



Mamboleo Women Group Co-opertative Society Limited v Ngeno & 9 others (Environment & Land Case E010 of 2021) [2024] KEELC 1397 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E010 OF 2021
CG MBOGO, J
MARCH 18, 2024**

BETWEEN

**MAMBOLEO WOMEN GROUP CO-OPERTATIVE SOCIETY
LIMITED PLAINTIFF**

AND

**JOSEPH NGENO 1ST DEFENDANT
JOSEPH MARINDANY 2ND DEFENDANT
JOSEPH NGETICH 3RD DEFENDANT
DAVID KERINGET 4TH DEFENDANT
PHILEMON LANGAT 5TH DEFENDANT
PAUL KIMETO 6TH DEFENDANT
AUGUSTINE SIGEI 7TH DEFENDANT
WILLISON KIPSANG KITUR 8TH DEFENDANT
STEPHEN LANGAT 9TH DEFENDANT
GEOFFREY TUNUI 10TH DEFENDANT**

RULING

1. Before this court for determination is the Notice of Motion Application dated 25th October, 2023 filed by the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th and 9th defendants/applicants and, it is expressed to be brought under Sections 1A, 1B, 3A, 63 (e) of the Civil Procedure Act, Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules and Article 159 (2), (b) & (d) of the Constitution seeking the following orders: -

1. Spent.



2. That the honourable court be pleased to review and or set aside the orders issued on 5th October, 2023 directing that the hearing of the matter had been closed and setting this matter for judgment on 14th November, 2023.
 3. Spent.
 4. That the honourable court be pleased to set aside its proceedings of 5th October, 2023 when the plaintiff witnesses testified.
 5. That the honourable court be pleased to re-open both the plaintiff and the 1st to 9th defendants' cases and allow the plaintiff's witnesses to be cross-examined and 1st to 9th defendants' witnesses to testify.
 6. That the costs of this application be in the cause.
2. The application is premised on the grounds on its face and more particularly as set out in the supporting affidavit.
 3. The application is supported by the affidavit of Khatherine Chepkulul, the advocate for the 1st to 9th defendants/applicants which was sworn on 26th October, 2023. The counsel deposed that this matter was coming up for hearing on 10th June, 2023 and the same was adjourned on the basis that she was indisposed. Further, that the counsel who was holding her brief mistakenly informed her that the matter was coming up for hearing on 31st October, 2023, instead of 5th October, 2023.
 4. The counsel further deposed that upon being served with the plaintiff's submission on 25th October, 2023, she enquired from the registry and was informed that the matter proceeded on 5th October, 2023. Further that the defence case was closed ex-parte and judgment was reserved for 14th November, 2023.
 5. The counsel further deposed that the failure to appear on 5th October, 2023 can only be attributed to an inadvertent and regrettable miscommunication on the part of the counsel and the defendants/applicants pray that they be given a chance to present their case.
 6. The application was opposed vide the replying affidavit of James Nyaigoti Makori, the chairperson of the plaintiff/respondent sworn on 6th November, 2023. The plaintiff/respondent deposed that this matter was slated for hearing on 10th July, 2023, where the defendants/applicants sought an adjournment and were condemned to pay costs for the day. That on the said date, the matter was once again slated for hearing on 5th October, 2023, which date was taken by consent of the advocates on record.
 7. The plaintiff/respondent further deposed that the defendants/applicants and their advocate on record failed to appear in court for the hearing on 5th October, 2023. The plaintiff/respondent further deposed that the defendants/ applicants' counsel failure to appear in court on 5th October, 2023, was not as a result of an honest mistake but a calculated move to further delay this matter. Further, that the defendants/ applicants have never paid their costs of Kshs. 15,000/- as ordered by this court, and this court cannot entertain an indolent litigant who does not comply with court orders.
 8. The 1st to 9th defendants filed a further affidavit in response thereto which was sworn on 16th November, 2023 by Mercy Njogu, advocate. The counsel deposed that she held brief for Ms. Chepkulul on 10th June 2023, when the latter was indisposed and that the hearing of the matter was adjourned on condition that the defendants/applicants pay costs of Kshs. 15,000/- and court adjournment fees of Kshs. 2,000/- before the next court date.



