Nakuru Joy Teck Enterprises v Korir (Environment & Land Case 143 of 2019) [2023] KEELC 333 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEELC 333 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 143 OF 2019

FM NJOROGE, J

JANUARY 30, 2023

(FORMERLY HCCC NO 331 OF 2011)

BETWEEN

NAKURU JOY TECK ENTERPRISES ..... PLAINTIFF

AND

RAPHAEL K KORIR ..... DEFENDANT

RULING

1. This is a ruling arising from the defendant's notice of motion application dated April 21, 2022 seeking orders that the judgment entered against the defendant on February 28, 2022 and all consequential orders be set aside. It has been brought under order 9 rule 9 and 2, order 10 rule 11 and order 51 of the *Civil Procedure Rules*, sections 1A, 1B and 3A of the *Civil Procedure Act* and article 159(2) (a) (b) and (d) of the *Constitution*.

2. The application is supported by the grounds on its face and in the affidavit sworn by Raphael K Korir on April 21, 2022. In the affidavit the applicant deposes that he was not notified of the hearing of the suit and hence he never participated in it though he had an advocate on record; that he ought not be condemned to bear the consequences of his advocate's error; that he was not aware that the hearing proceeded *ex parte* until March 17, 2022 when he stumbled on a copy of the judgment; that he is the lawful owner of the suit property; that the plaintiff's claim to the property can only be based on fraud and that this court has discretion to set aside judgment upon such terms as are just. He avers that his defence which is in the court record raises triable issues; that no prejudice would be occasioned to the plaintiff if the orders sought were granted by this court and he undertakes to abide by any conditions set by the court should he be given an opportunity of being heard.

3. The application is opposed by way of a replying affidavit of Benjamin Kisoi Sila on behalf of the respondent. In that affidavit it is deponed that the application is incompetent; that it is calculated at preventing the plaintiff from enjoying the fruits of his judgment; that the application does not disclose

any justifiable cause as to why the defendant failed to participate at the hearing yet the date was taken by consent of the parties; that the defendant has no excuse as he ought to have kept contact with his counsel; that the applicant was only indolent; that by the time of the impugned judgment the applicant had already filed another suit over the same subject matter; that the new filing demonstrates that he was in touch with his advocates; that the defendant waited for over one year to file the instant application instead of attempting to set aside the proceedings and that the court is now *functus officio*.

4. The defendant filed submissions on November 14, 2022 and the plaintiff on December 19, 2022. I have taken consideration of those submissions in the present ruling.

Determination

5. The principal issue for determination in the present application is whether the applicant has demonstrated to the court that there is good ground for the setting aside of the judgment in this case. It is clear that the judgment is a regular one arrived at after hearing of the suit and in the absence of the applicant who knew of the hearing date. It cannot be regarded as an *ex parte* judgment.

6. The main ground relied on by the applicant is that his advocate failed to communicate to him the hearing date or to update him of the progress of the matter and that he should not be allowed to suffer for the mistake of his advocate. He cites *Lucy Bosire v Kehancha Divisional Land Dispute Tribunal & 2 others* for that proposition. He also relies upon the cases of *Wachira Karani v Bildad Wachira* 2016 eKLR and *Richard Ncharpai Leiyangus v IEBC and 2 others* (no full citation given). He states that the orders that the court gave were grave and the suit property is his residence and that he has no other place to go to if evicted. He avers that since he had filed a defence, he would have attended court had he known that the matter was coming up for a hearing. He avers that a key issue in this litigation is whether the plaintiff obtained title by way of fraud which is a triable issue and which can only be determined after hearing the evidence of both parties. He relies further on the case of *Patel v East Africa Cargo Handling Company Services Ltd* 1974 EA 75. He avers that his side of the case ought to be heard by this court.

7. The *Constitution* of Kenya safeguards the right to be heard. Article 50 states, to paraphrase, that any person who has a legal dispute that can be determined by application of the law is entitled to a hearing before an impartial court or other institution. The judicial process as legislated for in Kenya provides that any person involved in a dispute should be accorded the opportunity to be heard if he so desires. In accordance with the rules, the applicant filed a defence in the suit but failed to appear at the hearing. The main concern of this court is now whether the applicant has justified his absence at the hearing and sufficiently so to warrant the grant of an order setting aside judgment. Where a judgment is *ex parte* and the task that an applicant faces is less strenuous than that which faces an applicant against whom a regular judgment has been entered as in this case.

8. The applicant, without giving any further particulars, merely states that he "stumbled on the judgment in this case." I am not inclined to believe that the applicant merely stumbled upon the judgment somewhere along the pathway to his home one evening. The manner in which the applicant came to know of the judgment is crucial to an application for setting aside that judgment as the litigation arena is replete with persons who are dishonest and quite keen to play games with the court process. Failure to state where and how he came across a judgment in his own case is therefore a serious omission and it may be taken to be lack of candour on his part.

9. The second point I wish to address is that he blames his advocate for failure to attend court. It is not in all cases where a litigant laments the conduct of his advocate that the court ought to grant orders of setting aside. Where no diligence has been demonstrated by a litigant in following up on his case

with his legal counsel, and where there is doubt as to the truthfulness of the statements apportioning all the blame for the debacle to the advocate, the court may decline orders of setting aside. The court in the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No 397 of 2002 held as follows:

> "Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant."

10. The court in the case of *Racheal Njango Mwangi (suing as personal representative of the estate of mwangi kabaiku) v Hannah Wanjiru Kiniti & another* [2021] eKLR held as follows:

> "This court is always sceptical of parties that seek to blame their Advocates and fail to produce any evidence that they have taken any steps to make the said advocate liable for their negligence. The court recognizes that a case belongs to a party and it is upon that party to follow up on their case and once a party appoints an advocate, the party then becomes liable for the actions of the said advocates who was acting on their behalf."

11. In this matter the defendant has nothing to prove that his advocate mishandled his case in any manner. I cannot take mere averments from the applicant to be true. There are no correspondences between him and his advocate that can demonstrate what transpired. I have also not been informed that the applicant has taken any action against the said advocate and I decline to accept the excuse that his advocate failed him in his time of need simply because he states so. In any event I have perused the court record and I have found that the plaintiff's case was closed on January 28, 2021 in the presence of Mr Ochang, counsel for the defendant, and the matter was listed for hearing of the defendant's case on the May 31, 2021 when neither the defendant nor his advocate appeared. The matter must have been mentioned earlier in the morning on May 31, 2021 because the record shows that later on at 12.12 pm, the matter was called out again in the absence of the defendant and his counsel and the defendant's case was deemed as closed by the court.

12. When the matter next came up for the directions on September 21, 2021, the defendant was still unrepresented as his erstwhile counsel Mr Ochang, upon becoming aware of the matter explained to the court that the defendant had filed a notice of change of advocates.

13. As I have stated before there are litigants who are intent on playing games with the court process. The present applicant should have clarified in his application whether the utterances of his erstwhile counsel made in court on September 21, 2021 regarding the applicant's filing of a notice of change were true or not. He has not and this is a further gap in his evidence as to what transpired on that day that made the matter come up for hearing in his absence. Besides, if, as the record reflects, he had filed a notice

of change before the case record was transmitted to the Hon Justice Ohungo for the preparation of judgment, then it must be assumed that he had terminated Mr Ochang's services and that he had kept track of the matter at all times. He must be assumed to have deliberately failed to file submissions. He also did not apply for the setting aside of the proceedings after closure of the plaintiff's case or otherwise apply for the reopening of the case to enable him have his defence heard.

14. The court in the case of *Peter Ngigi Kigira v Fredrick Nganga Kigira* [2022] eKLR held as follows:

> " 18. Although the *constitution* guarantees the right to be heard, the Applicant was granted the opportunity to be heard but squandered it by failing to attend court for the hearing not once but twice. The right to be heard does not mean a party will be heard on his own terms. If that were to be the case, then the business of the court would be interrupted at will as and when a party feels like being heard. Once a date has been given and a party fails to appear for the hearing the court is mandated to proceed with the hearing of the parties that are ready to be heard. Courts time is precious and must be utilized prudently."

15. Further, the Court of Appeal in the case of *Martin Kabaya v David Mungania Kiambi* [2015] eKLR held as follows:

> " The need for judicial proceedings to be concluded in a timely fashion is too plain for argument. It is a desideratum of a rational society. A justice that is too long in coming, encumbered by sloth or inattention on the part of those who seek it, is a pain and a bother. An expensive one at that. A justice that comes too late in the day is a tepid drop on perched lips that quenches no thirst. A justice delayed is a justice denied. Litigants, especially those summoned by plaints, petitions, applications or appeals are vexed when those who summoned them hence go to sleep yet the proceedings and processes they engendered remain alive but comatose, a burden to the mind and to the pocket. And they form part of the dead weight the judiciary bears as backlog."

16. In my view, the applicant has failed to demonstrate that he diligently followed up on the case with his erstwhile advocate, or that that advocate failed him in any manner. He has also not demonstrated that he was unaware of the hearing date, or that there was a good reason for not taking action earlier than he did to set aside judgment.

17. All in all, I am unable to find any good ground upon which the judgment in this case can be set aside and I therefore disallow the application dated April 21, 2022. The costs of the application shall be borne by the applicant.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU