



Omollo (Suing on his Own Behalf and on Behalf of the Estate of Valentine Omollo Ongeso -Deceased) v Ondege (Environment & Land Case 151 of 2013) [2023] KEELC 296 (KLR) (27 January 2023) (Ruling)

Neutral citation: [2023] KEELC 296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 151 OF 2013**

**A OMBWAYO, J
JANUARY 27, 2023**

BETWEEN

DAVID OWINO OMOLLO (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE ESTATE OF VALENTINE OMOLLO ONGESO - DECEASED) PLAINTIFF

AND

KENNEDY ONDEGE DEFENDANT

RULING

Brief Facts

1. The Applicant filed the instant application dated June 10, 2022 seeking the following orders:
 1. Spent.
 2. Spent
 3. Spent.
 4. The judgment issued herein on January 30, 2020 together with all consequential orders be set aside.
 5. Leave be and is hereby granted to the applicant to defend himself in this suit in terms of the amended statement of defence.
 6. That cost of this Application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Kennedy Ondege sworn on June 10, 2022.



3. He stated that he engaged the services of Kuke & Company Advocates to defend him in the suit. That the firm entered appearance and filed the necessary defence documents.
4. That the matter was set for hearing but the said advocates did not inform him until when he learnt that judgment had been entered in favour of the Plaintiff and he was served with an eviction order.
5. It was further stated that the said advocates had filed an application on June 3, 2020 seeking orders for stay of execution and to set aside the judgment. That the application was dismissed for being a cover up for failed representation.
6. He stated that had his advocate informed him of her failure to attend court then he would have instructed another counsel or even appear in person. He added that a decree had been extracted and the same is about to be executed.
7. In conclusion, the Applicant urges the court to set aside the ex parte judgment and in the interest of justice allow him defend his suit

Respondent

8. The Respondent herein filed his Replying Affidavit dated July 5, 2022 in opposition to the Applicant's Notice of Motion Application dated June 10, 2022.
9. He deposed that he is the administrator of the estate of his father Valentine Omollo Ongeso (deceased). That the defendant's advocate's was served on several occasions with the hearing dates but they failed to attend court and the matter heard in their absence.
10. He stated that judgment was delivered in their favour on January 30, 2020 and the defendant's advocate served with an entry of judgment on February 21, 2020. He further stated that the defendant ought to have followed up with his advocate on the progress of his case.
11. The respondent stated that the present application is an afterthought and that the defendant was not condemned unheard. That he was simply negligent and should not seek sympathy now that the plaintiff is executing his judgment.
12. He stated that the mistake of a counsel cannot be used to derail a judgment rightfully earned since the defendant has always failed to attend mentions or hearings despite being duly served.
13. The Respondent stated that the application does not meet the threshold to set aside the same as it has been brought in bad faith.

Submissions

14. The Applicant filed his submissions dated July 22, 2022 on July 26, 2022 while the Respondent filed his submissions dated September 14, 2022 on the same day.
15. The Applicant identified three issues for determination, one is the jurisdiction of the court to set aside an ex parte judgment. He relied on Order 10 Rule 11 of the *Civil Procedure Rules* and the case of *Wachira Karani V Bildad Wachira [2016]* and submitted that the court in determining such an application should do so in a just and fair manner. It is submitted that mistakes occur during the course of litigation and parties should not be condemned unheard due to an unavoidable mistake. He submitted that there was no fraud inferred from the defendant's actions hence it would be prudent that the judgment be set aside.



