Langat & 3 others (Suing as the administrators of the Estate of Samuel Cheruiyot Lang'at) v Byomdo (Environment & Land Case 114 of 2018) [2024] KEELC 847 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEELC 847 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 114 OF 2018

FM NJOROGE, J

FEBRUARY 21, 2024

BETWEEN

ELIZABETH CHEBET LANGAT ..... 1ST PLAINTIFF

ERNEST KIPROTICH CHERUIYOT ..... 2ND PLAINTIFF

ERICK LANGAT CHERUIYOT ..... 3RD PLAINTIFF

ENOCK KIPTOO CHERUIYOT ..... 4TH PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF SAMUEL CHERUIYOT LANG'AT

AND

JOEL KIPNGENO BYOMDO ..... DEFENDANT

RULING

1. This is a ruling with respect to the Defendant's Notice of Motion application dated 9/3/2023. It has been brought under; Article 50 and 159 of *the Constitution* of Kenya, Order 45 (1) (b) and Order 51 (1) of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, Provisions of Practice, Directions on Proceedings Relating to Environment and the Use and Occupation of and Title to Land and it seeks the following orders:

    a. This Honourable Court do review its order in the ruling dated 20/2/2023 and set it aside forthwith.

    b. This Honourable Court be pleased to hear the Applicant's Application dated 30/1/2023.

    c. The cost of this Application and the entire suit be borne by the Plaintiffs.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by Joel Kimutai Bosek counsel for the Defendant. He deposed that the Court delivered a ruling on the Applicant's application dated 19/4/2022 seeking to have the suit struck out for failure to extract and serve summons upon the Defendant. This court will not dwell on what counsel has deponed regarding that application and regarding the issue of service of summons as those are not the subject matter of the application at hand dated 9/3/2023. Whether, as the deponent alleges, there were glaring errors apparent on the face of the ruling meriting review should have been made the subject of another application filed timeously after the ruling issued.

3. In response to the application, the Plaintiffs filed on 28/3/2023 a Replying Affidavit sworn by Desmond Odhiambo counsel for the Plaintiffs and he deposed that the summons to enter appearance were delivered to the office of the Defendant/ Applicant's advocate J.K Bosek on 28/11/2022, evidenced by the affidavit of service sworn by George Mutiso Komu dated 28/11/2022; that the Summons to Enter Appearance were effected in person to the Defendant/Applicant on 17th January 2023 as evidenced by the Affidavit of Service sworn by Mr. Arasa Kinara dated 17/1/2023; that despite receiving the summons to enter appearance, the Defendant neither entered appearance nor filed their defence to their claim; that Order 10 Rule 6 of the *Civil Procedure Rules* provides that where pleadings are drawn and served on a defendant and the defendant fails to appear, the court shall, on request by the Plaintiff, enter interlocutory judgment against such defendant; that on 17/2/2023, they filed a request for interlocutory judgment against the Defendant for failing to file a defence in the suit despite being served with a copy of the Plaint and its accompanying documents; that the applicant is not entitled to the orders sought and it is in the interest of justice that the Applicant's application filed herein be dismissed with costs.

4. The application was argued by way of written submissions. The Defendant/Applicant filed his submissions dated 18/4/2023 on 18/5/2023 and the Plaintiffs/Respondents filed their submissions dated 24/5/2023 on 24/5/2023.

5. Submitted for the Defendant: 5 issues arise for determination; (a) Whether the Plaintiffs sought leave of the court to prepare and file summons out of time, (b) Whether participating in interlocutory applications is different from participating in a suit, (c) Whether there was inordinate delays and laches on the part of the Plaintiffs that couldn't entitle them the relief they got, (d) Whether the court erred in granting orders not prayed for and which were not part of the issues canvassed by parties, (e) Whether the Defendant's Application dated 30/1/2023 was properly before the court.

6. Again, I must caution that the present application is not for orders to review the ruling of this court delivered on the application dated 19/4/2022 and therefore the defendant's submissions regarding whether the Plaintiffs prepared and filed summons are not relevant. Permitting submissions in that behalf would be tantamount to allowing through the back door a review of the ruling dated 6/10/2022.

7. It is submitted for the Plaintiffs/Respondents that the following single issue arises for determination; (a) Whether this Court should set aside the interlocutory judgment delivered on 20/2/2023.

