Nyamohanga v Keboye (Environment & Land Case 417 of 2017) [2025] KEELC 937 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 937 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT & LAND CASE 417 OF 2017

FO NYAGAKA, J

FEBRUARY 27, 2025

BETWEEN

PETER MAROA NYAMOHANGA .... PLAINTIFF

AND

SAMUEL NICHOLAS KEBOYE .... DEFENDANT

RULING

1. The Defendant/Applicant filed the instant application dated 25th January, 2024 seeking the following orders:
    1. ...Spent.
    2. That this honourable court be pleased to stay execution of its decree dated (sic) arising from the judgement entered on 29th July 2022 and any other consequential proceedings and orders arising therefrom.
    3. That this honourable be pleased to set aside its judgment entered against the defendant/applicant on the 29th July 2022 and open the case and grant the defendant leave to defend his case on merit.
    4. That upon granting of prayers 2 and 3 above, this honourable court be pleased to grant the applicant/defendant leave to file further amend his defence.
    5. That costs of this Application be provided for.
2. The Application was based on the grounds set out and supported by the Affidavit of Samuel Nichola Keboye the Defendant/Applicant, sworn on 25th January, 2024.
3. The Applicant stated that he had instructed the firm of Mr. Mwita Kerario of Kerario Marwa & Co. Advocates to represent him in the matter. The said advocate filed a Statement of Defence on his behalf.

Therefore, he was aware and believed that the advocate was taking all the necessary steps in prosecuting his matter. He added that the advocate did not inform him that he had ceased acting on his behalf and that he only learnt of the same from the Court Registry officials. He went on to state that failure to attend court for hearing was a mistake that should not be visited upon him. Further, the advocate failed to notify him that he had ceased acting or even notify him of the hearing date. He also stated that the Plaintiff/Respondent continued to serve various notices to the said law firm despite being aware that the Defendant/Applicant had ceased acting.

4. He stated that he was shocked to learn that a judgment had been entered against him without having been accorded an opportunity to defend his case. That he reached out to his then advocate's office only to be informed that the said advocate had already left the firm. He stated that he had written to his advocates to inquire the progress of his case but never got any response. The Applicant added that the mistake of his advocate should not be used to punish him since he had been ready and willing to defend his case save for the manner his advocate handled his case.

5. He went on to state that he was apprehensive that the Respondent would execute the eviction order and render him landless. He added that no prejudice would be suffered by the Respondent should the present application be granted. In conclusion, the Applicant urged the court to allow the instant application as prayed.

Response

6. The Plaintiff/Respondent filed his Replying Affidavit dated 19th February, 2024. He averred that he was the registered owner of all that parcel of land known as Bukira/buhiringera/7 the suit property herein. He further averred that the application was an afterthought and an abuse of the court process.

7. It was his contention that the matter was heard and determined in his favour but that the Applicant had continued to disobey the court orders and that he should be cited for contempt. The Plaintiff was only intent to deny him the fruits of his judgment by filing endless applications yet pleadings (sic) must come to an end. He averred that the Applicant failed to disclose any grounds in support of his application. In conclusion he urged the court to dismiss the application.

Submissions

8. Counsel for the Defendant/Applicant filed his written submissions dated 7th October, 2024 where he identified three issues for determination. On the first and second issue which this court is of the view that they were similar, being whether the mistakes of the Plaintiff's Advocate should be visited on him, he submits that the Applicant was represented by his counsel, he did not have personal conduct of his matter, and that he has demonstrated his several attempts to follow up his case with the advocate in vain. He submits that it is clear from the follow up letters that he has not been indolent. He further submits that the errors or omissions by a duly instructed advocate should not be visited on his principal. Counsel relied on the cases of Mugachia V Mwakibindu 1KAR 660, Ngoni Matengo Cooperative Marketing Union Ltd V Alimo Hamed Osman and Trust Bank V Portway Stores (1993) Ltd & Others (2001) 1EA 296.

9. The third issue was whether the court should exercise its discretion and reopen the suit. While submitting in the affirmative, counsel relied on Order 12 Rule 7 of the Civil Procedure Rules and the case of Patel V E.A Cargo Handling Services Ltd (1974) EA 75. He submits that the power to set aside ex parte orders are discretionary and the court ought to use its discretion while ensuring that justice has been done. He also cited the Court of Appeal Case of Shah V Mbogo & Another (1967) E.A 470 and urged the court to exercise its discretion in favour of the Applicant.

10. Counsel for the Plaintiff/Respondent on the other hand filed his submissions dated 27th November, 2024 where he identified four issues for determination. The first issue was whether the Applicant had a right to be heard in this matter. Counsel submits that the case was heard and closed on 29th July, 2022 in the Applicant's absence despite the Applicant having been served. He submits that the Applicant did not annex any application to cease from acting nor was there any proof of service of such application to the Plaintiff/Respondent. It was counsel's submission that the Applicant was indolent as he only remembered his case 2 years down the line. He cited Article 50 of *the Constitution* of Kenya. The second issue was whether the Applicant has a good defence with triable issues. He submits that the Applicant despite seeking orders to reopen the defence case, he failed to annex the defence for the court to establish whether it raised triable issues. Counsel argues that the same is a delaying tactic by the Applicant to frustrate the Respondent from enjoying the fruits of his judgment. He submits that the correspondence attached by the Applicant as proof that he was following up on his case is an academic exercise. He adds that the same did not bare any stamp or proof of receipt by the said office.

11. The third issue is whether the Applicant is entitled to the orders being sought. Counsel relied on the case of Allan V Sir Alfred MC Alphine and sons Ltd [1968] 1ALL ER 543. He submits that the indolent action by the Applicant goes against the overriding objective of the *Civil Procedure Act*. He urges the court to dismiss the application for the reason that the Applicant has no interest in pursuing the matter thus occasioning the Respondent injustice. Counsel further relied on the case of Multiscope Consulting Engineers V University of Nairobi & Another (2014) eKLR and submits that justice delayed is justice denied. He argues that the application was an afterthought meant to allow the Applicant interfere with the Respondent's quiet and peaceful enjoyment of the suit land. It was counsel's submission that the Respondent had been seeking justice for the last 19 years and therefore litigation ought to come to an end. He argues that further delay in prosecuting the case continues to occasion prejudice to the Applicant (sic) who stands to suffer irreparable harm should the application be allowed. He relied on the case of Moses Kimaiyo Kipsang V Geoffrey Kiprotich Kirui & 2 Others [2022] eKLR. In conclusion, he urged the court to dismiss the application with costs to the Respondent.

Analysis and Determination

12. This court has considered the application and is of the view that the main issue for determination is whether the Applicant is deserving of the orders sought for. The minor issue, attendant to the main one, is who to bear the costs of the application.

13. This Court will use the conventional way of determining legal issues. It is the four-step method of analysis which is, Issue, Rule, Application and Conclusion (IRAC). It thus starts with determining the first issue.

14. The Issue herein is whether the Applicant has demonstrated to the court that he has sufficient grounds to set aside the judgment herein, allow him to amend his defence and defend the suit.

15. Whereas the applicant cited Articles 50 and 159 and Rules 5(d) (sic) of *the Constitution*, he did not submit on their relevance. Nevertheless, this court has carefully looked at them and is of the view that they together with Sections 1A, 1B and 3A of the *Civil Procedure Act* do not have direct relevance to the application although they have rules and principles that may be applicable generally. Regarding Order 42 Rule 6 which he cited, it is abour stay of execution in instances where an appeal has been preferred. Herein no appeal has been filed against the Judgment impugned. Lastly, Order 51 Rule 1 is generally on the format of applications.

16. That said, the jurisdiction of this court for setting aside of its orders is provided for under Order 12 Rule 7 of the Civil Procedure Rules which provides as follows:

> " Where under this order judgment has been entered or the suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

17. While exercising the discretion to set aside, the court ought to do so judiciously and not whimsically. The Applicant claims that he was not aware that his advocate on record had ceased acting for him resulting in his case being closed due to non-attendance. He also claims that he has been following up with his advocate in vain through correspondences he annexed in his supporting affidavit.

18. I have perused the court record. It is not in dispute that on 29th July, 2022 this court delivered its judgment in favour of the Plaintiff/Respondent. I have also keenly perused the correspondences dated 22nd March, 2020, 17th September, 2021 and 13th October, 2022 as annexed by the Defendant/ Applicant in the present application. First, they are not to make them authentic or genuine. They cannot pass as letters genuinely written and delivered to the addresses at the purported times. Second, it is clear that in as much as the Applicant addressed the same to his advocate on record even though they do not bear the postal and physical addresses, there is no evidence proving that the same was received by the law firm. In the circumstances, even if the court were to assume that indeed the 'letters' were ever written as claimed, this Court wonders whether they were mailed or hand-delivered. If they were mailed, where is the evidence of mailing? If they were hand-delivered, where is the evidence of that delivery? The three documents are a cheap way of a desperate applicant intent on convincing the court by all means necessary.

