



REPUBLIC OF KENYA



**Njuguna v Mungai (Being sued as an administrator of the Estate of Samuel Gachau Maina)
(Environment & Land Case 25 of 2023) [2024] KEELC 4746 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 25 OF 2023
YM ANGIMA, J
MARCH 7, 2024
(FORMERLY NYAHURURU ELC 31 OF 2019)**

BETWEEN

JAMES MWANIKI NJUGUNA PLAINTIFF

AND

**BENSON N GICHAU MUNGAI (BEING SUED AS AN ADMINISTRATOR OF
THE ESTATE OF SAMUEL GACHAU MAINA) DEFENDANT**

RULING

A. Plaintiff's Application

1. Vide a notice of motion dated 08.09.2023 expressed to be grounded upon Sections 1A, 1B(1)(a), 3A & 80 of the *Civil Procedure Act*, (Cap 21), Section 146(4) of the *Evidence Act*, (Cap 80) and Order 45, Rules 1(1) & 2; Order 18, Rule 10; Order 12, Rule 7 & Order 51, Rule 1 of the *Civil Procedure Rules*, 2010 the Plaintiff sought, *inter alia*, an order for review, variation and setting aside of the order dated 25.7.2023 and for leave to defend the Defendant's application dated 16.05.2023 which sought the dismissal or striking out of the suit.
2. The application was based upon the various grounds set out on the face of the motion and contents of the supporting affidavit sworn by Beverlyne Ambani on 08.09.2023 and the annexures thereto. The Plaintiff's advocates contended that the matter proceeded in their absence because Ms. Beverlyne Ambani who was handling the matter was on maternity leave on 25.07.2023. It was further contended that the Plaintiff's response to the Defendant's notice of motion dated 16.05.2023 was ready by 25.07.2023 but the same had not been signed by the Plaintiff due to a communication breakdown with his advocates. The Plaintiff consequently urged the court to set aside the dismissal order of 25.07.2023 and allow him to defend the application dated 16.05.2023.



3. It was the Plaintiff's contention that the Defendant shall not suffer any prejudice which cannot be compensated by an award of costs and that it would be in the interest of justice to safeguard the Plaintiff's constitutional right to be heard. As a result, the court was urged to allow the application.

B. Defendant's Response

4. The Defendant filed a replying affidavit sworn on 08.11.2023 in opposition to the application on several grounds. First, that the Plaintiff's suit was time-barred since it was filed 25 years after the accrual of the cause of action. Second, that the Plaintiff had failed to disclose the existence of Nakuru Civil Appeal No. 181 of 2006 between the parties which was still pending. Third, that the Plaintiff had not taken any steps to prosecute the suit between 2019 and 2022. Fourth, that there was no reasonable explanation for the Plaintiff's failure to comply with the directions on the hearing of the application dated 16.05.2023 and there was no good reason for his advocate's absence on 25.07.2023. Fifth, that justice delayed was justice denied and that the application was not brought in good faith.

C. Directions on Submissions

5. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Plaintiff's submissions were filed on or about 03.12.2023 whereas the Defendant's submissions were filed on or about 29.01.2024.

D. Issues for Determination

6. The court has perused the Plaintiff's notice of motion dated 08.09.2023, the Defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following 3 issues arise for determination:
 - a. Whether the Plaintiff has made out a case for the review or setting aside of the order made on 25.07.2023.
 - b. Whether the Plaintiff is entitled to leave to defend the notice of motion dated 16.05.2023.
 - c. Who shall bear costs of the application

E. Analysis and Determination

Whether the Plaintiff has made out a case for the review or setting aside of the order made on 25.07.2023

7. The court has considered the material and submissions on record on this issue. The court has noted that the Defendant did not seriously challenge the explanation given by the Plaintiff's advocate for her failure to file a response to the notice of motion dated 15.06.2023 and her failure to attend court on 25.07.2023. It was not contended that she was not, in fact, on maternity leave at the material time. It was not disputed that the Plaintiff had not signed the replying affidavit at the material time due to a communication breakdown.
8. The court has noted that the Defendant has contested the application mainly on the same grounds which were raised in his notice of motion dated 16.05.2023 for striking out the suit. The merits or otherwise of that application which was allowed on 25.07.2023 cannot be a suitable response to the Plaintiff's application for review and setting aside of the default order made on 25.07.2023.



9. The court has noted from the record that the Defendant's notice of motion dated 16.05.2023 was allowed on 25.07.2023 primarily because there was no response thereto. The Plaintiff has now expressed his desire to contest the said application and has rendered a fairly reasonable explanation for his failure to file a response on time and his advocate's failure to attend court on 25.07.2023. The orders the Defendant obtained on 25.07.2023 were in every sense default orders.
10. The court is of the opinion that the Plaintiff has made out a case for review and setting aside of the ex parte and default orders made on 25.07.2023. The court takes the view that denying a litigant a hearing on either an application or a suit should be last resort of the court. A litigant who should be denied such an opportunity is one who has previously been accorded a chance of being heard and has failed to utilize the opportunity without any reasonable explanation. In the premises, the court is inclined to grant the Plaintiff the order for review and setting aside.

Whether the Plaintiff is entitled to leave to defend the notice of motion dated 16.05.2023

11. The court has already found and held that the Plaintiff has made out a case for the review and setting aside of the ex parte orders of 25.07.2023. The court has found and held that the Plaintiff has rendered a fairly reasonable explanation for his failure to file a response to the notice of motion dated 16.05.2023 on time and for his advocate's failure to attend court on 25.07.2023. As a result, the court is of the view that the Plaintiff is entitled to defend the notice of motion dated 16.05.2023.

Who shall bear costs of the application

12. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Although the Plaintiff is the successful litigant in this application, the court is of the opinion that he should bear costs of the application for his default in responding timeously to the notice of motion dated 15.06.2023 and for his advocate's default in attending court on 25.07.2023. As a consequence, the Defendant shall be awarded costs of the application to be borne by the Plaintiff.

F. Conclusion and Disposal Order

13. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 08.09.2023 and consequently makes the following orders for disposal thereof:
 - a. The ex parte orders made on 25.07.2023 are hereby set aside together with all consequential orders.
 - b. The Plaintiff is hereby granted leave to defend the Defendant's notice of motion dated 16.05.2023 by filing and serving a replying affidavit within 14 days from the date hereof.
 - c. The Plaintiff shall pay the Defendant thrown away costs of the application in the sum of Kshs.20,000/= within 30 days from the date hereof.
 - d. The matter shall be mentioned on 18.04.2024 to confirm compliance with the directions made on 30.05.2023 and fix a ruling date for the notice of motion dated 16.05.2023.

It is so ordered.

RULING DATED AND SIGNED AT NYANDARUA THIS 7TH DAY OF MARCH, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.



Y. M. ANGIMA

JUDGE

In the presence of:

Ms. Ambani for the Plaintiff

Mr. Wanyoike for the Defendant

C/A - Carol

