Kiome v Kihuga (Environment & Land Case 291 of 2015)
[2023] KEELC 144 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 144 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 291 OF 2015

OA ANGOTE, J

JANUARY 19, 2023

BETWEEN

JAMES NDIRANGU KIOME ..... PLAINTIFF

AND

MOSES MWANGI KIHUGA ..... DEFENDANT

RULING

1. Before this Court for determination is the Defendant's/Applicant's Notice of Motion Application dated March 28, 2022 brought pursuant to the provisions of Sections 1A, 1B & 3A of *Civil Procedure Act* and Article 159 of the *Constitution* of Kenya, 2010 seeking the following order:

    i. That this Honourable Court be pleased to set aside the proceedings thus far and grant leave to the Applicant/Defendant to appropriately defend the suit.

    ii. That costs of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of RN Njiraini, an Advocate with conduct of the matter on behalf of the Defendant/Applicant, who deponed that on March 21, 2022, the matter proceeded for hearing in his absence and was subsequently closed with the Court directing the parties to file final submissions.

3. The Defendant's counsel deponed that as a consequence, the Defendant's two witnesses were unable to tender their evidence; that his failure to attend court was occasioned by the fact that he, as counsel was uninstructed and unaware of the filing date and that the Defendant's previous counsel one Mr Gachie being aware that the Defendant wanted to appoint another advocate had called the Defendant and informed him of the hearing date pursuant to the hearing notice dated the October 7, 2021.

4. According to counsel, he was the Defendant's choice to replace Mr Gachie advocate having been instructed earlier but his clerk was still searching for the file which he only managed to get and peruse

on March 23, 2022 after the hearing had concluded; that on perusing the file, he discovered that the Court had declined to adjourn the matter and that the same proceeded in the absence of the Defendant and his counsel.

5. It was deponed that the Defendant's failure to give evidence infringed on his rights to a merited hearing and a determination of the matter without his evidence will occasion him grave injustice; that the mistakes of counsel should not be visited on the Defendant; that the Court should grant the application as prayed so as to ensure no injustice is occasioned on the Defendant especially given that it was not his fault as Counsel had been instructed and that the court file could not be traced as it had a hearing date.

6. In response to the application, the Plaintiff/Respondent filed a Replying Affidavit in which he deponed that the Defendant has not demonstrated sufficient cause for setting aside of the proceedings, neither has he demonstrated sufficient cause for the grant of leave to defend the suit after squandering his chances and that when the matter was scheduled for hearing on June 17, 2019, the Defendant was not ready to proceed on account of sickness.

7. It was deponed by the Plaintiff that the matter was adjourned and fixed for hearing on February 26, 2020; that on the aforesaid date, the Defendant was still not ready to proceed leading to the matter being adjourned to March 17, 2020; that when the matter came up on the February 1, 2021, the Defendant was absent and the matter was fixed for hearing on April 20, 2021; that the Defendant was absent on April 20, 2021 and the next date set for the matter was on the September 29, 2021; that the matter was thereafter fixed for March 21, 2022 on which date the Defendant was informed of the hearing date vide the hearing notice of October 7, 2021 and that on the said date, the matter proceeded in the absence of the Defendant.

8. According to the Plaintiff, it is apparent that the orders sought by the Defendant are meant to assist him in his delay and obstruction of justice contrary to good practice and timely administration of justice. Counsel relied on the cases of *Shah vs Mbogo & Another* [1965] EALR, *Kenya Canners Limited vs Titus Muiruri Doge*, CA No 119 of 1996, eKLR and *Republic vs Shinyalu Land Disputes Tribunal & Another* [2005] eKLR.

9. It was submitted that the Defendant's un-seriousness should not be tolerated; that the principles of equity require that a person who seeks equitable remedies must be honest and truthful which the Defendant has not been and that the Defendant is guilty of material non-disclosure and falsehoods and that contrary to his assertions, he was not searching for the file and neither did the Court decline an adjournment. He was simply absent.

