



REPUBLIC OF KENYA



**Omeno v Andajo & another (Environment & Land Case 3 of 2022)
[2024] KEELC 5921 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 3 OF 2022
AY KOROSS, J
SEPTEMBER 19, 2024**

BETWEEN

PETER OKOTH OMENO PLAINTIFF

AND

AMBROSE OCHIDO ANDAJO 1ST DEFENDANT

BENEDICT ODHIAMBO OKECH 2ND DEFENDANT

RULING

Defendant's Case

1. The notice of motion filed by the defendants dated 2/02/2024 which is the subject of determination is brought under several provisions of the law. They sought the following reliefs from this court:
 - a. Spent.
 - b. Spent.
 - c. That the honourable court be pleased to vary and set aside its orders issued on 13/12/2023 dismissing their application dated 9/11/2023 for non-attendance.
 - d. That the application dated 09/11/2023 and the consequential orders therein be reinstated for hearing and final disposal.
 - e. Costs of the motion will be provided.
2. The motion is premised on the grounds set out on its face and on the supporting affidavit of the defendants' counsel on record M/s. Ida. R. Anyango deposed on the instant date.
3. The grounds postulated were inter alia, that the application dated 9/11/2023 had been fixed for hearing on 13/12/2023. Nonetheless, the defendants' counsel unintentionally failed to diarize the matter hence



it was dismissed for want of attendance; failure to attend was not inadvertent or deliberate; the counsel's mistake should not be visited upon the defendants; it is in the interests of justice if the orders sought are granted; the plaintiff will not be prejudiced and the motion had been filed without unreasonable delay.

4. In the affidavit in support, it was the counsel's averment that upon ex parte hearing of the application dated 9/11/2023, the court granted certain orders which they complied with including remitting the sum of Ksh. 30,000/- to the plaintiff. Counsel also rehashed the grounds contained on the face of the motion.
5. A further affidavit was deposed on 6/03/2024 by the 2nd defendant with the authority of the 1st defendant in which he rebutted averments contained in the plaintiff's replying affidavit sworn on 1/03/2024.
6. In it, he reiterated grounds contained in the motion and stated the reasons advanced for non-attendance by their counsel were not flimsy and the motion was not an afterthought. He stated that his counsel had attempted to settle the erstwhile dismissed application with the plaintiff's counsel but to no avail.

Plaintiff's case

7. The plaintiff's affidavit was mentioned earlier in this ruling. In it, the plaintiff averred that the application dated 9/11/2023 had been filed inordinately late- 2 ½ years after the judgment was rendered on 13/05/2021.
8. He confirmed the ex parte orders in respect of the application dated 9/11/2023 were served upon his counsel which duly notified his counsel of the hearing date yet on the hearing date, the defendants' counsel was a no-show. He stated the reasons advanced by the defendants' counsel for non-attendance were not satisfactory.
9. According to him, the defendants were guilty of laches and unreasonable delay as the motion was filed 1 ½ months after the dismissal of the application dated 9/11/2023. He asserted the motion was brought in bad faith, untruthful, misconceived, lacks merit, and a waste of the court's time and urged this court to dismiss it.
10. The plaintiff also filed a supplementary affidavit on 26/04/2024 which availed a Court of Appeal decision of *Adanjo & another v Omeno* (Civil Appeal (Application) E091 of 2023) [2024] KECA 401 (KLR) (26 April 2024) (Ruling) which granted a stay of execution of the judgment of this court in this matter with an exception on the certificate of costs.

Defendants' submissions

11. As directed by the court, the motion was canvassed by written submissions. The defendants' law firm on record Ms. Otieno, Yogo, Ojuro & Co. Advocates filed written submissions dated 6/03/2024.
12. The defendants' counsel rehashed the averments contained in the supporting and further affidavit and stated the court had been moved under the provisions of Order 12 Rule 7 of the *Civil Procedure Rules*. Counsel urged this court to exercise discretion in the defendants' favour and relied on several authorities that she did not tender to this court and thus, this court will not consider them.

Plaintiff's submissions

13. The plaintiff's counsel on record Mr. J.A. Mwamu filed written submissions dated 18/03/2024 which identified 2 issues as arising for determination; whether the court should grant the defendants interim



stay of execution and whether the court should vary and set aside its orders issued on 13/12/2023 dismissing the application dated 9/11/2023 and reinstate the application for hearing.

14. On the 1st issue, Mr. Mwamu submitted the defendants had filed a barrage of applications to avoid payment of the decretal sum and the prayer for a stay of execution should not be granted. Mr. Mwamu submitted that the defendants had been guilty of delay and did not deserve to be granted such a relief and placed reliance on the case of *Francis J. K. Ichatha v Housing Finance Company of Kenya Ltd* [2005] eKLR. However, having read this decision, I have not come across the portion he relied upon to buttress his argument and it appears he misquoted the relevant decision.
15. On the 2nd issue, Mr. Mwamu submitted the application dated 9/11/2023 was made 2 years post-judgment, and therefore, the defendants were guilty of laches and the motion should not be allowed. Mr. Mwamu relied on the Court of Appeal decision of *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR which held thus:-

“63. In dealing with laches, *Halsbury’s Laws of England*, 4th ed. Vol. 16(2) at §910 has this to say;

A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).”

