



Nakuru Citimega Limited v Kenya Farmers Association Ltd (Environment & Land Case 220 of 2013) [2024] KEELC 1472 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1472 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 220 OF 2013**

**A OMBWAYO, J
MARCH 14, 2024**

BETWEEN

NAKURU CITIMEGA LIMITED PLAINTIFF

AND

KENYA FARMERS ASSOCIATION LTD DEFENDANT

RULING

1. This ruling is in respect to the Applicants Notice of motion application dated 24th January,2024. The said application is expressed to be brought under Order 12 rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Act, Article 50 (1) and 159 (2) of the Constitution of Kenya 2010.
2. The application is filed under Certificate of urgency and seeks the following orders:
 - a. Spent
 - b. That the Court be pleased to arrest and/or to Stay Execution of its impending Judgment/ Decree herein slated for delivery on the 01/02/2024 or on any other date, pending the hearing and determination of this application.
 - c. That the exparte proceedings and hearing herein dated 08/12/2023, together with all and any consequential Judgment, Decree or Orders herein, be set aside.
 - d. That the Defendant be granted leave to defend this suit, and the Defendant be given an opportunity to be heard in the suit and that the matter proceeds to hearing afresh inter partes and be heard and determined on merit.
 - e. That the Court be pleased to issue such further directions or timelines as would be just and expedient.



- f. That costs of this application be in the cause.

Applicant's Contention

3. Symon K Cherogony deposes that he is the managing director of the Defendant/Applicant Company and he has the authority of the Defendant to swear this affidavit on its behalf. He deposes that the matter came up for hearing on 8th December 2023 and he informed his advocate that the Plaintiff had approached him with a proposal for the Plaintiff to withdraw the case and have the dispute resolved amicably out of court and hence there would be no need to proceed with the hearing. He deposes that because of the foregoing assurance, the Defendant KFA Ltd never moved to file a defence in this suit and he trusted that the suit was to be withdrawn and hence there was no need to move to defend the same.
4. He contends that in the year 2021, their advocates on record informed them that the Plaintiff had filed an amended plaint and he reached out to Mr. Samuel Towett who was very upset by that information. He deposes that he told him that there seemed to be some confusion at the Plaintiff's Advocates' office as to who was handling the matter for the Plaintiff. He contends that he had informed him that he had specifically discussed the matter with Mr. Kiplenge and Mr. Kurgat both of the firm of Kiplenge & Kurgat Advocates the firm on record for the Plaintiff. He deposes that he was assured that he would have the matter sorted out and withdrawn.
5. He further deposes that unfortunately, Mr. Towett passed on before he could give him feedback and both Mr. Kiplenge and Mr. Kurgat are deceased. He deposes that it is plausible that there may have been confusion in the matter following the takeover of the said law firm by its current proprietors and the re-naming of the firm to Kiplenge, Andama and Makau Advocates, the new firm presently on record for the Plaintiff.
6. The deponent contends that he was reassured by Dr Daniel Tuitoek around October 2023 of the Plaintiffs desire to have the matter removed from the court. He deposes that he did not attend court on 8th December, 2023 as he had been assured by the Plaintiff that there would be no trial proceedings. He deposes that he was shocked to learn later that in fact the Plaintiff proceeded with the hearing ex-parte in spite of their assurance and intimation to the contrary.
7. He deposes that the Defendant did not move the court sooner on this present application for setting aside, owing to the intervening Christmas recess which affected both the court and Defendant's Advocates office. He deposes that this court may have no jurisdiction to try or determine this suit, as the Plaintiff's claim is purely a commercial dispute for special damages. It is his deposition that if this matter should proceed to determination by the court as opposed to withdrawal or an out of court settlement as all along intimated by the Plaintiff, then in that case, he prays that the Defendant be accorded an opportunity to file its defence and to be heard before the suit can be determined.

