. The application was premised on the grounds that the defendant has a good Defence which raises serious triable issues and he should therefore not be condemned unheard. The defendant further averred that his counsel, by mistake, diarized the matter for June 17, 2022 instead of June 8, 2022; and therefore that the defendant should not be punished for the mistake of his Advocate. He added that there will be no prejudice if the orders sought are granted as there will be a fair and just determination of the dispute between the parties.

3. The application was supported by the affidavit sworn by Ms Caroline Njogu, Advocate, in which she sincerely apologized to the Court for the mistake on their part in not diarizing the matter for June 8, 2022. She added that the defendant has a strong defence and should therefore be given an opportunity to defend the suit in exercise of his right to fair hearing under article 50 of the *Constitution*.

4. The plaintiff opposed the application, and to that end, he relied on his Replying Affidavit sworn on July 15, 2022. He gave a chronology of the suit and pointed out that he had, on previous occasions accommodated the defendant; notwithstanding that he stays in Naivasha and had to arrange and pay for for the attendance of not only himself but also of his witness, one Andrea Maria Urig, who is a German national and a resident of Naivasha who often travels out of the country. At paragraphs 10 and 11 of the Replying Affidavit, the plaintiff averred that the defendant's Advocates have not been keen on court attendances previously; and that there is a clear and consistent trend of indolence displayed by them. The plaintiff accordingly averred that re-opening the case will only serve one prejudicial purpose of dragging the case, thereby delaying justice.

5. In a Further Replying Affidavit sworn by Caroline Njogu, she conceded that she did not attend court on March 16, 2022 as stated by the plaintiff, but went ahead to explain that this was at the instance of counsel for the plaintiff who had assured them that the matter had been taken out of the cause list for the day. She therefore refuted the allegation that they have not been keen on court attendances.

6. The application was canvassed by way of written submissions, pursuant to the directions given herein on June 8, 2022. On behalf of the defendant, Ms Njogu proposed two issues for determination, namely, whether the plaintiff will suffer any prejudice if the case is re-opened; and whether the defendant is entitled to the relief sought. She relied on Nakuru ELC No 392 of 2016: *Joseph Ndungu Kamau v John Njihia*, and Nakuru ELC No 493 of 2016: *Ngugi Kagia v Buci Rotuba* to underscore her submission that the court retains the discretion to allow re-opening of a case, so long as the re-opening does not embarrass or prejudice the opposite party.

7. She urged the court to note that the defendant filed the instant application for re-opening immediately; and therefore that the application is not an abuse of the process of the court, since it will enable the court arrive at a just determination. Counsel also submitted that, by dint of article 50 of the *Constitution*, the defendant has a right to fair hearing and therefore ought to be given an opportunity to be heard. Thus, counsel prayed that the application be allowed and the orders and proceedings of June 8, 2022 be set aside.

8. On behalf of the plaintiff, written submissions were filed herein on August 11, 2022 by Ms Mathenge, reiterating the plaintiff's stance that hearing notice for June 8, 2022 was duly served in good time. She pointed out that no attempt was made by counsel to back up her averment that the matter was mis-diarized, as their diary entries for June 8, 2022 were never availed. Accordingly, she urged that, in this instance, counsel should bear the consequences of her mistake. Ms. Mathenge relied on *Charles Omwata Omwoyo v African Highlands & Produce Co Ltd* [2002] eKLR and *Agricultural Finance Corporation v George Ochieng Ojwando & 6 others* [2018] eKLR to buttress her submissions in this regard. She added that, should the Court be inclined to allow the application, then the defendant ought to be ordered to pay the plaintiff's costs.

9. I have carefully considered the application, the affidavits filed in respect thereof by the 5th defendant and the plaintiff, as well as the written submissions prepared and filed by learned counsel. I have, likewise, perused the court record and ascertained that the background facts are, largely undisputed. The court record shows that the hearing date of June 8, 2022 was taken ex parte; and that Hearing Notice was duly served on counsel for the defendant. Neither the defendant nor his counsel attended Court on the hearing date, and therefore, upon the Court being satisfied as to service of the Hearing Notice, an

order was made for the matter to proceed ex parte, in accordance with order 12 rule 2(a) of the Civil Procedure Rules.

10. Needless to say that, under order 12 rule 7 of the *Civil Procedure Rules*, the Court has the discretion to set aside any order made pursuant to the provisions of that Order upon such terms as may be just; but such discretion must be based on sufficient cause. Hence, in Shah v Mbogo [1967] EA 116, it was held that the discretion is intended to be exercised "...to avoid injustice or hardship resulting from 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.

11. Similarly, in *Patel v East Africa Cargo Services Ltd* (1974) EA 75, this principle was expressed thus:

> " The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

12. As was acknowledged by the Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & others* in Civil Appeal No. 147 of 2006 what constitutes sufficient cause ought to be given a liberal construction in order to advance substantial justice. Here is what the Court had to say:-

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant"

13. The explanation now proffered by Ms. Njogu is that the matter was mis-diarized by their clerk for June 17, 2022 instead of 8th June 2022. In the premises, the only issue for consideration is the question whether that explanation amounts to sufficient reason to warrant the setting aside the order and proceedings of June 8, 2022.

14. Although no document, such as copies of counsel's diary for the days in issue were availed, the defendant has expressed his desire to defend the suit. Accordingly, the defendant's right to fair hearing as protected by article 50 of the *Constitution* must be weighed against the fact that, by the time the instant application was filed, the plaintiff had called his two witnesses, Ravji Karsan Hirani (PW2) and Andrea Maria Urig (PW3); the last of whom was called at some expense on the part of the plaintiff. He averred at paragraph 9 of his Replying Affidavit that:

> " ...both the witness Andrea Maria Urig and myself currently reside in Naivasha and had to travel to Mombasa on the eve of the hearing of the case to ensure that we were in Court in good time and to avoid unforeseen circumstances. I therefore had to foot her travel and accommodation expenses as well as mine."

15. The plaintiff annexed documents in proof of the expenses incurred; and in my view, balancing the interests of both parties leads to the conclusion that the defendant ought to be given an opportunity to present his case as the plaintiff's concerns can be assuaged by an award of costs.

16. In the premises, I am satisfied that sufficient cause has been shown by the appellant for the setting aside of the order of June 8, 2022 and the consequential proceedings herein, bearing in mind the holding in *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173 that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside an 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..."

17. In the result, I find merit in the application dated June 28, 2022. The same is hereby allowed and orders prayed for therein granted, namely:

    (a) That the orders of June 8, 2022 that allowed the ex parte hearing of the plaintiff's case be and is hereby set aside and is substituted with orders re-opening the plaintiff's case for purposes of cross-examination.

    (b) The plaintiff's thrown away costs as well as the costs of the application to be borne by the defendant.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF MAY 2023.

OLGA SEWE

JUDGE