



**Muinde v Muinde (Environment and Land Appeal 17 of 2019)
[2024] KEELC 5780 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 17 OF 2019**

CA OCHIENG, J

JULY 29, 2024

BETWEEN

KIVUVA MAUNDU MUINDE APPELLANT

AND

MUSAU M MUINDE RESPONDENT

RULING

1. What is before Court for determination is the Respondent/Applicant's Notice of Motion Application dated the 8th April, 2024 brought pursuant to Section 1A, 1B and 3A of the *Civil Procedure Act* as well as Order 42 Rules 20, 21 and 23 including Order 51 Rule 1 of the *Civil Procedure Rules*. He seeks the following Orders:-
 - a. Spent
 - b. That the Court do make an order for stay of execution of the Judgment of this Honourable Court made on 6th November, 2023 and all other subsequent orders pending the hearing and determination of this Application inter partes.
 - c. That the Court do make an order to set aside the ex parte Judgment of 6th November, 2023 and have the Appeal re- admitted for fresh hearing inter partes.
 - d. That the costs of this Application be in the cause or do abide the final Judgment.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Musau M. Muinde. The Respondent confirms that when the Appeal was lodged, he was represented by his advocate who appeared on his behalf, in the initial proceedings. He claims he was not informed of the hearing date of the Appeal as he has been sick for some time thus he was not able to get in touch with his Advocate to get an update of the matter. Further, that as a result, the Appeal proceeded ex parte and Judgment was entered against him. He explains that he learnt of the Judgment in



- February, 2024 and that he was granted 120 days to vacate a portion of land parcel number Machakos/Kiandani/1683, which period has since lapsed. He reiterates that failure to defend the Appeal was due to a communication breakdown between his Advocate and himself which was occasioned by sickness but not lack of interest. He reaffirms that he will suffer irreparable harm if he is evicted from the suit land, where he has resided with his family over a long period.
3. The Appellant/Respondent opposed the instant Application by filing a replying sworn by Kivuva Maundu Muinde where he deposes that the said Application is an abuse of the court process and devoid of merit. He contends that he is the absolute registered proprietor of land parcel number Machakos/Kiandani/1683. He states that the Respondent has not advanced any plausible reasons why he failed to follow up on the Appeal. He insists that cases belong to litigants and not Advocates. Further, that the Respondent should have followed up on his case to the conclusion. He reiterates that no substantive ground has been advanced warranting the setting aside of the Appeal and he should be left to enjoy the fruits of his Judgment. He avers that the Counsel for the Respondent was always served with all the mention and hearing notices but chose not to severally attend court.
 4. The Application was canvassed by way of written submissions. The Respondent/Applicant in his submissions reiterated his averments as per the Supporting Affidavit and insisted that he has advanced sufficient cause for the impugned Judgment to be set aside. He submitted that mistake to Counsel should not be visited upon him. To buttress his averments, he relied on various decisions including: *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No. 1 of 2017; *George Ngugi Njuguna v Jeremiah M. Njebu* Nairobi HCCA No. 558 of 2009; *Trust Bank v Portway Stores [1993] Limited & 4 others*; *Philip Chemwolo & Another v Augustine Kubende* (1982 – 88) KLR 103; and *PMM v JNW* [2020] eKLR.
 5. The Appellant/Respondent in his submissions also reiterated the averments in his replying affidavit and insisted that the Applicant willfully failed to attend court. He argued that cases belong to the litigants and not the advocates. To support his arguments, he relied on the following decisions: *Nelliwa Builders & IVIL Engineers v Kenyatta National Hospital* [2003] eKLR; *Fran Investments Ltd v G4S Security Services Limited* [2015] eKLR and *DGM v EWG* [2021] eKLR.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective affidavits as well as the rivalling submissions, the only issue for determination is whether the Judgment delivered on 6th November, 2023 should be set aside and the Appeal readmitted for hearing.
7. The Respondent/Applicant seeks for the Judgment delivered on 6th November, 2023 to be set aside as he did not defend the Appeal. He contends that he had been sick and lost touch with his Advocate who did not update him, on the Appeal. Further, that as a result, the Appeal proceeded ex parte and Judgment was entered against him. He confirms being aware of the Judgment in February, 2024. Further, that he had been granted 120 days to vacate a portion of land parcel number Machakos/Kiandani/1683, which period has since lapsed. He insists that failure to defend the Appeal was due to a communication breakdown between his Advocate and himself.
8. The Appellant has opposed the instant Application insisting that no plausible reason has been provided to set aside the impugned Judgment. Further, that he is advanced in age and should be allowed to enjoy the fruits of his Judgment as he is the registered owner of the suit land.
9. From perusal of the Court record, I note the Respondent/his Counsel stopped attending Court on 15th May, 2020 when the Court granted an Order of Stay pending Appeal. From annexure 'KMM 2' which are various mention notices, dated the 25th April, 2022, 10th May, 2023, 14th June, 2023, and 28th



July, 2023 respectively, wherein the Respondent's Counsel was served with notices for direction on Appeal, Submissions and Judgment. Further, I note despite services of the said notices, the Respondent including his erstwhile Advocate failed to attend Court. The Respondent despite seeking to blame his erstwhile advocate, has not furnished court with an affidavit from the said Advocate to present reasons as to why, he severally failed to attend court despite service. I note this Court granted a stay of execution for 120 days on 6th November, 2023 and the Respondent claims to have been aware of the Judgment in February 2024 but proceeded to file the instant application two months later.

10. On setting aside Judgment from an Appeal, and re-hearing it, Order 42, Rule 23 of the Civil Procedure Rules stipulates that:-

“Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit.”

11. In the case of *Shah v Mbogo and Another* [1967] EA 116 it was held that:-

“This discretion is intended 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.”

12. Further, in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR Mativo J (as he then was) held that:-

“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...”

13. While in the case of *CMC Holdings Limited v Nzioki* [2004] 1 KLR 173, it was held that:-

“In law, the discretion that a Court of law has, in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error.”

14. It is trite that setting aside of Judgment is discretionary and the court is expected to consider sufficient cause proffered by the Applicant, before proceeding to do so. From my analysis above including the Court record, I opine that the Respondent including his erstwhile Advocate intentionally failed to severally attend Court despite being duly served. In my view the Respondent has failed to provide plausible reasons to demonstrate sufficient cause why together with his Advocate, they severally failed to attend court for mention, hearing and Judgment and now seek to set aside the orders claiming, he will suffer irreparable harm, if he is evicted from the suit land. To my mind, the Respondent was fully aware of the Appeal, which had been filed in 2019 but failed to pursue it. Further, the Respondent/Applicant has not furnished Court with any Medical Report to demonstrate he has been ailing over



a long period of time as claimed, and hence could not follow up on the Appeal. I opine that there is no sufficient cause warranting the setting aside of the impugned Judgment and blaming an erstwhile Counsel cannot be a cure for all ills as cases belong to the litigants and not their Counsels. Insofar as the Court has a discretion to set aside the impugned Judgment, however, at this juncture, I opine that the Respondent's actions only seek to delay the settlement of this matter.

15. In the circumstances, while associating myself with the decisions cited, I find that the Respondent is not entitled to the orders as sought. In the foregoing, I find the Notice of Motion application dated the 8th April, 2024 unmerited and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JULY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Wachira for Appellant

No appearance for Respondent

Court Assistant- Simon/Ashley