19. Again, the Applicant instructed counsel. He knew he learned counsel's offices. He has not demonstrated that he made efforts to go to the said offices of the law firm and get the position of his matter. Further, he has not demonstrated to the court when and how he got to learn from the court staff that judgment had since been entered against him. In addition, on 24th January, 2022 when the matter came up for hearing, this court noted that the Applicant and his advocate had failed to attend court three times consecutively, despite service of process. It is also not in the court record that the Applicant's advocate filed an application to cease acting and therefore the hearing notice served was proper to warrant the court proceed with the matter.

20. At this point it is important to pause and reflect on the brief history of this matter. The suit was filed on 8th October, 2012 when the Plaintiff moved the Court with an application for injunction, claiming that the Defendant had entered his parcel of land. On 14/01/2013 the application was argued in presence of the plaintiff and counsel for the Defendant. Ruling was delivered on 19/02/2013, dismissing the application. This Court refers to the proceedings after that to the time of the first judgment as the first phase of the suit. Thus, regarding the first phase, the record bears that a number of times the suit was acted upon in one way of other but on 16/07/2018 the Plaintiff having served the Defendant proceeded with the hearing scheduled on that date. Judgment was delivered on 30/07/2018. The Plaintiff filed his Bill of Costs. On 27/09/2018 when it came up for taxation, the Defendant's counsel sought time to respond to the Bill. He was granted two weeks. and it was fixed for taxation on 11/10/2018.

21. Interestingly, and in a demonstration of lack of candor by both the Defendant and counsel, they already prepared an application or were busy intending to prepare one while they appeared before the Deputy Registrar for taxation because on the same date, instead of responding, the Defendant moved to the Judge and filed an application dated 26th September, 2018. It sought to set aside the judgment. The application would be heard on 5th February, 2019 and a ruling delivered on 06/03/2019 allowing it. Then began the second phase of the suit, leading to the instant application.

22. The Applicant contended that his Advocate was served with the hearing notices but did not notify him as he had ceased acting for him. This Court has carefully perused the record of the second phase of the suit. It is borne out that on after the first judgment was set aside, the Plaintiff prayed for a date on priority basis since the Defendant was in occupation of more than three quarters of the suit land. Instead the Defendant prayed for maintenance of status quo. The Court fixed the matter for hearing "afresh on priority and marathon basis on 21/03/2019" while ordering status quo to be maintained. Come 21/03/2019, the Defendant applied for adjournment, to file a Defence and Counterclaim. It was granted. On 07/10/2019 the Defendant sought time to try the resolution of the matter through the Alternative Dispute Resolution (ADR) method. It was granted and the matter fixed for mention on 12/11/2019. Then on 12/11/2019 the Plaintiff was absent but the Defendant present in person reported to the Court that they had not discussed the matter. A further mention date of the matter was "dispensed with in view of the history of the matter" as the record reads. It was fixed for hearing on 04/02/2020. On that date the Plaintiff proceeded with the hearing in the presence of learned counsel for the Defendant who cross-examined him. A further date was given for 12/03/2020.

