



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 201 OF 2013

JOHNSON KAMAU MACHARIAPLAINTIFF

VERSUS

ALICE BOMET1ST DEFENDANT

MAGDALINE CHELIMO.....2ND DEFENDANT

RUTH CHEPTARUS AS TRUSTEES OF

KANU MAENDELEO YA WANAWAKE ORGANISATION

NAKURU DISTRICT3RD DEFENDANT

LAND REGISTRAR NAKURU4TH DEFENDANT

COMMISSIONER OF LANDS5TH DEFENDANT

THE ATTORNEY GENERAL6TH DEFENDANT

RULING

(An application seeking review and setting aside of an order confirming striking out of the suit; where the order resulting in the striking out was not addressed; duty of a party seeking setting aside to give full and frank disclosure; grounds for setting aside not satisfied; courts ought not to act in vain; application dismissed)

1. What is before the court for determination is plaintiff's Notice of Motion dated 27th February 2017. The application is brought under Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. The prayers sought in the application are:

1.

2.

3. *THAT this honourable court be pleased to discharge, vary or set aside the orders issued by honourable Mr. Justice Ohungo on the 22nd day of February 2017.*

4. *THAT the plaintiff's suit and all consequential orders therein be reinstated for inter partes hearing.*

5. *THAT the costs of this application be provided for.*

2. The application is supported by the affidavit of Johnson Kamau Macharia and is based on the

grounds inter alia that.

3. *The 1st defendant without due regard for procedure and without any consultations with the plaintiff listed the plaintiff's case for hearing and only gave 4 days notice for the hearing.*
4. *The plaintiff received the said notice under protest as it was an ambush and did not in any way allow for time to plan for hearing and consequently make the necessary arrangements to comply with the court orders.*
5. *The plaintiff wrote to the Deputy Registrar protesting that the date had been taken without notice and more so that the condition for adjournment had not been fulfilled. In the circumstances, there was no hearing date in the legal sense.*
3. Several other grounds were listed on the face of the application. I have considered all of them.
4. At the hearing of the application counsel for the plaintiff submitted that taking a hearing date without the consent of the other party amounts to an unfair administrative action under Section 4 of the Fair Administrative Action Act. Counsel further submitted that there is an error in the face of the record since if the Deputy Registrar had acted on the plaintiff's advocate's letter to the court seeking removal of the matter from the cause list then may be the matter would not have been listed for hearing on 22nd February 2017. Finally, counsel also argued that under Order 17 of the Civil Procedure Rules there is no anticipation of a defendant fixing a plaintiff's matter for hearing and that instead, the defendant ought to have applied for dismissal of the suit.
5. The application is opposed by the defendants who filed in court a replying Affidavit sworn on 2nd February 2017 by Alice Bomet.
6. The defendants contend inter alia that when the matter came up for hearing on 22nd February 2017 the plaintiff had not complied with the court's specific orders of 17th October 2016. That the defendants' advocates fixed the suit for hearing and duly served a hearing notice on 25th January 2017. That advocates for the plaintiff were given adequate notice of the hearing and the allegation that only three days' notice was given is untrue. Counsel referred the court to an affidavit of service on record which shows that the hearing notice was served on 25th January 2017. Finally, counsel submitted that the application does not satisfy the conditions for granting an order of review.
7. It is important to restate the history of the matter as can be seen from the record. On 17th October 2016 the matter was scheduled for hearing before Munyao Sila J. All parties indicated to the court that they were ready to proceed and a time indication of 12.30pm was given for hearing. Later at 12.45pm counsel for the plaintiff sought an adjournment which counsel for the 1st, 2nd and 3rd defendants did not oppose save for costs. The learned judge made the following ruling:

The matter is scheduled for hearing. Earlier in the day, the plaintiff's counsel confirmed readiness for hearing and I gave time allocation. At the appointed time, the plaintiff's counsel has now applied for adjournment on two grounds. One is to follow up on a report by the National Land Commission and the second is that he has had difficulty communicating with his client who is said to have a hearing problem. The adjournment is not opposed save for costs which Mr. Githinji applies to have in the cause.

I would have rejected the adjournment if there was objection. On the first reason, I think there has been more than enough time to get any report.

On the second issue, counsel ought to have liaised with his client much earlier. I think the defendants fully deserve the costs which I assess at Kshs.10,000/= each payable before the next date and in default the suit will stand struck out. Court Adjournment Fees of Ksh.1,000 also be paid before the next date

The parties to take another hearing date in the registry

8. The aforesaid orders had not been set aside or reviewed as at 22nd February 2017 when the matter came up before me. The plaintiff's counsel does not dispute their existence nor does he say that

the costs of Ksh.10,000 and Court Adjournment Fees of Kshs.1,000 had been paid before 22nd February 2017. These sums had in fact not been paid.

9. The application is brought under Order 45 rule 1 of the Civil Procedure Rules, 2010 which states:

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from

which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or

evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some

mistake or error apparent on the face of the record, or for any other

sufficient reason, desires to obtain a review

of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without

unreasonable delay.

10. To succeed, the plaintiff needs to show that there is new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order of 22nd February 2017 was made or that there is some mistake or error apparent on the face of the record. I have considered plaintiff's submissions and I have not found any evidence or grounds that warrant granting an order of review. The plaintiff has shown no new and important matter or evidence.

11. Counsel for the plaintiff submitted that the Deputy Registrar's failure to act on the plaintiff's advocate's letter to the court seeking removal of the matter from the cause list amounted to an error apparent on the face of the record. That cannot be so. The Deputy Registrar could not unilaterally take out a matter on the strength of a letter from one of the parties. I find that no case has been made for the grant of an order of review as sought.

12. Prayers 3 and 4 of the application show that the plaintiffs essentially seek setting aside of the orders of 2nd February 2017 even though the law cited is in respect of review. In essence therefore, the plaintiff seeks exercise discretion in his favour. The main concern of the court in an application for setting is to do justice as between the parties. The court will not impose conditions on itself to fetter the wide discretion given it by the rules. Discretion must however be exercised judiciously.

13. The principles applicable in such an application were considered in **PATEL vs EA. CARGO HANDLING SERVICES LTD [1974] EA 75 at P. 75** where the court stated:

There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance.

14. In **ASHWINCHAND HIRJIE SHAH & ANOTHER V LUCY WAIRIMU MWAURA CIVIL APPEAL NO. 59 OF 2006 (Unreported)**, the Court of Appeal whilst considering an application to set aside an ex-parte judgment stated:

In an application of this nature an applicant has to show that there is prima facie defence to the action and further satisfy the judge as the cause of the delay in entering an appearance and filing the defence.

15. It should be noted that in view of the orders made by Munyao Sila J. on 17th October 2016 the suit stood struck out by the first second of the first hour of 22nd February 2017 since the order was self-executing. All I did was to confirm that which had happened. If the plaintiff seriously wanted any order to be reviewed, he should have sought a review of the orders made by Munyao Sila J. on 17th October 2016. Those orders were very clear. The plaintiff was represented by counsel and there is no suggestion that there was any failure to understand the import of the orders. As soon as the advocates received the hearing notice they ought to have ensured that the payments were made by the end of the day on 21st February 2017.
16. In the circumstances it would be futile to discharge, vary or set aside the orders of 22nd February 2017 since even if I grant the orders sought the suit will still remain struck out. Courts do not act in futility.
17. Even if I were to decide that I can discharge, vary or set aside the orders, I would have to investigate whether the plaintiff has satisfied the test for granting the order of setting aside. The plaintiff has not. Contrary to the assertions by the plaintiff's advocates, I am convinced that they were served with a hearing notice on 25th January 2017 and had ample time to comply with the order.
18. When seeking an equitable relief, a party has to approach the court with full and frank disclosure. The plaintiff has not satisfied this test either. Nothing would have been easier than to candidly own up to the failure to comply with the order and thereby seek an indulgence. I find that an order of discharge, varying or setting aside is not merited.
19. The application is dismissed with costs to the 1st, 2nd and 3rd defendants.

Dated, signed and delivered in open court at Nakuru this 31st day of March 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Murunga holding brief for Mr. Githinji for the plaintiff

Mr. Ogola for the 1st, 2nd and 3rd defendants

Ms. Cheruiyot for the 4th, 5th and 6th defendants

Court Assistant: Gichaba