9. The counsel deposed that she mistakenly informed Ms. Chepkulul that the matter was coming up for hearing on 31st October, 2023 instead of 5th October, 2023 and the same was diarized as such. Further, that failure to attend court on 5th October, 2023 was not deliberate, but a genuine mistake which should not be visited upon the defendants/ applicants. Further, that the amended defence and counter claim on record are reasonable and would require a trial in order to be fully substantiated.
10. The application was canvassed by way of written submissions.
11. On the 17th November, 2023 the defendants/applicants filed their written submissions dated 16th November, 2023 where they raised two issues for determination as listed below: -
 - i. Whether the proceedings for 5/10/2023 should be set aside.
 - ii. Whether the application dated 25/10/2023 should be allowed.
12. On the first issue, the defendants/applicants submitted that the orders for setting aside are within the wide discretion donated by the rules governing the procedure of the court and that the only question to be answered, is whether the advocate's mistake is excusable as to merit the reopening of the case and whether when reopened, the defendants/ applicants have a reasonable defence on record. The defendants/applicants relied on the case of *CMC Holdings Limited v Nzioki* [2004] 1 EA 23 (CAK). The defendants/applicants submitted that the reasons for non-attendance is excusable and that they have a reasonable defence on record.
13. On the second issue, the defendants/applicants submitted that the court is under a duty to make orders that will advance justice which is paramount in a matter like this. Further, that this is a fundamental principle of natural justice as was held in the cases of *Wachira Karani v Bildad Wachira* Civil Suit No. 101 of 2011 [2016] eKLR and *Patel v EA Cargo Handling Services Limited* [1974] 1 EA 75 (CAM).
14. On the 20th November, 2023 the plaintiff/respondent filed their written submissions of even date where it raised two issues for determination as listed below: -
 1. Whether the applicants have satisfied the threshold for grant of the orders sought.
 2. Whether allowing the application will prejudice the plaintiffs/respondents.
15. On the first issue, the plaintiff/respondent submitted that the defendants/ applicants have not furnished a satisfactory reason as to why they never appeared for hearing, and that they have been derailing this matter on account of numerous adjournments. The plaintiff/respondent further submitted that the defendants/ applicants' failure to attend court for hearing was a calculated move to delay the matter. Further, that allowing the application is allowing the defendants/applicants to continue derailing the suit herein at its expense. Reliance was placed in the case of *Argan Wekesa Okumu v Dima College Limited & 2 Others* [2015] eKLR.
16. On the second issue, the plaintiff/respondent submitted that the orders for payment of costs and adjournment fees has not been complied with to date, and this demonstrates the unwillingness of the defendants/applicants to comply with court orders contrary to the law. They submitted that the application has not been made in good faith owing to the numerous adjournments by the defendants/ applicants.
17. I have considered the application, replies thereof and the rival submissions as well as the authorities cited. In my view, the issue for determination is whether the application is merited.



18. Order 12 Rule 7 of the *Civil Procedure Rules* provides:

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

19. The Court of Appeal in *Njue Njagi v Ephantus Njiru & Another* [2016] eKLR stated that dismissal of a suit for none attendance by the plaintiff or for want of prosecution amounts to a judgment in that suit.

20. This court has discretion to set aside judgment or order to avoid injustice or hardship resulting from an accident inadvertence or excusable mistake, as it was held in the case of *Shah v Mbogo & Another* [1967] E.A. 116.

21. Also, in *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173, it was held that:

“In law, the discretion that a court of law has, in deciding whether or not to set aside 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. Such an exercise of discretion would in our mind be wrong in principle. We do not think the answer to that weighty issue was to advise the appellant of the recourse open to it, as the learned Magistrate did here... In doing so, she drove the Appellant out of the seat of justice empty handed when it had what might have very well amounted to an excusable mistake visited upon the appellant by its advocate.”

22. The defendants/applicants’ counsel contended that on the day the matter was coming up for hearing, she was indisposed and another counsel held her brief in the matter where an adjournment was sought. Further, the counsel contended that there was miscommunication and the matter was recorded in their diary for hearing on 31st October, 2023 as opposed to 5th October, 2023.

23. It would be necessary to reproduce the proceedings on the relevant days and for the record, this matter was not before this court on 10th June, 2023 as alleged by the counsel for the defendants/applicants. That notwithstanding, this matter was slated for hearing on 10th July, 2023 where, Ms. Njogu, the counsel holding brief for Ms. Chepkulul informed the court as follows:

“Ms Njogu

Ms Chepkulul is not ready to proceed as she is indisposed. Unfortunately, I was unable to contact Mr Nyambati to inform him about it. We will be praying for adjournment.”

24. The counsel for the plaintiff/respondent in reply, stated as follows: -

“Reply By Mr Nyambati

This is extremely unfortunate and owing to the fact that we have travelled all the way from Kisii to Narok and considering that the firm of Ogolla has made more than 5 counsel, I do pray for our costs. A sum of kshs. 20,000/- for myself and my clients will be sufficient.”

25. This court observed as follows and granted the following orders: -

“COURT



Arising from what I have heard, case is adjourned on account of the defendant's counsel indisposition. Today's costs to the plaintiff. Same is assessed at Kshs. 15,000/-. These costs together with CAF of Kshs. 2,000/- to be paid on or before the next hearing date. The suit as against the 6th and 10th defendants will proceed as undefended (suit). By consent, hearing on 5/10/2023/."

26. On 5th October, 2023, the counsel for the defendants/applicants and the defendants/applicants were absent in court on this date and the court was inclined to proceed with the plaintiff/respondent's case upon which the defendants/respondents' case was deemed as closed.
27. The reasons adduced by the counsel for the defendants/applicants are excusable and in upholding the objective of this court which it is called upon to, that it to see to it that there is substantive justice, I will allow the application save that the defendants/applicants are condemned to pay costs. I say so for the reason that when this matter came up for hearing on 5th October, 2023, the defendants/respondents were yet to comply with the orders of this court issued on 10th July, 2023. I do also note that the applicant has been made without delay which in my view, calls for this court to consider the same.
28. As such, the notice of motion dated 25th October, 2023 is hereby allowed in the following terms:
 - i. The order issued on 5th October, 2023, directing that the hearing of the matter had been closed, is hereby set aside.
 - ii. The proceedings of 5th October, 2023 are hereby set aside.
 - iii. Both the plaintiff/respondent's case and the defendants'/applicants' case are hereby re-opened for the witnesses to testify.
 - iv. That the costs of this application is assessed at Kshs. 45,000/-, to be paid before the next hearing date.
 - v. The defendants/applicants do comply with the orders of this court issued on 10th July, 2023 before the matter is mentioned on 11th April, 2024.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 18TH DAY OF MARCH, 2024.

HON. MBOGO C.G.

JUDGE

18/03/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