10. The Plaintiff finally deponed that the Court records shows that the Defendant has never had any interest in having the matter determined; that the Court should not exercise discretion in his favour and that in the event it is inclined to do so, the Defendant should be ordered to pay throw away costs of Kshs 60,000. The Plaintiff's and the Defendant's advocates filed submissions which I have considered.

Analysis & Determination

11. Having canvassed the application, the sole issue that arises for determination is;

i. Whether the proceedings herein should be set aside and the Defendant granted leave to defend the suit?

12. The Defendant/Applicant herein is seeking to have the *ex-parte* proceedings set aside and the Defence case re-opened to enable him appropriately defend the suit. At the time of filing the present application,

the matter had proceeded for hearing and the Plaintiff had closed his case. The court thereafter issued directions on filing of final submissions.

13. It is trite that the power to re-open a case as sought by the Defendant is a discretionary power granted to this Court pursuant to its inherent jurisdiction as set out under Section 3A of the *Civil Procedure Act*.

14. The Courts have stated that where a court is called upon to exercise its discretion, it must do so judiciously and on sound principles. This was expressed by the Court of Appeal in the case of *Patriotic Guards Limited vs James Kipchirchir Sambu* [2018] eKLR ;

> " ...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit."

15. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated sufficient cause warranting the setting aside of the *ex-parte* decision or proceedings. What constitutes sufficient cause was discussed in the case of *BML vs WM* [2020] eKLR, where the Court of Appeal surmised thus;

> " What amounts to sufficient cause depends on the circumstances of each case and the court is called upon to exercise its discretion depending on the said circumstances. Musinga, JA in the case of *The Hon. Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No 133 of 2011 (ur) defined sufficient cause to be: "Sufficient cause" or "good cause" in law means: ....the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See Black's Law Dictionary, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."
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> Similarly, the Supreme Court of India in the case of *Parimal v Veena* [2011] 3 SCC 545 observed that:
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> > "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

16. The Court will be so guided. By way of brief background, the Plaintiff instituted this suit on March 18, 2015 seeking inter-alia, injunctive orders restraining the Defendant from illegally constructing on

Plot no 2/9 at Kayole-Soweto (suit property), directing him to demolish any structures constructed on the suit property and restraining him from any interference with the property.

17. The Defendant entered appearance and filed a Defence. On April 9, 2018, the parties confirmed compliance with pre-trial directions and the Court directed that the matter would proceed for hearing on November 5, 2018. On November 5, 2018, an adjournment was sought at the behest of Counsel for the Defendant on account of bereavement, which was granted. The matter was rescheduled to June 17, 2019 for hearing.

18. On June 17, 2019, an adjournment was sought for the Defendant with Counsel holding brief indicating that the Defendant's counsel was unable to travel from Nyeri and his witnesses were equally un-available. The Court granted the adjournment purely on the basis that the matter would not have been attended to as two hearings were already proceeding. The matter was then re-scheduled for February 26, 2020.

19. On February 26, 2020, the Defendant was present in person and sought an adjournment on the grounds that he wished to change his advocate. The Court granted the adjournment and condemned the Defendant to pay throw away costs of Kshs 10,000/= before the next hearing date.

20. On February 1, 2021, the matter proceeded for hearing in the absence of the Defendant whom the Court found to have been properly served. PW1 & PW2 testified and the Court granted a further hearing date of April 20, 2021.None of the parties appeared on April 20, 2021 and the Court set the matter for mention on September 29, 2021. On this date, Counsel for the Plaintiff was present and the Court directed that the matter would proceed for hearing on March 21, 2022. The Court ordered that the Plaintiff issue a hearing notice to the Defendant.

21. On March 21, 2022, only the Plaintiff and his counsel were present. They provided proof of service of the hearing notice to the Defendant. Being satisfied with the mode of service of the hearing notice on the Defendant, the matter proceeded pursuant to the provisions of Order 12 Rule 2 of the *Civil Procedure Rules* which provides that if on the day a matter is scheduled for hearing only the Plaintiff attends, the court, if satisfied that the hearing notice was duly served, may proceed *ex-parte*. PW3 testified on the day and the Plaintiff closed his case. The Court thereafter gave directions on the filing of final submissions.

22. According to the Defendant's advocate, his failure to attend Court was occasioned by the fact that his clerk was attempting to trace the file to file a Notice of Change of Advocates and that by the time he accessed the file, the matter had already proceeded for hearing. He further states that a perusal of the file showed that the Court had declined to grant an adjournment.

23. To begin with, the record is clear that neither counsel for the Defendant nor the Defendant were present when this matter proceeded for hearing on the March 21, 2022. The issue of the Court refusing to grant an adjournment does not arise.

24. Counsel contends that he was unable to access the court file. However, he has not stated the period within which he was looking for the file, especially in light of his admission that he had been earlier on instructed to take over conduct of the matter from the previous counsel. The Defendant's counsel has further not adduced any evidence showing his efforts in this regard. Nonetheless, with the advent of the e-filing system, parties can and indeed do file documents, at will, notwithstanding the position of the physical Court file.

25. Further, at paragraph 3 of his Supporting Affidavit, Counsel admits that the Defendant was aware of the hearing date having been advised of the same by previous counsel. This brings to the fore a number

of questions. How can counsel claim not to have been aware of the date when his client was aware of the same?

26. Even if the court was to take the position that the Defendant did not inform him of the date, why didn't the Defendant attend Court in person? This is critical because it is a cardinal principle that a case belongs not to an Advocate but the client. In the case of *Habo Agencies Limited vs Wilfred Odhiambo Musingo* [2015] eKLR, the Court of Appeal stated;

> "Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel."

27. This Court is not convinced by the explanation rendered by counsel. Looking at the chronology of the events as set out hereinabove, it is clear that the non-attendance of court by the Defendant and his counsel wherever the suit came up for hearing has been the norm rather than the exception. Moreover, while the Defendant's focus appears to be on the proceedings of March 21, 2022, it is noted that the matter first proceeded in his absence on February 1, 2021 where PW1 & PW2 testified.

28. Counsel asserts that parties have a right to be heard on merit. The Court indeed agrees with this position. However, litigants are equally expected to be vigilant in pursuing and ensuring that their cases are prosecuted without undue delay and with all fairness to the other party. As expressed by the court in *Ecobank Ghana Limited vs Triton Petroleum Company Limited (in receivership) & Others* Civil Case No 24 of 2009 (UR);

> "Ultimately, it may as well be customary that courts should in the interest of justice lean towards according parties to litigation the opportunity to ventilate their cases before eventual determination.... However, in the face of a Constitution that expressly advocates for justice to all and which must be dispensed without delay, and in the face of overriding principles alluded to above, the time for change of the customary mind set is here. Litigants should therefore stand guided that they must embrace themselves to up the gear, for speed and vigilance will now be the trend. The wheels of justice will no longer be turning on the thrust of a team engine."

29. In the case of *Mawji vs Lalji & Others* [Civil Application No. 236 of 1992] Kwach, JA cited with approval the dicta of Lord Griffins in the case of *Kettleman vs Hansel Properties Ltd* [1998] 1ALL ER38 at P 62, where the learned Lord of Appeal said:-

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards negligent conduct of litigation as was perhaps possible in a more leisured age."

30. Counsel pleads that the courts should not punish litigants for their mistakes. When it is a genuine mistake or error on the part of the Advocate, the court may indeed overlook the same in the interest of justice. However, in the instant matter, the Court is not persuaded that there was any genuine mistake and/or error on the part of the Defendant's previous counsel.

31. Lack of diligence and/or casualness or sloppiness by a party cannot be equated to genuine mistake or error. In such a case, the overriding objective principle under Sections 1A and 1B of the *Civil Procedure Act* cannot come to the aid of the party.

32. This is so because the fundamental tenets of the overriding objectives are that justice should be delivered in an efficient and expeditious manner. The Defendant's conduct herein clearly runs afoul these tenets.

33. In the premises, and for the above reasons, the Court finds no merit in the Defendant's application dated March 28, 2022. The application is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF JANUARY, 2023.

O. A. Angote

Judge

In the presence of;

Mr. Jaoko for Plaintiff

Ms. Wambui for Jiraini for Defendant/Applicant

Court Assistant - June