



Gachanja & another v Kariuki & another (Environment & Land Case 156 of 2008) [2024] KEELC 3745 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 156 OF 2008**

**LN MBUGUA, J
APRIL 18, 2024**

BETWEEN

ROSE WOTHAYA GACHANJA 1ST PLAINTIFF

CHRISTOPHER KABAU KIAI 2ND PLAINTIFF

AND

FRANCIS M KARIUKI 1ST DEFENDANT

MARION WANJA KIMANI 2ND DEFENDANT

RULING

1. The Plaintiffs commenced this suit by a plaint dated 7.4.2008 against one Francis Murigi Kariuki, and the same was amended vide the court orders (ruling) of 21.9.2023 whereby the 2nd defendant, one Marion Wanja Kimani was joined as a party to this suit.
2. Thereafter, the court gave the following directions;
 1. The plaintiff to amend the plaint and file and serve the same within 7 days (by 28.9.2023).
 2. The defendants to amend their defences accordingly by 7.10.2023.
 3. Parties to file/serve their paginated Trial Bundles containing; Their amended pleadings, Witness statement, Documentary evidence by 14.10.2023
 4. Hearing on 30.1.2024
 5. Documents filed outside the given timelines shall stand as expunged.
 6. The case shall not be adjourned at the instance of any of the parties again.”



3. On 30.1.2024, it emerged that the 1st defendant had not filed their amended pleadings and documents on time, while the 2nd defendant had not filed a defence at all. In light of the orders given previously, the court declined to adjourn the case and proceeded with plaintiff's case *ex parte*. The matter was then given a judgment date for 25.4.2024.
4. The 2nd defendant has now brought forth an application dated 6.2.2024 where she seeks orders that the delivery of the judgment be arrested, and that the proceedings of 30.1.2024 be set aside so as to enable the said defendant to file his documents and to defend herself.
5. The application is premised on the grounds on the face of the application and on the replying affidavit of her advocate, one Elias Gitari who avers that he logged into the digital platform when the matter was called out in the morning and the matter was allocated time at 11.00.am. When he tried to log in again, he was not admitted. He later learnt that the matter proceeded and a judgment date was given. He avers that he was ready for the hearing with two witnesses.
6. In her submissions dated 28.2.2024, the applicant argues that she should not be condemned unheard and relies on a raft of authorities including *Kenya Human Rights Commission vs. Non – Governmental Organizations Co-ordination Board (2016)* eKLR.
7. The plaintiffs have opposed the application vide the Replying Affidavit of the 1st plaintiff dated 22.2.2024. She contends that the advocate for the applicant had written a letter via email the previous day indicating that he would be attending a burial.
8. She also contends that the hearing was to be conducted in open court, adding that they had also been served with amended defence and counterclaim irregularly on 12.1.2024.
9. In their submissions dated 7.3.2024, the plaintiffs aver that the defendants are abusing the courts processes, hence obstructing and delaying justice as they had not complied with courts directions. To this end, the cases of Rose Jerono Tiren vs. Isaac K. Tallam HCCA NO. 138 OF 2018 and Board of Management St Augustine Secondary School vs. Chambalili Trading Co. Ltd High Court Civil Appeal No. 343 of 2019 were proffered.
10. I have considered all the arguments tendered herein. The issue falling for determination is whether, the proceedings taken on 30.1.2025 should be set aside to enable the 2nd defendant to defend the suit. The court has jurisdiction to set aside *ex parte* orders keeping in mind that the duty of the court is to do justice. See *Patel V EA Cargo Handling Services LTD (1974) EA*.
11. This court has set out the express directions given by this court on 21.9.2023. The applicant did not comply with the same. Indeed on 30.1.2024, the applicant was seeking leave to file their defence. No plausible reasons were advanced for none compliance. Further, it is noted that the matter was to be heard in open court and to this end, the plaintiff duly attended court and the matter proceeded to hearing.
12. Notwithstanding the foregoing shortcomings of the applicant, this court has a constitutional mandate to do justice. To this end, I have interrogated the status of the 2nd defendant vis a vis the other parties in relation to the litigation history. That whereas the other parties have been in the picture for the last 16 or so years, the 2nd defendant was only joined in this suit few months ago on 21.9.2023.
13. As a new party, she ought to get an opportunity to table her case fairly. The notion of fairness embraces going through all the requisite steps of litigation including; the service of summons to enter appearance, closure of pleadings and then the pretrial. I note that on 30.1.2024, the court was informed



that the applicant had entered appearance, hence that step of service of summons need not be revisited. However, much as the case is old, the 2nd defendant deserves her day in court.

14. In the case of Martha Wangari Karua -vs- IEBC Nyeri Civil Appeal No. 1 of 2017 the Court of Appeal held that:-

“The Rules of natural justice require that the Court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case maybe....”.

Also see - *Isiolo Stage View Enterprises v Isiolo County Government & 2 others [2018]* eKLR.

15. Another point of concern is that the amended plaint, the one which was to be filed and served by 28.9.2023 was only filed and served on 18.10.2023. In essence, the pleadings have not closed. What is good for the goose is good for the gadder. Thus the plaintiff should not seek orders for 2nd defendant to be penalized for none compliance with courts orders when themselves they are guilty of none compliance!

16. In the end, I find that the right to be heard is jealously guarded in the Kenyan constitution as enshrined under Article 50 (1) of *the constitution*. In the case of CMC Holdings LTD v Nzioki (2004) KLR 173 the court set out the guiding principle in matters of setting aside orders and stated that;

“In law the discretion that a court of law has, in deciding whether or not to set aside ex parte orders was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.....The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only the reason why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence whichraises triable issues.”

17. In light of the foregoing analysis, I proceed to allow the application dated 6.2.2024 in the following terms.

1. The orders on delivery of judgment given on 30.1.2024 are hereby set aside, hence the date of 25.4.2024 for delivery of judgment is vacated.
2. The proceedings of 30.1.2024 are hereby set aside.
3. The court will give fresh directions on the filing of pleadings and documents.
4. Each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Kimano for Plaintiff

Gitari for 1st and 2nd Defendants



Court assistant: Eddel

