



Beach Villas Limited v Kassim (In the Capacity as a Joint Administrator of the Estate of Mohamed Kinango Kitonyo alias Kinango Kitonyo) & 5 others (Environment & Land Case 7 of 2020) [2024] KEELC 4263 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 7 OF 2020
FM NJOROGE, J
MAY 23, 2024**

BETWEEN

BEACH VILLAS LIMITED PLAINTIFF

AND

HAMAD MOHAMED KASSIM (IN THE CAPACITY AS A JOINT ADMINISTRATOR OF THE ESTATE OF MOHAMED KINANGO KITONYO ALIAS KINANGO KITONYO) 1ST DEFENDANT

AMIN MTINDA KINANGO KITONYO (IN THE CAPACITY AS A JOINT ADMINISTRATOR OF THE ESTATE OF MOHAMED KINANGO KITONYO ALIAS KINANGO KITONYO) 2ND DEFENDANT

MARURA HOLIDAY RESORT LIMITED 3RD DEFENDANT

COUNTY GOVERNMENT OF KILIFI 4TH DEFENDANT

LAND REGISTRAR MOMBASA 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. For determination is a notice of motion application dated 11th May 2023 filed by the 3rd Defendant invoking Articles 50 and 159 of *the Constitution* of Kenya, 2010; sections 1A, 1B, 2A and 63 (e) of the *Civil Procedure Act*; and Order 12 rule 7, Order 18 rule 10 and Order 51 rule 1 of the Civil Procedure Rules for orders: -

a.Spent.



- b. That this court be pleased to vacate and/or set aside the court proceedings and all other consequential orders made on the 13th day of April 2023 when the matter proceeded in the absence of the 3rd Defendant/applicant.
 - c. That in the alternative to prayer 2 above, the Plaintiff's witness namely Mwangemi Constance Wakesho be recalled for the purpose of cross-examination by the 3rd Defendant/applicant counsel.
 - d. That costs of this application be provided for.
2. In support of the present application are the grounds enumerated on the face of the motion and the supporting affidavit sworn by Isabel Yusto on the even date who stated that she is the counsel for the 3rd Defendant in this matter. She deposed that the 3rd defendant filed a statement of defence, list of documents and witnesses on 18th March 2021 contesting the Plaintiff's suit. Subsequently, the matter was listed for mention on 9th February 2023 when the court issued a hearing date for 13th April 2023 in the presence of all parties. Counsel added that her law firm's clerk and herself inadvertently failed to diarize the said date and was therefore absent on the hearing date; that she was later notified by Mr. Munga, State Counsel, that the hearing proceeded as scheduled and plaintiff's case was closed. She stated that the 3rd Defendant's counsel had been at all material times ready to proceed with the hearing hence the inadvertent mistake should not be visited upon the 3rd Defendant. Counsel told the court that she intends to cross-examine the Plaintiff's witness which cross-examination would shed more light to the issues arising in this suit.
 3. In opposition, the Plaintiff filed grounds of opposition dated 20th July 2023 stating that the application is unmeritorious, bad in law and an abuse of the court process; that the 3rd Defendant's advocate has failed to provide a justifiable and excusable reason for non-attendance and that their non-attendance was a result of their indolence and negligence; that the Plaintiff will be greatly prejudiced if the application is allowed owing to the costs that it will incur to avail the witness physically, who is currently based in Vietnam, a region with poor internet connection.
 4. The application was canvassed by way of written submissions.

3rd Defendant's Written Submissions

5. In the submissions dated 9th November 2023, counsel identified three issues for determination. Firstly, whether there is sufficient reason for non-attendance by the 3rd Defendant on 13th April 2023. Counsel argued that the reason advanced in the supporting affidavit was sufficient to excuse the mistake. She relied on the notion that the 3rd Defendant should not be penalized for the mistake of their advocate as was pronounced in the case of *Belinda Murai & 9 others v Amos Wainaina* [1979] eKLR; and *Ahmed v Highway Carriers* [1986] LLR 258 (CAK) (Unreported).
6. Counsel added that under Order 12 rule 7 and Order 51 rule 15 of the Civil Procedure Rules, the court has the power to set aside ex-parte proceedings and powers to recall a witness for further examination-in-chief or cross-examination under section 146 (4) of the *Evidence Act* and Order 18 rule 10 of the Civil Procedure Rules. She added that while the said powers are a discretion of the court, the discretion ought to be exercised judiciously as was explained by the Court of Appeal in *Patriotic Guards Limited v James Kipchirchir Sambu, Nbi* CA No. 20 of 2016 [2018] eKLR. Counsel urged the court to exercise that discretion in their favour and in the interest of justice so as to cross-examine the witness. She relied on the case of *CMC Holdings Ltd v James Mumo Nzioka* [2004] eKLR.



7. Secondly, counsel submitted that the present application was brought within a reasonable time and as soon as the proceedings were brought to their attention.
8. The final issue to counsel was whether there will be any prejudice occasioned upon the 3rd Defendant if the application is denied. Counsel argued that should the orders being sought be denied, then the 3rd Defendant will miss out on the opportunity to explain their position over the dispute herein. She asserted that this court has a duty to do justice which should be a guiding factor in determining this application. Counsel relied on the case of Muthaiga Road Trust Company Ltd v Five Continents Stationers Ltd & 25 others [2003] KLR 714 to buttress this point; Richard Ncharpi Leiyagu v IEBC & 2 Others [2013] eKLR; and Wachira Kimani Karani v Bildad Wachira [2016] EKLR were also relied on.