23. On 12/03/2020, the Plaintiff brought an application dated 19/02/2020 seeking to stop the Defendant from carrying out agricultural activities on the land because the members of the family were so annoyed at the defendant's activities on their land that they were about to cause trouble (sic). Thus, the hearing was adjourned and parties given chance to ventilate the application. On 27/07/2020 a ruling was given in presence of the Plaintiff and counsel for the Defendant. The Defendant was given chance to harvest the season crop and cease cultivating afterwards until the determination of the suit. A further hearing of the case was fixed for 27/10/2020 when counsel for the Defendant instructed counsel to hold brief and seek adjournment on account of the fact that he had taken a senior counsel to hospital. The suit was adjourned to 10/12/2020 for hearing on priority. Come 10/12/2020 the Plaintiff who had filed a Notice of Motion dated 25/11/2020 seeking punishment of the Defendant for contempt of court over the orders issued on 19/02/2020 withdrew it in favour of the hearing. Nevertheless, the hearing was adjourned to 10/02/2021. Again, on 10/02/2021 counsel for the Defendant sought an adjournment, this time round, to consider applying to cease acting for the Defendant. Adjournment was granted to 05/05/2021. Costs and witnesses' expenses of KShs. 4,000/= were to be paid by the Defendant before the next hearing date. On three further occasions the matter was mentioned. Then on 10/11/2021 a new Judge in the station took over the matter and counsel who had not ceased acting for the Defendant took a hearing date by consent with the Plaintiff for 15/12/2021. On this date the same counsel sought adjournment on account of the fact that he had not seen the Defendant. Adjournment was granted and costs of KShs. 5,000/= granted to the Plaintiff. Hearing was fixed for 24/01/2022. On that date both the Defendant and counsel were absent. The Court indulged them and fixed the further hearing on 28/02/2022. On the material date the Defendant and counsel were absent though served. The further hearing proceeded. Both parties' cases were closed afterwards and judgment fixed for 10/05/2022 and delivered finally on 29/07/2022. After that were filed two post judgment applications dated 13/07/2023 for determination on contempt of court and the instant one dated 25/01/2024.

24. The above is the "tired history" of the matter. The Defendant argues that the mistake of counsel should not be visited on him. Regarding mistakes of counsel vis-à-vis client's innocence, courts have stated that indeed that ought not to be where it is shown that it occurred but due to inadvertence. Such mistake should not be deliberate and of sheer professional negligence or malpractice since that would have its realm of address in terms of compensation. Otherwise, why do counsel take our insurance policies and pledge to execute their professional mandate on account of employment as professionals in the legal field? Even where the party would seek to be excused for counsel mistake, the burden lies on him, under Section 107 of the *Evidence Act*, to show that indeed there was a mistake and it was of counsel and

not adverted to. Inaction and indolence by either or both the counsel and client are not of the class of mistakes of inadvertence.

25. In Itute Ingu & another v Isumael Mwakavi Mwendwa [1994] eKLR, Court of Appeal held,

> "What I understood the applicants to be telling me by citing this case is that the error by their advocate should not be a bar to my exercising my discretion in their favour. Since the amendment to this Court's rule 4, the discretion of the Court under that rule is wholly unfettered and I agree with the applicants that a mistake by counsel, particularly where such a mistake is bona fide, can entitle an applicant to the exercise of the court's discretion in his favour. But before doing so, the Court must, of necessity, examine the nature or quality of the mistake or mistakes."

26. Also, in Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR Justice Odunga J (as he then was) stated that:

> "33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client."

27. Further, In Edney Adaka Ismail vs Equity Bank Limited [2014] eKLR, the court similarly declined to exercise its discretion simply because the Applicant claimed a mistake of counsel. The Court stated:

> "It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by cost .... However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court".

28. In the instant case I see no mistake on the part of the advocate. Further, at no point in time did the advocate cease acting for the Defendant. If anything, he acted to the end but both chose not to attend court when required to do so. It was misleading for the Defendant to argue that his advocate did not update him of the hearings yet during the period of the alleged authoring of the letters sought to be relied on by him, he attended court, for instance on 12/03/2020 he was present in court and purported to inquire seven days later on the position of the matter. This is an example of a concocted lie. Ina any event the former advocate has not sworn an affidavit to show that indeed he received such correspondence from the Defendant or that he did not inform the applicant of the position of the file.

29. Lastly, the Defendant's fourth prayer (4) is that he be given an opportunity to amend his Defence. That is the song he seems to be having. It must be recalled that at the very initial stages of the suit, that is on 21/03/2019, he applied for time to file Defence and Counterclaim. The record shows that on 01/07/2019, almost four months later, he filed the Amended Defence and Counterclaim dated the same date. In the instant application he has not annexed the proposed draft of the pleading to be amended. This is a prayer designed to convince the court that the Defendant has a serious contention. He has none.

30. It this court's humble view that the Applicant has failed to place before this court any sufficient material for consideration to warrant the setting aside of the Judgment herein delivered on 29th July, 2022. I therefore do not find reasons to exercise discretion in favour of the applicant.

31. The upshot of the foregoing is that the present application is without merit and is therefore dismissed with costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 27TH DAY FEBRUARY OF 2025.

HON. DR. *IUR* F. NYAGAKA,

JUDGE

In the presence of,

B. D. Achola Advocate for the Defendant

Plaintiff in person