



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mung'aru & 56 others v Kamulu Housing Co-operative Society Ltd & 3 others (Environment & Land Case E004 of 2020) [2024] KEELC 1765 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1765 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E004 OF 2020**

**A NYUKURI, J  
APRIL 11, 2024**

**BETWEEN**

**JAMES MUNG'ARU & 56 OTHERS ..... PLAINTIFF**

**AND**

**KAMULU HOUSING CO-OPERATIVE SOCIETY LTD ..... 1<sup>ST</sup> DEFENDANT**

**MADUBAT TRADING CO LTD ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide an application dated 16<sup>th</sup> October 2023 and filed on 17<sup>th</sup> January 2024, the applicant sought the following orders from the court;
  1. Spent
  2. Spent
  3. That the honourable court be pleased to set aside, vary or review the ruling made on the 27<sup>th</sup> September 2023, and all consequential orders emanating therefrom and remit the matter for hearing of the 2<sup>nd</sup> defendant's case.
  4. That cost of this application be in the cause.
2. The application is based on grounds on the face of it and supported with the affidavit of Charles Kyalo, who deponed to be retained as the director of the 2<sup>nd</sup> defendant/applicant. It was his averment that the plaintiffs are members of the 1<sup>st</sup> defendant that claim to own LR 8485 IR No 10656 located in Kamulu/Syokimau, Machakos county, measuring approximately 2034 acres (suit property) whereof the 2<sup>nd</sup> defendant/applicant owns approximately 800 acres excised from the same parcel of land.



3. He also maintained that the plaintiff's suit was filed on 26<sup>th</sup> September, 2020 seeking to cancel the 2<sup>nd</sup> defendant's title and have the 2<sup>nd</sup> defendant and its purchasers evicted from the parcel of land and that the applicant filed its defence and counterclaim to the suit. Further that the suit was only certified ready for hearing on 12<sup>th</sup> April, 2023 and the matter was set for the first hearing on 27<sup>th</sup> September, 2023 as per the court records.
4. It was his averment that his advocate was indisposed on the said 27<sup>th</sup> September, 2023 and wrote a letter to the parties herein and communicated that he was unwell and unable to attend to the hearing on that day, whereof the letter was served and acknowledged by all counsel in the matter. He stated that on 27<sup>th</sup> September, 2023, their advocate instructed another counsel to hold his brief and apply for an adjournment of the matter on account of his sickness, whereof the counsel holding brief communicated the same to the court and further indicated that all the medical evidence shall be supplied to court since Mr. Bundi was still under treatment. It was his averment that the court ordered the matter to proceed without the applicant herein, whereof the matter was heard and closed, with parties being ordered to file submissions and a mention slated for 11<sup>th</sup> October, 2023, to fix a judgment date.
5. The deponent averred that failure by their advocate to attend court was due to sickness and the same was communicated to all parties in time. He also pleaded that they should not be condemned unheard owing to the failure of their advocate to attend court due to sickness. Further that had they known that he was unwell and could not attend court, they could have sought alternative representation since they were ready for hearing. He also stated that as per court records, they have never sought for an adjournment in this matter before and that the applicant complied with all the pre-trial requirements and it has always been ready to proceed with the case save for the unforeseen circumstances stated above.
6. He prayed that the applicant be given a chance to defend this suit and also prosecute their counter claim before a judgement can be rendered on the merits. He also averred that the property subject of this suit is occupied by thousands of people who have bought land from the applicant and that these individuals have developed their property and there are many developments in the suit land. He stated that the applicant and its purchasers stand exposed to execution by eviction from the suit land unless the orders sought herein are granted in the interim and that there are over 2500 genuine and innocent occupants residing on the applicant's land, including schools, 2 mosques, residential and commercial houses, offices, boreholes and roads.
7. The application was opposed. James Mung'aru, the 1<sup>st</sup> Plaintiff swore a replying affidavit dated 29<sup>th</sup> January 2024 opposing the application. He averred that the applicant was guilty of unexplained inordinate delay and is completely undeserving of the discretionary orders sought. It was his averment that the matter was in court on 27<sup>th</sup> September 2023 and the applicant casually and unashamedly filed the subject application four months later, with absolutely no explanation why the application could not be filed earlier.
8. He also stated that on 23<sup>rd</sup> January 2024, upon being prodded by the court as to why there was such a delay the applicant's advocate alleged that the defendant's director had been hospitalized in India, the reason why the application could not be filed earlier. The respondent stated that, the excuse given for the delay was unsatisfactory, because;
  - a. The supporting affidavit to the application was evidently sworn on 16<sup>th</sup> October 2023 and could have been filed on the same day or soon after but not 3 months after.
  - b. No evidence of the director's hospitalization in India has been provided hence the allegation is hollow and empty.