16. The second issue is whether the defendant has shown sufficient cause, he relied on the case of *Wachira Karani V Bildad Wachira (supra)* and submitted that he had intent on defending the suit as demonstrated by the decision to instruct a law firm to represent him and furnishing them with all the required documents. It was submitted that it is only when a judgment based on merits of the case rather than non-appearance is rendered that the applicant would deem justice to have been served. He submitted that the defendant's failure to appear in court was not deliberate hence sufficient cause to warrant setting aside of this judgment.
17. On the final issue whether the defendant/applicant is entitled to the prayers in its application dated June 10, 2022, the applicant relied on Article 50(1) and 159(2) of the *Constitution* as well as Sections 1A, 1B and 3A of the *Civil Procedure Act*. He submitted that to condemn the defendant unheard would amount to a travesty of justice and go against the sacrosanct values of the *Constitution*.
18. In conclusion he submitted that this application should be allowed as prayed and the judgment dated January 30, 2022 together with all consequential orders be set aside.
19. The Respondent gave a brief background of the case and raised two issues for determination, one whether the judgment delivered on July 4, 2018 can be set aside. He submitted that the Applicant was duly served with the hearing notice through his advocate's office and that there is a return of service on record. He further submitted that the applicant is therefore stopped from claiming that the judgment was made ex parte.
20. The respondent submitted that it is the court's duty to do justice for all parties involved and that parties must also not be indolent in the way they prosecute their cases. He relied on the case of *John Mukuba Mburu V Charles Mwenga Mburu [2019] eKLR* and submitted that there was indeed proper service and that it would be an abuse of the court process to allow a person who was duly served but chose not to attend court the reliefs he is seeking. He submitted that the applicant does not meet the threshold for setting aside of the ex parte judgment.
21. On the final issue, whether the defendant/applicant is entitled to the reliefs being sought for in the application dated June 10, 2022, the respondent submitted that the applicant's statement of defence raises no triable issues or particulars of fraud. He further submits that the applicant has not offered any reasonable explanation for the delay in making the instant application.
22. The respondents submitted that the application was filed on June 10, 2022 more than two years with no reasonable explanation for the delay tendered. He submitted that that the judgment was regular and therefore not entitled to the reliefs sought. He relied on the case of *Bl Mech Engineers Ltd V James Kahoro Mwangi (2001) eKLR* and *Grace Cherotich Kemboi V Simon Kipkoech Ngotwa & Another [2020] eKLR*. He submitted that litigation must come to an end keeping in mind that the present case has been in court since 2013.
23. In conclusion, the respondent submitted that the application should be dismissed with costs to the respondent.

Analysis and Determination

24. This court has looked into the application and the grounds of opposition filed by the parties and is of the view that the main issue for determination is whether this court should stay the proceedings in KISUMU CMELC NO E012 OF 2021 pending the hearing and determination of this Appeal.



25. In the case of *Global Tours & Travels Limited; Nairobi HC Winding up Cause No 43 of 2000* Ringera J, (as he then was) stated as follows:

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously'.

26. In the case of *Kenya Wildlife Vs James Mutembei (2019) eKLR* held as follows:

'The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.'

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.'

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case'.

27. Further the Court of Appeal in the case of *David Morton Silverstein V Atsango Chesoni (2002) eKLR* the court held as follows:

'The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay'.

28. It is this court's view that the power to grant stay of proceedings is a discretionary one exercisable by the court upon consideration of the facts and circumstances of each case. The same should be entertained only in the most deserving cases as it impacts the right to expeditious trial.
29. The Appellants contend that they have an arguable appeal with chances of success and that if the proceedings in KISUMU CMELC NO 12 OF 2012 are not stayed, then the pending appeal will be rendered a nullity.
30. The Respondent on the other hand contends that the application is incompetent for not meeting the threshold for grant of the orders sought. Further, that the Appellants filed an appeal from a ruling on a preliminary objection without leave of court.



31. This court notes that from the orders being sought, the Appellant desires that this court exercises its appellant power to the Ruling while at the same time, staying the proceedings to allow time for appeal.
32. It is this court's view that the Appellants have not established the prejudice it would face if it was not to grant stay of proceedings in the lower court. Furthermore, this court has perused the memorandum of appeal and is of the view that the grounds as raised by the Appellant can either succeed or not.
33. This court therefore finds that the stay orders sought are not merited. Thus, the prayer for the stay of proceedings is not allowed. In the upshot, the application dated April 8, 2022 is hereby dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 27TH DAY OF JANUARY 2023.

A O OMBWAYO

JUDGE

