Gacoki v Gathu (Environment & Land Case 23 of 2023)
[2024] KEELC 834 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 834 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT & LAND CASE 23 OF 2023

JM MUTUNGI, J

FEBRUARY 22, 2024

BETWEEN

NANCY WANJIKU GACOKI ..... APPLICANT

AND

STEPHEN GATURA GATHU ..... RESPONDENT

RULING

1. The Respondent/Applicant vide a Notice of Motion application dated 20th June 2023 expressed to be brought under Section 1A, and 3A of the *Civil Procedure Act*, Order 10 Rule 11 and Order 51 Rule 1 of the *Civil Procedure Rules* prays for the following orders:-

    1. That this matter be certified urgent and be heard ex-parte in the first instance.

    2. That this Honourable Court be pleased to stay execution of any/and or intended decree pending the hearing and determination of this Application together with all consequential orders emanating from the Judgment delivered on 30th May, 2023.

    3. That this Honourable Court be pleased to set aside the Judgment delivered on 30th May 2023.

    4. That the Applicant/Respondent be granted leave to reopen its case and call witnesses in support thereof.

    5. That this Court be pleased to order for the recall of the Applicant/Respondent for purposes of further cross-examination.

    6. That the costs of this application be in cause.

2. The application is predicted on the grounds set out on the body of the application which *inter alia* include: That the suit was heard on the 28th June 2022 in the absence of counsel for the Respondent/ Applicant; that the Court declined an application for adjournment made on behalf of the Respondent

on the day inspite of the Counsel for Applicant/Respondent having written explaining he was unwell; the application for adjournment was objected to and the objection was sustained; that the hearing proceeded in the absence of Counsel for the Respondent/Applicant which was detrimental; and that the request for adjournment was made in good faith and in the interest of fairness and justice the Respondent should be afforded an opportunity of being heard. The application was further supported on the grounds set out in the Supporting Affidavit of Davies Wairegi Kiarie Counsel for the Respondent/Applicant. The Applicant's Advocate in the supporting affidavit outlined the reasons why he was unable to attend the Court for the hearing of the matter on 8th June 2022. He explained that he had been taken ill and that he did all that was necessary to inform the opposing Counsel of his inability to attend Court for the hearing. He instructed Counsel to hold his brief and apply for an adjournment on his behalf but unfortunately the application for adjournment was declined.

3. The Applicant/Respondent opposed the application vide a Replying Affidavit sworn on 17th July 2023. The Applicant/Respondent averred that the Respondent/Applicant's conduct was not one of a person who was interested to have the suit heard as he had not complied with the directions of the Court even as at the time the suit was fixed for hearing on 8th June 2022. The Applicant/Respondent averred that the Respondent/Applicant's application for adjournment on 8th June 2022 was dismissed and the matter proceeded for hearing at which the Respondent/Applicant was represented by counsel who cross-examined the Applicant on her evidence. The Applicant/Respondent contends that the Respondent/Applicants instant application is misconceived as it is inviting the Court to sit on appeal on its own decision disallowing the application for adjournment. The Applicant further avers that the application is not one for review which the Court could consider within the parameters for applications for review under Order 45 Rule 1 of the *Civil Procedure Rules*.

4. The application was canvassed by way of written submissions. The Respondent/Applicant filed his submissions on 13th October 2023 while the Applicant/Respondent filed hers on 9th October 2023. I have considered the application, the affidavit in support and the Replying Affidavit in opposition and have considered the parties written submissions. The fulcrum of the Respondent/Applicant's application is clearly the refusal of the Court to grant an adjournment on 8th June 2022 following application for adjournment by the Respondent's Advocate. The Learned Judge exercised his discretion to reject the application for adjournment. The Judge directed the suit to proceed for hearing and the record shows Mr. Asiimwe Advocate who held brief for the Respondent's Advocate on record participated at the hearing and cross examined the Applicant after she testified.

5. The issue that stands to be determined is whether the Court having exercised its discretion to disallow the application for adjournment, the Court can interfere with the Court's exercise of discretion. The Respondent/Applicant argues that the Court has unfettered discretion to set aside its orders and/or proceedings if it is necessary to do so to enable the ends of justice to be met. The Applicant further argues the suit was not heard and determined on merits since he had not been heard. He urgues that in the circumstances under which the suit was heard and Judgment delivered in this matter, the provisions of Order 10 Rule 11 of the *Civil Procedure Rules* would be applicable to have the Judgment set aside and the suit heard and determined on merits.