Respondent's Response

8. The Respondent filed a replying affidavit on 7th February, 2024. The deponent is one Daniel Tuitoek and he deposes that he is the Plaintiff's director. He also deposes that the failure by the Applicant to file a defence for more than 10 years is a clear indication that the Applicant was not willing to defend the suit herein and the same is in no way attributable to the Respondent or the Respondent's counsel.
9. He deposes that the Applicant has claimed that he was informed by him that he was not interested in testifying and that he was compelled to do so. He stated that such information is not true and he willingly testified on behalf of the Respondent. He deposes that he was not pressured to proceed with



the hearing but he did it because the Respondent wanted to conclude the matter since the same has been pending for over ten years. He deposes that the application is an afterthought and he opposed the application dated 24th January, 2024.

Submissions

10. The Applicant filed submissions on 11th March, 2024. It submits that this court has a wide discretion to set aside its orders and or proceedings as long as the same is done on such terms as may be just. Reliance was placed on Order 12, Rule 7 of the Civil Procedure Rules, 2010 and the cases of Patel vs E.A Cargo Handling services Ltd [1974] E.A 75, Shah v Mbogo and another [1967] EA 116 and Wachira Karani v Bildad Wachira [2016] eKLR. The Applicant submits that it is truly deserving of the discretion to avoid the injustice that will befall it in the instance if the ex-parte proceedings herein are not set aside.
11. The Applicant submits that unless the ex-parte proceedings are set aside, it will suffer grave injustice as it will have been condemned unheard whereby he claims is for a sum of over Ksh 8,000,000/=. He submits that a party should not be condemned unheard and he relied on Article 50 of *the Constitution* of Kenya and the cases of Richard Nchapi Leiyagu v IEBC & 2 others [2013] eKLR and Multiscope Consulting Engineers v University of Nairobi & Another [2014] eKLR.
12. The Applicant submits that this court may have no jurisdiction to try or determine this suit as the Plaintiff's claim is purely a commercial dispute for special damages. It submitted that there is absolutely no dispute or claim herein relating to occupation, use or title to the suit land. It submitted that the suit land was admittedly successfully sold to, transferred and possessed by the purchaser Emerg Investments Ltd since way bac in 2012. It relies on the case of Phoenix of E.A Assurance Company Limited v S.M Thiga t/a Newspaper Service [2019] eKLR. The Applicant prays that the application dated 24th January, 2024 be allowed. The Respondent did not file any submissions.

Analysis And Determination

13. I have considered the application, the affidavit in support of the application, the replying affidavit and the submissions filed. In my view, the question for determination is whether the court should set aside the ex-parte proceedings and hearing dated 8th December, 2023 together with all and any consequential Judgment, Decree or Orders.
14. The Applicant claims that the matter proceeded for hearing ex-parte on 8th December, 2023 when the Respondent/Plaintiff presented and closed its case. It is also the Applicant's claim that this was in spite of the Respondent having intimated to Applicant that the suit would not proceed as the Plaintiff/ Respondent was not interested in pursuing the same but wanted the matter resolved amicably out of court. The Respondent on the other in it's Replying affidavit filed on 7th February, 2024 claims that the hearing of the main suit on 8th December, 2023 was fixed by consent and in the presence of counsels representing both parties as can be confirmed from the proceedings of the pre-trial date.
15. The Applicant has invoked provisions of Article 50 (1) and 159 (2) of *the Constitution* of Kenya 2010 and Order 12 Rule 7 of the Civil Procedure Rules.

In Shah v Mbogo & Another [1967] EA 116, it was held that:

“The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.



16. The Applicant submits that it has demonstrated sufficient cause to warrant the exercise of this Court's discretion in its favour.
17. In *The Hon. Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 (ur) the court found sufficient cause to be:

“Sufficient cause” or “good cause” in law means:

“.....the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused”. See *Black's Law Dictionary*, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

18. This court has considered the Applicants claim and especially the right to be heard as enshrined in Article 50 of *the Constitution* of Kenya. It is in the interest of justice that the Applicant be given an opportunity to defend the suit. The Application dated 24th January, 2024 is found to have merit and I consequently grant the following orders:
 - a. The ex-parte proceedings and hearing dated 8th December, 2023 together with all and any consequential Judgment, Decree and orders are hereby set aside.
 - b. The Defendant is hereby granted leave to defend this suit.
 - c. Each party shall bear their own costs in respect of the application dated 24th January, 2024.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF MARCH 2024

A.O. OMBWAYO

JUDGE