- c. That as a matter of fact, the deponent, Charles Kyalo had not been away on illness but had been around organizing goons who had been harassing the plaintiffs.
  - d. The 2<sup>nd</sup> defendant is a limited liability company with more than one director and the absence of one could not have prevented the rest from acting.
  - e. The person who was said to be absent in Court on 27<sup>th</sup> September 2023 was the applicant's advocate and no justification has been demonstrated to show why he could not swear an affidavit himself and had to wait for the applicant's director to do it.
9. The deponent stated that it was mandatory under the relevant rules for the order sought to be reviewed to be attached to the subject application, failure to which the application becomes fatally defective. He maintained that having been present in court on 27<sup>th</sup> September 2023, the allegation that the court ordered the matter to proceed without the applicant herein is not correct as what the court did was to decline the application for adjournment but directed all the parties and their advocates to proceed to open court for hearing. He averred that there was no reason given why the applicant's witness and the advocate holding brief did not proceed to open court for hearing and the only logical explanation is that the applicant was determined to scuttle the hearing for that day and had no intention of attending whether their advocate was sick or not. He also averred that the firm of Bundi & company advocates as seen from its letterhead in the applicant's annexure marked as CK-2, has more than one advocate and that there was no explanation as to why another advocate did not handle the matter. He also deposed that the 2<sup>nd</sup> defendant was represented on 27<sup>th</sup> September 2023 by an advocate and when the court directed the parties to appear in an open court, the said advocate and the witness opted to deliberately stay away from the court and did not even bother to cross examine the present witnesses, hence prayers of setting aside or reviewing the orders of the court are not warranted as they were not completely unrepresented, unless an appeal was filed to a higher court.
10. He also stated that he believed that the applicant did not approach the court with clean hands and is undeserving of the orders sought for the following reasons;
- a. Ever since the interim orders were issued in this matter back in September 2020, the 2<sup>nd</sup> Defendant has shown nothing but absolute contempt for the orders and has in this regard continued erecting premises, selling, disposing off portions of the property and largely harassing the plaintiffs using hired and organized goons that have attacked and maimed the Plaintiffs with no mercy.
  - b. The court record bears him witness that every time they appeared in court in this matter, the plaintiff's advocate would always lament about the continued defiance of the court orders and it is for that reason that an order for police assistance was given and then varied to include Muungano Police Station.
  - c. The 2<sup>nd</sup> defendant has not relented in the defiance of the court orders and one of its directors one week before the hearing of 27<sup>th</sup> September 2023 was captured on camera urging the persons they had sold the land to continue construction.
  - d. Even after the hearing took place, the 2<sup>nd</sup> defendant has continued to defy the court orders leading to a lot of run-ins with the police.
11. He further added that the applicant has been in the habit of making last minute moves and delaying the matter, including delay in filing submissions on its application dated 23<sup>rd</sup> September 2023 and changing advocates. He further added that since the 2<sup>nd</sup> defendant is happily selling and constructing on the subject premises, it is not motivated to have this case determined thus the efforts at delaying



the matter at every stage. He concluded by noting that the applicant did not seek for setting aside the testimony of the witnesses by the plaintiff who testified, hence the proceedings should not be defeated as the plaintiff would suffer much prejudice.

12. In response to the averments by the respondent, the applicant filed a supplementary affidavit dated 27<sup>th</sup> March 2024. He averred that he was the only active director of the applicant, with one Harrison Mutunga having been deceased and the other, Mohamed Abdullahi, being sick, paralyzed and immobilized after a road traffic accident. He also averred that although he had been informed of the proceedings of 27<sup>th</sup> September 2023, he was not in a position to instruct his advocates on record to facilitate them to file the necessary application on time. He stated that the delay in filing the application was solely due to incapacitation of the directors and the failure by his advocates to attend court had been explained and the same was communicated to all the parties on time. He averred that the counsel who held brief had limited instructions and that there is no evidence placed on record that shows that the applicant has ever disobeyed court orders or disrupted status quo on the property, but the plaintiffs have constantly interfered with the applicant's occupation. He also deposed that the applicants had withdrawn an application for contempt of court so as to ensure expeditious disposal of the matter. He prayed that they be allowed to ventilate their case so the court can make a determination based on merit.
13. The application was canvassed by way of written submissions. On record are the applicant's submissions dated 27<sup>th</sup> March 2024. There are no submissions on record from the respondents.

#### **Submissions by the applicant**

14. Counsel for the applicant submitted that the not-so-inordinate delay in filing the application was occasioned by death and sickness on the part of the directors, and that the same was beyond the applicant's control and reiterated the facts as spelt out in the applicants' two supporting affidavits. He prayed that the court finds the delay excusable.
15. On non-attendance, it was submitted for the applicant that the reasons advanced by the advocate for non-attendance on the hearing date were valid, reiterating the averments in the affidavits. It was submitted that the counsel holding brief could not have acquainted himself with the matter and proceeded with the hearing on such short notice. On fair hearing, counsel submitted that the applicant had never applied for adjournment in the matter and any delay cannot be attributed to the applicant. To support their case on their right for a fair hearing, reliance was placed on the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] Kesc 3 (KRL) (Civ) (6 Aug 2021). Counsel concluded by arguing that if the applicant is not given a chance to ventilate their case, there would be gross miscarriage of justice.

#### **Analysis and determination**

16. I have carefully considered the application, supporting affidavits, the response thereto as well as the applicant's submissions. The sole issue that arise for determination is whether the applicant deserves the orders sought.
17. The applicant has sought the setting aside of the order of 27<sup>th</sup> September 2023 and leave to hear the 2<sup>nd</sup> defendant's case. On 27<sup>th</sup> September 2023, the Plaintiff's case was heard and closed, the 1<sup>st</sup> defendant's case was also heard and closed and the court dismissed the 2<sup>nd</sup> defendant's counterclaim for want of prosecution.
18. Order 51 Rule 15 of the *Civil procedure Rules* grants the court jurisdiction to set aside ex parte orders.



19. In addition, Order 12 Rule 7 of the Civil Procedure Rules empowers the court to set aside an order of dismissal and provides as follows;

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.

20. The principles to set aside ex parte orders are now well settled. This court has unfettered discretion to set aside ex parte orders, on terms that are just. The court's discretion must however be exercised judiciously based on sufficient cause and not capriciously.

21. In the case of *Shah v Mbogo* (1967) EA 116, the court held that the exercise of the court's discretion in setting aside ex parte orders is to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought by evasion or otherwise to obstruct or delay the course of justice.

22. On 27<sup>th</sup> September 2023, the 2<sup>nd</sup> defendant's counterclaim was dismissed as the 2<sup>nd</sup> defendant was not in court. The applicant has explained that although they had three directors, one of them is now deceased, another one was involved in a road traffic accident as is paralysed and immobilized and that it is only one director who is active and who was not able to be in court on the 27<sup>th</sup> September 2023. Considering that there is no prayer to revisit the plaintiff's and 1<sup>st</sup> defendant's testimony, but only a prayer to allow the 2<sup>nd</sup> defendant present its case, the plaintiff has not stated any prejudice that they stand to lose if the application is allowed save for delay, which in my view can be mitigated with an order for costs. Therefore, it is in the interests of justice that the applicant be given an opportunity to be heard on the counterclaim.

23. In the premises, I find and hold that the application dated 16<sup>th</sup> October 2023 is merited and the same is allowed as follows;

a. The order made by this court on 27<sup>th</sup> September 2023 dismissing the 2<sup>nd</sup> defendant's counterclaim for want of prosecution is hereby set aside, and the 2<sup>nd</sup> defendant's counterclaim is reinstated for hearing on merit.

b. The 2<sup>nd</sup> defendant to pay the plaintiffs thrown away costs of Kshs. 50,000/= within 30 days of this ruling.

24. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Thuita for plaintiffs

No appearance for the defendants

Court Assistant – Josephine