Plaintiff's Written Submissions

9. In their submissions dated 28th November 2023, counsel also identified three issues for determination. First, whether the application should be allowed. Counsel's submission was that the reason advanced by counsel for the 3rd Defendant is not excusable since the advocate was present when the hearing date was taken in court and should not be allowed to shift the blame to the clerk. The Plaintiff's counsel submitted that the application is an abuse of the court process meant to delay the matter and should thus be dismissed. Counsel relied on the case of Kenya Anti-Corruption Commission V George Fred Onyango & 4 Others [2018] eKLR. Counsel referred to an affidavit sworn by Ms Mulongo annexed to the supporting affidavit which he stated shows that the 3rd Defendant's counsel were made aware of the hearing date but chose not to attend court.
10. Counsel further submitted that the counsel had a duty not only to her client but also to the court not to act in an indolent manner, and urged the court to consider this and the case of Tana & Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others [2015] eKLR.
11. Secondly, counsel submitted that the Plaintiff will be prejudiced if the application is allowed and should the same be allowed, then the 3rd Defendant be ordered to cater for the witnesses' travel expenses and logistics.
12. Lastly, it was counsel's argument that for the reason that the 3rd defendant has failed to give sufficient reason, it should bear the costs of the application.
13. Having considered the pleadings, affidavits, submissions and authorities cited by both parties, I find that the issues for determination are - whether the proceedings of 13th April 2023 should be set aside; and whether the court should order the recalling of the Plaintiff's witness for cross-examination.

Analysis and Determination

14. The facts leading to this application are not disputed. The hearing dated was taken in court in the presence of parties, and on the said date, 13th April 2023, the Plaintiff called one witness Constance Wakesho in support of its case. Thereafter the Plaintiff's case was marked as closed. Looking at the proceedings, the only counsel present was Mr. Munga for the 5th and 6th Defendants and Mr. Karega for the Plaintiff. Counsel for the 3rd and 4th Defendants were marked absent. The 3rd Defendant's counsel admits that while she was initially aware of the hearing date, she forgot to diarize the same hence her absence on the hearing date.



15. Section 146 (4) of the *Evidence Act* grants the court powers to recall a witness. It provides as follows:

“(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

16. Similarly, Order 18 Rule 10 of the Civil Procedure Rules grants the court powers to recall any witness who has been examined. It provides thus:

“The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”

17. It is also settled that granting of orders for setting aside ex-parte proceedings is discretionary, it is upon the applicant for such orders to demonstrate sufficient cause for failure to attend court. In the case of *Shah v Mbogo* (1968) E.A. the court held that the power to set aside ex parte orders is to avoid hardship or injustice but not to help a party who deliberately intends to delay or obstruct the course of justice.

18. Further the court in *Victoria Naiyanoi Kiminta v Gladys Kiminta Prinsloo* [2019] eKLR broadly stated the principles which guide the jurisdiction to re-open a case and receive additional evidence. The court explained: -

“...the court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (See *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & others* (2018) eKLR; *Samuel Kiti Lewa v Housing Finance Company of Kenya Limited & another* (2015) eKLR; and *Ladd v Mashall* (1954) 3 All ER 745).”

19. Applying the relevant principles above, to this case, it is clear to me that the application was in the first place, filed inordinately late. I say so because even after being made aware of the proceedings of 13th April 2023 on the same date, the 3rd Defendant’s counsel waited for almost a month to bring the present application. Counsel for the 3rd Defendant has not even made any remote attempt to explain this delay. To this court, the explanation that the clerk and advocate forgot to diarize the hearing date, is not sufficient to warrant this court to exercise its discretion in the 3rd Defendant’s favour on that basis alone.

20. This court however notes the constitutional imperative under Article 159 (2) (d) to do substantive justice without being hindered by technicalities. That may be countered by the reaction that justice may be delayed in breach of the principle under Article 159(2) (b) of the same Constitution if the orders sought herein are granted. To this court it is a matter of weighing against the greater evil that would result out of either decision. This is a land case and land is an emotive subject in this country, it being a critical factor of production. The 3rd defendant who has presented the application is a limited



liability company who depends on the advocates in its employ to represent it adequately in court. Those advocates have come bare, disclosing every nook and cranny of the aspect of dysfunctionality in their office which in itself is a hard thing to acknowledge in an era so exacting of professional respectability and diligence and no person let alone the court can in the least envy their decrepit and humbled position. This court knows not of any contribution by the 3rd defendant to the mess that the ineptitude of the advocate created for it, yet perchance the orders sought are not granted that litigant will have to live with the consequences thereof indefinitely. Of greatest importance however is the requirement to do substantive justice even where that may cost a litigant or a counsel some few more cents than would have been ordinarily expended; when heard in substance despite the subsistence of a technicality that could have defeated the hearing, a litigant will always cathartically discharge the burden that comes with the feeling that they have not been accorded true justice. Often it is only the lawyers and the court who understand the technicality and not the litigant especially if illiteracy of a party features in the case. I am aware there is not any record of a similar situation in the past history of this suit as the applicant finds itself in now and I am ready to accord it and its advocates a margin, but not without a cost to remind them and the 3rd defendant to enhance diligence in future when faced with similar mishaps.

21. Consequently, and in the interests of justice, I allow the application dated 11th May 2023 but only on condition that the 3rd defendant will pay to the plaintiff the sum of Kshs 30,000/= being thrown away costs within 30 days of this order in default of which the orders granted herein will stand automatically vacated and the case will proceed from where the plaintiff closed its case and the other parties will all be called upon to prosecute their respective defences. This matter will be mentioned on 26/6/2024 for ascertainment of compliance and the fixing of a hearing date.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