   Order 10 generally deals with consequence of non-appearance, default of defence and failure to serve. Rule 11 provides as follows:-

   > " Where Judgment has been entered under this order the Court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just."

6. The Applicant/Respondent placed reliance on the Case of *Standard Chartered Financial Services Ltd & 2 Others v Machester Outfitters Ltd & 2 Others* (2016) eKLR where the Court observed thus:-

> " We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation."

7. The Respondent/Applicant further submitted he has a defence that raised triable issues and should therefore be afforded an opportunity to be heard. He relied on the Case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where the Court (Duffus,P) held:-

> " 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. I agree that where there is a regular judgment as is the case here the Court will not usually set aside Judgment unless it is satisfied that there is a defence on merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means as Sheridan, J put it a triable issue that is an issue which raises a prima facie defence and which should go to trial for adjudication".

8. The Applicant/Respondent in a brief submissions argued that the Court lacks the jurisdiction to sit on appeal against the decision of the Judge who held concurrent jurisdiction. The contention being that the Applicant was asking the Court to supervise and/or overturn a decision of its own which the law does not permit. The Applicant/Respondent relied on the Supreme Court Case of *Kenya Hotel properties Ltd v Attorney General & 5 Others* (2022) eKLR where at paragraph 55 of its Judgment the Court stated:-

> " We need to emphasize and reiterate that Mutunga CJ did not in any way state that the High Court may in any way, purport to overturn or order final decisions issued by higher Courts than itself to start denovo, especially on appeals that have been finally concluded by the highest Court at the time. Furthermore, the concurrence by Mutunga CJ cannot override the Judgment by the majority, despite what the Appellant chooses to submit. As was thus rightly noted by the High Court and the Court of Appeal the rule of the thumb is that Superior Courts cannot grant orders to reopen or review decisions of their peers of equal and competent jurisdiction much less those Court higher than themselves."

9. In the instant matter the Learned Judge evaluated and considered the reasons advanced by the Respondent/Applicant for adjournment and in exercise of his discretion, disallowed the application and ordered the hearing to proceed. The Respondent's Advocate participated in the proceedings as he cross-examined the Applicant. Apparently the Respondent himself was not present on 8/6/2022 when the suit was fixed for hearing and no explanation was given for his non attendance with the result that the trial closed after the Applicant testified and was cross examined and re-examined. Both the Applicant and the Respondent filed written submissions as directed by the Court. The Court rendered its Judgment on 30th May 2023. The Judgment evaluated the evidence and considered the submissions made by both parties.

10. The present application by the Respondent applicant is predicated on the application for adjournment that was declined by the Court for the reasons that it did. The Applicant further argues that since he was not heard in his evidence, he was prejudiced. There was however no explanation offered as to why the Respondent/Applicant was not present in Court when the matter was scheduled for hearing

and was heard in his absence. The suit was heard by Cherono J and on the hearing date on 8th June 2022 he disallowed the Respondent's Advocate's application for adjournment of the suit and directed the hearing to proceed. He exercised his discretion in rejecting the application for adjournment. The Learned Judge and myself have concurrent jurisdiction and I cannot properly interrogate his decisions unless in an application for review and even in such an application for review the conditions upon which an order, Judgment or decree may be reviewed have to be satisfied. The application before me is not one for review, and even if it was, the Applicant would have been required to demonstrate that there had been a discovery of new matter of evidence that was not available at the time the order or Judgment was passed; or that there was an error or mistake apparent on the face of the record and/or that there was sufficient reason to warrant a review. None of the grounds upon which a review maybe granted has been demonstrated by the Applicant.

11. The application as I see it is inviting the Court to sit on appeal against the decision of Cherono J. I decline the invitation as Cherono, J and myself exercise equal jurisdiction and I cannot supervise or overrule his decision. The option the Respondent/Applicant had if he was aggrieved and dissatisfied by the decision/Judgment of Cherono, J was to lodge an appeal to the Court of Appeal for redress.

12. The upshot is that I find no merit in the Notice of Motion dated 20th June 2023. The same is ordered dismissed with costs to the Applicant/Respondent.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LINK THIS 22ND DAY OF FEBRUARY 2024.

J. M. MUTUNGI

ELC - JUDGE