Gachu & another v Ndocha & another (Civil Suit 41 of 2008)
[2024] KEELC 5804 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5804 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT 41 OF 2008

OA ANGOTE, J

JULY 31, 2024

BETWEEN

STEPHEN MUNGAI GACHU .... 1ST PLAINTIFF

MARGARET WANJIKU .... 2ND PLAINTIFF

AND

GEOFFREY NYAKUNDI NDOCHA .... 1ST DEFENDANT

SAVANNAH DEVELOPMENT COMPANY LIMITED .... 2ND DEFENDANT

RULING

1. Before this Court for determination is the 1st Defendant's/Applicant's Notice of Motion Application dated 10th October, 2023 brought pursuant to the provisions of Articles 50(1) and 159(2) of *the Constitution* of Kenya, 2010, Sections 3, 3A and 80 of the *Civil Procedure Act*, and Order 12 Rule 7, Order 17 Rule 3, Order 18 Rule 10 and Order 45 Rule 1 of the Civil Procedure Rules. It seeks the following reliefs;

    i. That the Honourable Court be pleased to review its orders made both on 4th October, 2021 as well as 28th September, 2023 with the very limited purpose of setting aside the proceedings that took place on the 4th October, 2021 and re-opening this case for de novo hearing.

    ii. That as an alternative to (i) above, the Honourable Court be pleased to review its orders made both on 4th October, 2021 as well as on the 28th September, 2023 with the very limited purposes of recalling the witness that testified on the 4th October, 2021 for cross-examination, and thereafter to allow the Applicant herein to tender his evidence in support of the pleadings he had filed as at 4th October, 2021.

    iii. That the costs of and incidental to this Application be provided for.

2. The Motion is based on the grounds on the face thereof and supported by the Affidavit of Geoffrey Nyakundi Ndocha, the 1st Defendant of an even date, who deponed that the suit was instituted vide a Plaint on 12th February, 2008; that it was initially dismissed for want of prosecution and subsequently reinstated and that at some point, one of the initial Plaintiffs died and was substituted with Alex Njoroge Gachu, the subject of this Court's ruling on 28th September, 2023.

3. The 1st Defendant deposed that the matter proceeded for hearing on 4th October, 2021 and neither him nor his Counsel participated; that his failure to participate was occasioned by his belief that the suit against him by the deceased Stephen Mungai Gachu had abated; that his belief aforesaid was based on the advice of his Counsel and that from the Ruling of 28th September, 2023, the Court took a different view on the question of abatement.

4. The 1st Defendant deposed that irrespective of his position on abatement, it behooved his Counsel to attend Court on 4th October, 2021; that it is apparent his failure to attend court was occasioned by Counsel's mistake which should not be visited upon him and that the consequence of the Ruling of 28th September, 2023 together with the proceedings of 4th October, 2021 means the case may proceed for Judgement without him tendering evidence in support of his Defence and Counterclaim.

5. It is the 1st Defendant's case that the suit deals with land which is a sensitive issue and the parties should be allowed to present their respective cases.

6. In response, the 2nd Plaintiff, on her own behalf and on behalf of the 1st Plaintiff swore a Replying Affidavit in which she deponed that she is aware that the 1st Defendant filed a Motion on 22nd October, 2021 seeking to set aside the proceedings of 4th October, 2021 which was dismissed vide the Ruling of 27th April, 2023 and that therefore, the question of setting aside the proceedings of 4th October, 2021 is res judicata and the Court is functus officio on the same.

7. Ms Wanjiru deponed that she is aware that the 1st Defendant filed a Notice to Appeal against the aforesaid Ruling but failed to file the Memorandum and Record of Appeal within the statutory timelines; that the Ruling remains unchallenged and attempts to re-litigate a matter already decided upon constitutes an abuse of Court process and that as advised by Counsel on record, for a Court to review and/or set aside its Orders, there has to be new and important evidence which could not have been obtained after exercise of due diligence, mistake or error apparent on the face of the record and/or reasonable cause, none of which exist herein.

8. According to the deponent, mere belief that the matter had abated, without the Court having issued an order to that effect is not a cogent reason warranting the grant of the orders sought; that nothing barred the 1st Defendant from attending Court and raising the issue of the suit having abated in Court before proceeding with the hearing; that having taken directions, and having set the suit down for hearing, the 1st Defendant's Counsel was estopped from taking a contrary position and advising their client that the suit had abated.

