Munyua v Valley Creek Limited (Environment & Land Case 361 of 2019) [2024] KEELC 3747 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3747 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 361 OF 2019

LN MBUGUA, J

APRIL 24, 2024

BETWEEN

LEORNARD MUNYUA ..... PLAINTIFF

AND

VALLEY CREEK LIMITED ..... DEFENDANT

RULING

1. Before me is the Plaintiff's Notice of Motion dated 26.1.2024 brought forth by the defendant seeking orders that a new firm of advocates be allowed to come on record, that the order dated 8.1.2024 where the defendant was found to be in contempt of court orders be stayed and that the judgment delivered on 15.12.2021 be set aside to enable the defendant to defend the suit.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Eunice Njeri dated 26.1.2024. She avers that they were never aware of this suit as they were not served with any document save the order to appear in court on 8.1.2024. The deponent further states that they have never appointed Njue Muriithi advocates to act for them, adding that the plaintiff never paid the full purchase price of the property, thus they have a plausible defence.

3. On 31.1.2024, the court gave firm and self executing orders to the effect that the defendant applicant was to file and serve a supplementary affidavit along with submissions by 7.2.2024, while the plaintiff was to file submissions by 14.2.2024, of which documents filed and or served contrary to directions of the court were to stand as expunged. The defendant did not comply hence the order given by the court is hereby invoked.

4. I have considered the issues raised herein including the submissions of the plaintiff. The new counsel for the defendant was allowed to come on record by consent, thus the issues falling for determination are whether the judgment delivered on 15.12.2021 and the order of 31.10.2023 should be set aside to enable the defendant to defend the suit.

5. Courts have discretion to set aside judgment or orders. In the case of *Jomo Kenyatta University of Agriculture and Technology V Musa Ezekiel Oebal [2014]* eKLR CA 217/2009, the Court of Appeal stated that the object of clothing the court with discretion to set aside judgment obtained exparte was to: " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice. ....." See Shah V Mbogo & Another (1967) EA 116.

6. Further in *Southern Credit Banking Corporation Ltd V Johah Stephen Nganga (2006)* eKLR, it was held that;

> " Indeed principles of setting aside ex-parte judgment are very clear. If the judgment is regular the court is vested with unfettered discretion to set aside such judgment on such terms as are just. If judgment entered is found to be irregular it ought to be set aside ex debito justitiae."

7. Was the judgment entered on 15.12.2021 a regular judgment?. The defendants contend that they knew nothing about this suit, similarly, they knew not advocate Muriithi who was on record for them, and that they have never been served with any pleadings or documents.

8. A perusal of the file reveals that the suit was filed in the High court as case no. 599 of 2012 on 20.12.2012 and was only transferred to the Environment and Land Court in the year 2019. It is clear that from the infancy stage of the suit, the defendants were actively represented by the firm of Munene and Company advocates who filed a Preliminary Objection on 17.1.2012, less than a month from the time the suit was filed. They actively prosecuted the said preliminary objection resulting in a ruling dated 4.7.2013.

9. The said firm of advocates also entered appearance, filed a defence and counterclaim for the defendants and also filed a rather comprehensive trial bundle on 24.7.2013. A notice of change of advocate was then filed on 11.11.2013 where Njue Muriithi advocates took over from Munene advocates for the defendants.

10. There was no appearance for the defendants when the matter proceeded on 3.11.2021, however, the date had been given in the presence of the advocates for all the parties earlier on 1.7.2021.

11. It is clear beyond peradventure that the defendants were actively represented in this matter, thus the claim of the defendant that they did not know advocate Muriithi is unfounded. It follows that the judgment entered herein was a regular one.

12. The next question to interrogate is whether the defendant has proffered sufficient cause to warrant the setting aside of the aforementioned judgment.The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit, However, the defendant must demonstrate that he/she was prevented from attending the court by a sufficient cause – See *Wachira Karani v Bildad Wachira [2016]* eKLR.

13. The question which begs for an answer is; Is the defendant ready to defend the suit in the event that judgment is set aside. If so, how will she participate in the trial?. The court has already made a finding that the defendant was represented by two firms of advocates in this matter from the word go, yet without any justification, the defendants denounces these advocates. That in itself is a tell tale sign that the defendants are not candid and do not deserve a second chance.

14. The records of the court of 1.7.2021 give a sneak preview of how the defendants were delaying the matter, so much so that the court gave express directions as follows;

> "It does emerge that the defendant is not keen to proceed with the hearing of this suit. Secondly, if counsel fell sick yesterday, some effort should have been made to alert counsel for the plaintiff. I will in the circumstances reluctantly grant an adjournment to the defendant. This is marked as the last adjournment to be granted to the defendant. The defendant will pay Cost Adjournment Fee together with costs of counsel for the plaintiff, assessed at kshs.6,000 to be paid before the next hearing date. Hearing on 3/11/2021.
>
> The defendant is granted leave to file and serve a substitute witness statement within 14 days from today."

15. It is crystal clear that at every turn, the defendants were indulged by the court in an effort to ensure that the matter was heard.

16. It is also not lost to this court that the matter has been in the corridors of justice for close to a decade!. Starting the case again would certainly be prejudicial not only to the plaintiff, but to the overall administration of justice.

17. In the case ofMoschion v Mwangi (Environment & Land Case 350 of 2018) [2023] KEELC 17144 (KLR) (27 April 2023) (Ruling) Neutral citation: [2023] KEELC 17144 (KLR), while dismissing several consolidated matters for none compliance with court's directions, I stated as follows;

> "The right to be heard is sacrosanct and is embodied in the latin maxim "audi alteram partem". However, a party is only entitled to reasonable opportunity to be heard, See *Nginyanga Kavole vs. Mailu Gideon (2019)* eKLR. The instant case appears to be one of mere inaction which is not excusable. Thus this is a situation whereby the plaintiff has driven herself from the seat of justice".

18. Similarly, this is a situation whereby the defendants' inaction drove them away from the seat of justice; thus this is not a case where the court should exercise its discretion in their favour. The net effect is that the application dated 26.1.2024 is found to have no merits, the same is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Court assistant: Eddel