16. Counsel submitted that sufficient explanation had not been proffered as to why the defendants’ counsel did not attend court and urged this court to dismiss the instant motion with costs.

Issues for determination, Analysis, and Determination

17. I have carefully considered the motion, grounds in support, and affidavits either in support or in opposition to the motion together with rival submissions, and the issues arising for determination which shall be dealt with together are: -
 - a. Whether the defendants have met the threshold to warrant the variation or setting aside of the orders issued on 13/12/2023.
 - b. What orders should this court issue including an order as to costs?

18. My invitation to intervene is moved under Order 12 Rule 7 of the *Civil Procedure Rules* which provides as follows: -

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

19. When faced with such an application, the court exercises its discretion, and applicants have to tender sufficient cause. The persuasive decision of *Wachira Karani v Bildad Wachira* [2016] eKLR defined sufficient cause as;

“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.”

20. This was further explicated in the Court of Appeal decision of *Simon Thuo Mwangi v Unga Feeds Limited* [2015] eKLR as thus: -

“On reasons presented, it takes course to set aside or refuse to set aside. The court thus exercises a judicial discretion all the time having in mind what is just and fair in the case. The reason to set aside must therefore be based on good grounds or reasons advanced not on a whim or caprice.”

21. When rendering its decision, this court has to consider the provisions of Sections 1A and 1B of the *Civil Procedure Act* which call on this court to determine disputes in a just manner. By the same thread, the provision requires court business to be expedited. These provisions give life to Article 159 (2)(b) of the *Constitution*. By these provisions, the overriding objective is aimed at giving justice to all the parties who will be affected by the outcome of a case.

22. The principles that guide this court on reinstatement of an application are settled and this was well summarized in the case of *Shah v Mbogo and Another* [1967] EA 116 Limited [2020] eKLR which cited with approval in the case of *John Waweru Njenga & 5 others v Motor Botique* where the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte Court decisions) 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.”

23. The defendants’ counsel has advanced one reason for failure to attend court on the hearing date of 13/12/2023 - failure to diarize the matter. An extract of the diary that was availed to the court confirms that the defendants’ counsel is truthful in her explanation.

24. Although Mr. Mwamu has not questioned the misdiarization, his only concern is that he is perplexed that despite service of a hearing date upon his firm, the defendants’ counsel did not attend court on the hearing date.

25. In my view, Mr. Mwamu’s confoundment on the defendants’ counsel’s conduct confirms she indeed made a mistake in not diarizing the matter. I arrive at this conclusion because how else does one explain the great lengths the defendants’ counsel expended in complying with court orders issued on 16/11/2023 including making payments of Kshs. 30,000/- to the plaintiff’s counsel and even serving him with the dismissed application and hearing date notice yet she failed to attend court on the scheduled hearing date other than a mistake?

26. Mistakes can happen to the very best of us and this was well explicated in the case of *Belinda Murai & others vs Amoi Wainaina*, [1978] LLR 2782 (CALL) Madan, J.A. (as he then was) which was cited in the Court of Appeal decision of *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR thus: -

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of



experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...”

27. Accordingly, I am satisfied that the defendants’ counsel has proffered sufficient reasons for her failure to attend court on 13/12/2023. The instant motion was filed less than two months after the dismissal of the application dated 9/11/2023 and consequently, the defendants are not guilty of delay.
28. Before I issue my disposal orders, it is paramount I mention that this court is bound by the Court of Appeal *decision of Adanjo (Supra)* which declined to issue an order of stay of execution of the certificate of costs. Further, in my honest view, the delay in filing the dismissed application long after the judgment as rendered as raised by Mr. Mwamu should have been reserved for attacking the dismissed application and not the instant application.
29. Utmost and for the reasons stated, I find the motion dated 2/02/2024 merited. Since it is trite law that costs follow the event, I award costs to the plaintiff assessed at Ksh. 10,000/-. I hereby issue the following final disposal orders;
 - a. The order issued on 13/12/2023 dismissing the application dated 9/11/2023 for want of attendance is hereby set aside and the application is hereby reinstated.
 - b. The defendants shall pay the plaintiff costs of Ksh. 10,000/- within 7 days from today and in default, the order reinstating this application shall stand vacated.
 - c. Further directions shall be issued on 28/10/2024.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2024.

HON. A. Y. KOROSS

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Miss. Nyakwana for the plaintiff

Miss. Anyango for the defendant

Court assistant: Ishmael Orwa