9. Ms Wanjiku urged that the Motion has been brought after inordinate delay, having been brought in October, 2023 wherein the Motion of 22nd October, 2021 was dismissed in April, 2023; that the 1st Defendant has already filed his Defence and Counterclaim together with documents sought to be relied on; that the 1st Defendant has not sought to arrest the Judgement and that the Application is an afterthought and is meant to delay the conclusion of the matter that has been in Court for over 15 years now.

10. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

11. Having considered the Motion, the responses and submissions, the following are the issues that arise for determination;

    i. Whether the Motion is competent?

    ii. Whether the Court should re-open the case for de novo hearing or in the alternative recall the witnesses for cross-examination and allow the 1st Defendant tender his evidence.

12. Vide the present Motion, the 1st Defendant is asking this Court to set aside the proceedings of 4th October, 2021 and 28th September, 2021 limited to the re-opening of the case. The Plaintiffs are opposed to this Motion and contend that the same is not only unmerited but incompetent.

13. The Plaintiffs' objection in this respect is that the Motion is res judicata and the Court is therefore functus officio. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act*, which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

14. In the case of *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015*) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata thus;

> " ...The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time" [emphasis supplied].
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> Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

15. Vide the Motion of 22nd October, 2021, the 1st Defendant sought inter-alia, the setting aside of the proceedings of 4th October, 2021. It was his case that the 1st Plaintiff's suit had abated and that the proceedings of 4th October, 2o21, in which the evidence of Alex Njoroge Gachu and Margaret Wanjiku were taken, constituted a nullity as the two were strangers not being parties to the sale agreements in issue, and without the requisite locus to enforce the same.

16. The Court found that whereas indeed the 1st Plaintiff's suit had abated, the suit could proceed at the instance of the 2nd Plaintiff. The Court also found that while the 2nd Plaintiff was not a party to the contract, she was the 1st Plaintiff's wife and subsequently, there was need to determine whether she fell within the exceptions to the doctrine of privity; that further, the 1st Defendant acquiesced to the joinder of Alex Njoroge and the subsequent revival of the 1st Plaintiff's case. The Court declined to set aside the proceedings.

17. The 1st Defendant is once again before the Court seeking the setting aside of the proceedings of 4th October, 2021. He concedes that neither him nor his Advocate attended the proceedings of 4th October, 2021; and that this absence was informed by Counsel's advice that the suit had abated. He asks that the Court considers this a reasonable excuse for the failure to attend Court and re-open the proceedings.

18. Considering the foregoing narration as against the parameters for res judicata, there is no question as to the similarity of the parties, sameness of title and concurrence of jurisdiction. The question is whether the issue in both Motions is similar and whether the Court conclusively dealt with the same.

19. Whereas both Motions sought to have the proceedings of 4th October, 2021 set aside, the first was on account of the fact that the suit had abated and the proceedings were essentially a nullity. In the present case, the 1st Defendant seeks to have the proceedings set aside and the trial re-opened to enable him participate. He asks that the Court excuses his and his Counsel's non-attendance.

20. In light of the foregoing narration, the Court is not convinced that the issues in the Motion of 22nd October, 2021 are identical to the issue at hand or that vide its' Ruling of 27th April, 2023, it conclusively determined the issue herein. The plea of res judicata and/or functus fails.

21. The 1st Defendant seeks to have this Court set aside the proceedings of 4th October, 2021 and 28th September, 2023 and have the case start de novo and/or have the witnesses recalled for cross-examination.

22. On 4th October, 2021, the matter proceeded for hearing. Neither the 1st Defendant nor his Counsel attended the same despite the date having been given in Court in the presence of his Counsel. The Plaintiffs testified and closed their case and directions were issued on the filing of final submissions.

23. On 28th September, 2023, the Court issued directions with respect to the present Motion. It is unclear how any review of these directions will lead to re-opening of the case. It is likely that the 1st Defendant is making reference to the Ruling of 27th April, 2023.

24. However, vide the Ruling of 27th April, 2023, the Court dealt with the question of whether the suit had abated which it found in the negative. The suit had already been closed as at this time and the Ruling did not interfere with this position. Similarly, the Ruling cannot be reviewed " for the limited purpose of re-opening the case."

25. In its plea to have the Court re-open the case, the 1st Defendant has called upon the Court's different jurisdictions under Orders 12 Rule 7, Order 18 Rule 10 and Order 45 Rule 1 of the Civil Procedure Rules.

26. Order 12 Rule 7, under the head, setting aside judgment or dismissal provides thus;

> " 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."

27. When the matter came up for hearing on 4th October, 2021, the Plaintiffs testified and closed their case. The Court thereafter issued directions to the effect that parties proceed to file their submissions. Judgement has yet to be entered and no dismissal order was issued by the Court. The Court finds that this order is inapplicable.

28. Similarly, Order 18 Rule 10 of the Civil Procedure Rules is inapplicable. The provision grants the Court the power to, on its own motion recall and examine witnesses.

29. The Motion has also been brought pursuant to Sections 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Act provides as follows:

> " 80. Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

30. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows;

> " Rule 1 (1)Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay."

31. There are three (3) limbs which are discernible from part (b) above; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; any other sufficient reason and crucially, the Motion must be made without unreasonable delay.

32. Having considered the Motion, it is apparent that the same is not based on discovery of new and important matters of evidence, or that there is an error apparent on the face of the record. The only other ground open to the 1st Defendant is "any other sufficient cause."

33. Discussing what constitutes sufficient cause in the context of review, the Court of Appeal in Pancras T. Swai vs Kenya Breweries Limited [2014]eKLR stated thus;

> "As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed v. Charan Singh Nand Singh and Another (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993*) this Court with respect, correctly invoked and applied its earlier decision in Wangechi Kimata & Another vs Charan Singh (C.A. No. 80 of 1985) (unreported) wherein this Court held that;
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> > "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

34. The 1st Defendant maintains that his failure to attend Court was occasioned by mistake of Counsel which he contends should not be visited upon him. This finds support in various cases such as Philip Chemwolo & Another vs Augustine Kubede [1982-1988] where it was held as follows:

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

35. However, Courts have also held that it is not always that the Advocate's mistakes cannot be visited on a litigant. Further still, there must be credible evidence of the mistake alleged. This was affirmed by the Supreme Court in Supreme Court Application No E004 of 2023-Karinga Gaciani & 11 Others vs Ndege Kabibi Kimanga where the learned Judges stated thus;

> "Whereas mistakes of an advocate ought not to be visited upon a litigant, there must be cogent and credible evidence...It is not enough for a party to simply blame the advocates on record for all manner of transgressions. Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not.

36. The Court notes that vide the Motion of 22nd October, 2021, the 1st Defendant filed a Motion to set aside the proceedings of 4th October, 2021 on the basis that the proceedings had abated. This lends credence to the 1st Defendant's assertion that his Counsel advised him that the suit had abated.

37. Nonetheless, this belief, whether or not validly held does not in the Court's opinion constitute sufficient reason to fail to attend Court on the aforesaid date, especially considering that when this

date was given on 7th April, 2022, Counsel readily took it and made no mention of his belief that the suit had abated.

38. It is trite that an application for review must be made without unreasonable delay. This position was affirmed by the Court of Appeal in Francis Origo & another vs Jacob Kumali Mungala [2005] eKLR thus;

> "...most importantly, the applicant must make the application for review without unreasonable delay."

39. The question of what constitutes delay is a matter of fact. It is noted that the directions sought to be reviewed were issued on 4th October, 2021. The Motion has been filed about 2 years after the fact. Even if the Court were to consider the timelines as from when the Ruling was delivered, being 27th April, 2023, which is the date when the Court made a negative finding on the question of abatement, and subsequently when the 1st Defendant realized he ought to have attended the proceedings, there has been a 5-months delay. No attempts have been made to explain this delay.

40. It is also noted that the 1st Defendant had filed a Notice of Appeal after the Ruling of 27th April, 2023 and it is unclear what happened thereafter.

41. It cannot be gainsaid that the mandate of this Court is to render substantial justice expeditiously. The fact that this is a 2008 matter that only proceeded for hearing in 2021 and has not been concluded is concerning. While the 1st Defendant has sought to invoke equity, he has himself failed to uphold the same principles.

42. The Court therefore concludes that the prayer for review is unmerited. The Notice of Motion dated 10th October, 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 31ST DAY OF JULY, 2024

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Malanya for 1st Defendant

No appearance for Plaintiff

Court Assistant - Tracy