8. The Plaintiffs rely on Order 10, Rule 6 and 10 of the *Civil Procedure Rules* to submit that the rules clearly provide to the court the procedure to be followed where a defendant fails to file a defence after the defendant has sufficiently been served with Summons to Enter Appearance. The Plaintiff relies on the case of *Kenya Commercial Bank Ltd v Nyantange & another* [1990] eKLR 443 to advance the fact that judges have discretion to award any order set out in the *Civil Procedure Rules* and the same discretion can only be fettered where the order was obtained by failure to follow any rule of procedure. The Plaintiff in his submissions highlights the tenets a court should consider in setting aside an interlocutory judgment as espoused in the case of *Mohamed & another v Shoka* [1990] which

are (i) the length of any delay by the Defendant must be taken into account, (ii) any failure by the Defendant to provide a good explanation for the delay is a factor to be taken into account. (iii) the primary considerations are whether there is a defence with a real prospect of success; and (iv) prejudice to the claimant also has to be taken into account. In buttressing the prejudice that will be occasioned by the Plaintiff in setting aside the interlocutory judgment. The Plaintiffs rely on the case of *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR and submit that justice delayed is justice denied and that must equally balance both sides' interests in a case. The Plaintiffs implore this court to find that setting aside the ruling given on 20/2/2023 would prejudice the Plaintiffs/ Respondents as it will write off any efforts that they have made towards the determination of this suit. The Plaintiffs urged this Honourable Court to find that the Defendant's application lacks merit and it be dismissed with costs.

Analysis and Determination

9. After considering the application, affidavits and submissions, the issues that arise for determination are: whether the Defendant/ Applicant is entitled to the orders sought in its application dated 9/3/2023 and who should bear the costs of the application.

10. The Defendant's contention is that the court moved suo moto and granted orders dated 20/2/2023 and the same were not made on rules of practice known to law. The Defendant contends that there is an Application dated 30/1/2023 which ought to have been heard first before the making of any other orders. However, I have examined the court record and note that on 20/2/2023, in the presence of both counsels for the Defendant and the Plaintiff, counsel for the Defendant indicated that there is an application for review. No mention thereof was made by either counsel of that application again and in those proceedings the court directed that formal proof will be on 21/3/2023. On 21/3/2023 Ms Kiptui was absent and the court was reminded by counsel for the plaintiff that the hearing date was taken in the presence of counsel for both sides. It would appear that all this time there was no application dated 30/1/2023 in the file. I have leafed through the court file several times as I prepared this ruling at the court record and found no application dated 30/1/2023. Further the Defendant has neither attached the application dated 30/1/2023 to its supporting affidavit nor the contested order regarding which review is sought. In the submissions filed by the Defendant/Applicant on 18/5/2023 he has outlined the contents of the said application but the said application dated 30/1/2023 itself has not been attached. There is nothing filed to show that the Application dated 30/1/2023 existed. The court cannot be asked to hear an application that is not before it, yet that is what prayer no. 2 in the instant motion seeks to do. Such an order can only be made once the court is satisfied that the application exists and that it was served. For it to be deemed to exist, it must be before the court, not elsewhere.

11. The Court has examined the record and found no evidence to suggest that a mistake occurred as the alleged review application dated 30/1/2023 is not in the Court record. It is only proper to surmise that if it had been filed this court would have taken note of it timelily and ordered that it be disposed of first. The applicant himself appears to suggest that he never filed the application when he states that "there is an error apparent of the face of the record that there is a rule requiring that any application before ELC must be made online and hard copies be filed physically." In that statement this court sees an attempt to suggest that the application was filed electronically but still no evidence has been presented for that. The court could not have ordered an application to be fixed for hearing or heard while it was not in the court file. I believe that in the present proceedings the defendant has had ample time to establish by way of annexing copies of electronic mail vide which the application was transmitted to the court registry, official receipts and stamped copies of the purported application, to prove that he had paid for it and

that it had been received in the court registry. However, he has done nothing like that. Therefore, as the said application is not before court, prayer no 2 in the motion dated 9/3/2023 cannot be granted.

12. Regarding prayer no 1 in the present application, which is a prayer for review, it is noted that the only thing that this court did on 20/2/2023 was to set the matter down for formal proof in the absence of appearance and defence on the defendant's part. The law governing review of court orders or judgments is Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

13. Section 80 of the *Civil Procedure Act* states:

> " Any person who considers himself aggrieved:
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
>
> c. ....."

14. The Applicant has invoked Order 45 (1) (b) of the *Civil Procedure Rules* which provides that:

> Any person considering himself aggrieved 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.

15. In the case of *Nyamogo & Nyamogo Advocates v Kago* (2001) 1 EA 173 the Court of Appeal had the following to say:

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

16. Further, under Order 10 Rule 9 and Order 10 Rule 10 *Civil Procedure Rules*, where there is no appearance and defence in the court file, the only recourse is to order the matter to proceed to formal proof and this is what the court did. The application dated 9/3/2023 does not of itself address matters summons; its main grievance is that the defendant needed to be heard on the application dated 30/1/2023 before the formal proof, and that the court erred in ordering the matter to proceed to formal

proof. It has been established that no such application dated 30/1/23 was in the court record then so as to bar any formal proof and in the circumstances the order that the matter do proceed to formal proof was not erroneous. Consequently, the application dated 9/3/2023 is dismissed with costs to be borne by the Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 21ST DAY OF FEBRUARY, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI