



National Housing Corporation v Muchuma (Environmental and Land Originating Summons 556 of 2017) [2024] KEELC 4715 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 556 OF 2017
OA ANGOTE, J
JUNE 13, 2024**

BETWEEN

NATIONAL HOUSING CORPORATION PLAINTIFF

AND

THADDEUS LEBANON MUCHUMA DEFENDANT

RULING

1. Before the Court for determination is the Defendant's/Applicant's Notice of Motion application dated 16th October 2023 seeking the following reliefs;
 - i. Spent.
 - ii. The Court be pleased to stay, vary and/or rescind the orders granted on 10th May 2023 and the Applicant be granted time to be heard on his part in the presence of both parties.
 - iii. That the costs of this case[sic] be provided for.
2. The Motion is supported by an Affidavit sworn by Thaddeus Lebanon Muchuma, the Defendant/Applicant herein of an even date. He deponed that the matter proceeded for hearing in his absence on 10th May 2023; that his absence on the said date was due to the fact that he was un-aware of the hearing date and that he only became aware of the same on the evening of the 10th May, 2023 when he discovered the notice under his door as he arrived back home at 7pm.
3. He deponed that the following day, he went to the Court registry to find out what transpired; that he was informed that the hearing had proceeded and the matter was scheduled for a mention to confirm the filing of final submissions; that he has at all times been following the matter, and been ready and willing to prosecute the same and that his absence on the hearing day was due to reasons beyond his control to wit inefficient service.



4. In response, the Plaintiff/Respondent through its Estate Officer, Anne Saruni, swore a Replying Affidavit on 14th November, 2023. She deponed that they moved the Court *vide* an O.S on the 25th August, 2017 in which they sought vacant possession of the suit property and that when the matter was due to proceed for hearing on 23rd November, 2021, the Defendant informed Court that he was not ready to proceed as he had not been served with her witness statement.
5. She deponed that despite having served him with the witness statement, they nonetheless effected service in open Court and the matter was rescheduled for hearing on 6th December, 2021; that on the aforesaid date, the Defendant was not present in Court; that nonetheless, the Court suo moto deferred the hearing to 9th June, 2022 and that on this date, the matter was adjourned at their behest.
6. According to Ms Saruni, on 24th October, 2022, the matter came up for mention to take a hearing date; that the Court directed that the matter would proceed on 10th May, 2023 and directed that the Defendant be served with the hearing date; that by an Affidavit of Service of an even date, they served the Defendant with the hearing notice and that the process server knocked on the Defendant's door and on getting no response slipped the notice under the door.
7. Ms Saruni urged that the present Motion is an attempt to delay the judgement of the matter; that the Defendant has severally shown disinterest in proceeding with the matter and that the Plaintiff is a statutory body tasked with the critical role of providing government housing and such delays as will be occasioned should the Motion be granted places them at a great disadvantage.
8. The Defendant filed submissions which I have considered. The Plaintiff did not file submissions.
9. Having considered the Motion, the response and submissions, the sole issue that arises for determination is;
 - i. Whether the Defendant/Applicant has met the threshold for the grant of the prayer of setting aside the orders of 10th May, 2023?
10. *Vide* the present Motion, the Applicant is seeking for the orders of this Court to review its orders of 10th May, 2023 and allow him to be granted time to be heard in the presence of all the parties.
11. The record shows that on 10th May, 2023, the matter came up for hearing. The Plaintiff testified and closed its case. The Court thereafter gave directions on the filing of final submissions. The Defendant is asking this Court to review the orders aforesaid.
12. Under Order 51 rule 15 of the *Civil Procedure Rules*, the Court has the discretion to set aside an order made *ex parte*. Similarly, Section 3A of the *Civil Procedure Act* grants this Court jurisdiction to make orders as may be necessary for the ends of justice and to prevent abuse of court process.
13. The jurisdiction of the Court to review and set aside its decisions is wide and unfettered. In *Shah v Mbogo and another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside *ex parte* proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”



14. The Court of Appeal in *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR, discussing the role of the Court when called upon to exercise discretion stated thus;

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”
15. The legal threshold to consider before exercising discretion is whether the Applicant has demonstrated sufficient cause. Black’s Law Dictionary, 9th Edition, defines sufficient cause as follows;

“Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
16. In *Wachira Karani v Bildad Wachira* [2016] eKLR, the Court held;

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
17. The Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal v Veena Bharti* (2011) observed that:

“Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore the word “sufficient” embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man..”
18. The Defendant/Applicant states that his failure to attend Court was occasioned by the fact that he was not served with the hearing notice and that he only became aware of it on the evening of 10th May, 2023 after finding the notice under his door when he came back home in the evening. He asserts that he has always been ready and willing to defend the suit and has great interests therein.
19. On its part, the Plaintiff maintains that it duly served the Defendant with the hearing notice. The deponent adduced into evidence the Affidavit of Service dated 24th October, 2022 indicating that service was undertaken on the same day. Further, the Court has perused the e-filing portal and notes that the Affidavit of Service was filed on 24th October, 2022 lending more credence to the Plaintiff’s assertion that they served the notice on the aforesaid date.
20. The Court has equally considered the record. The present suit was filed by the Plaintiff on 25th August, 2017. It sought inter-alia vacant possession of the suit property. The Defendant duly filed a response on 12th July, 2018. The matter was first scheduled for hearing on 13th December, 2018. Both parties



were present on the day and the Plaintiff's Counsel sought for an adjournment citing failure to procure a witness.

21. The matter was next in Court on 13th June, 2019, both parties were present. Counsel for the Plaintiff sought leave to file a witness statement which was granted. On the next scheduled hearing of 5th December, 2019, Counsel for the Plaintiff was not ready to proceed. The Plaintiff was similarly not ready to proceed on 22nd September, 2020.
22. On 12th May, 2021, when the matter was next in Court, it was moved to 28th June, 2021. The Court noted that there was no evidence that the Defendant had been present in Court when the date was issued. On 28th June, 2021, the Court was unable to reach the matter and adjourned the same. The Defendant was present.
23. The matter was next in Court on 22nd November, 2021 where it did not proceed as the Defendant indicated that he had not been served with the Plaintiffs' witness statement. It was scheduled for 6th December, 2021 when it could not be reached.
24. Considering the entire narrative, it is noted that there have indeed been a few absences by the Defendant including on the date of the hearing. However, the Court is not convinced that the Defendant's actions through-out the proceedings have been outright indolent and/or suggestive of disinterest in the proceedings.
25. As regards prejudice, the Court finds that the injustice likely to be caused to the Defendant by the failure to state his case will be more than the harm that will be suffered by the Plaintiff. Ultimately, the Court holds that the interests of justice will be better served by allowing the Defendant to testify.
26. The Court is guided by the expression of the Court of Appeal in [Richard Ncharpi leiyagu v IEBC & 2 Others](#) CA 18/2013, which held thus;

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”
27. The upshot of the foregoing is that the present Motion is allowed in the following terms;
 - i. The Court does hereby vary the orders granted on 10th May 2023 directing that the matter proceeds for final submissions.
 - ii. The proceedings of 10th May, 2023 are re-opened to allow the Defendant cross-examine the Plaintiff and testify.
 - iii. Costs shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Odongo for Plaintiff

Mr. Lebanon Muchemi for Defendant



Court Assistant: Tracy

