



**Koskei v Issac & another (Environment & Land Case 25 of 2016)
[2023] KEELC 16101 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16101 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 25 OF 2016
MC OUNDO, J
FEBRUARY 23, 2023**

BETWEEN

REUBEN KIPTONUI KOSKEI PLAINTIFF

AND

EDWIN YEGO ALIAS ISSAC 1ST DEFENDANT

CHESONGONY RUTO 2ND DEFENDANT

RULING

1. Pursuant to a Judgment that was delivered on 5th February 2020 in which it had been declared that the Plaintiff was the rightful proprietor of the suit parcel of land No. Kericho/Kapsaos/971 whereby the Defendants and their legal representatives, assigns or anyone claiming on their behalf had been directed to vacate the parcel of land within 30 days failing which they would be forcefully evicted therefrom, there has now been filed two Applications for determination.
2. The first Application dated the 16th September 2020 is filed by the 1st Defendant herein and brought under the provisions of Order 9 Rule 9(9), Order 22 Rule 22 and 25, Order 42 Rule 6, Order 51 Rule 1 and 4 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* and all enabling provisions of the law wherein the 1st Defendant seeks for the stay of execution and the setting aside debito justiae the Judgment and all its consequential orders.
3. The said Application is supported by both the grounds thereto and a Supporting Affidavit sworn on 16th September 2019(sic) by Edwin Yego the 1st Defendant/Applicant herein.
4. In opposition to the Application, the Plaintiff via his replying affidavit sworn on 22nd September 2020 averred that the 1st Defendant Applicant herein had been granted an opportunity to cross-examine him, testify and call witnesses but had failed to attend court on the hearing date which had been taken by consent. That by asking the court to grant him an opportunity to be heard would be seeking that the court sits on an Appeal on its own decision which jurisdiction the court did not have. That seeking



to stay the execution of the Judgment was only intended to delay his enjoyment of the fruits of the Judgment. He sought for the Application to be dismissed with costs.

5. The second Application is dated the 4th February 2022 filed by the Plaintiff and pursuant to the provisions of Order 51 Rule 1&3, Order 22 Rule 29 of the Civil Procedure Rules and Section 3A of the *Civil Procedure Act* and all enabling provisions of the law where the Applicant seeks for orders to issue to the Officer Commanding Station at Kericho to render assistance to the Plaintiff/Applicant to ensure compliance of the eviction against the Defendant/Respondent to vacate land parcel No. Kericho/Kapsaos/971 in accordance to the court's decree dated 4th August 2020.
6. The said Application is supported by both the grounds thereto and a Supporting Affidavit sworn on 4th February 2022 by Reuben Kiptonui Koske the Plaintiff/Applicant herein.
7. There was no response in opposition to the Application.
8. On the 24th March 2022, the court directed that both Applications be disposed of by way of written submissions. Whereas the Plaintiff filed their respective submissions, there were no submissions filed by the 1st Defendant despite there having been service.
9. For ease of reference and due to the fact that there are two different Applications by the parties, they shall retain their references as per the Plaintiff.

Plaintiff's submissions.

10. The Plaintiff's submission was that pursuant to the delivery of the Judgment on the 5th January 2020, wherein the court had ordered the Defendants, their legal representative or assigns or anyone claiming on their behalf to vacate land parcel No. kericho/Kapsaos/971 within 30 days failing to which they shall be forcefully evicted therefrom upon Application, the 30 days had since elapsed and the Plaintiff had now filed his Application seeking an order directing the Officer Commanding Police Station Kericho to render assistance to him to ensure compliance of an eviction order against the 1st Defendant to vacate the suit land.
11. That instead, the 1st Defendant vide an Application dated 16th September 2020 moved the court and sought orders for stay of execution of the Judgment and for an order setting aside the said Judgment and all consequential orders.
12. That although the 1st Defendant had been ordered to vacate from the subject parcel of land within 30 days from 5th January 2020, he had willfully disobeyed to comply with the said orders without any plausible reasons.
13. The Plaintiff framed his issues for determination as follows;
 - i. Whether the Defendant is entitled to the orders of stay of execution?
 - ii. Whether the court should set aside the Judgment dated 5th January 2020?
 - iii. Whether the court should order the Officer Commanding Police Station Kericho to render assistance in eviction of the Defendant?
14. On the first issue for determination, it was the Plaintiff's submission while relying on the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules that an order of Stay of execution is always at the discretion of the court, which discretion should be exercised judiciously and not capriciously
15. Further reliance was placed on the decision in the case of ANM vs. VN [2021] eKLR to submit that the general principle of law is that the successful litigant in possession of a valid court Judgment is



entitled to the fruits of Judgment unless there exists exceptional circumstances to deny him or her that right. That the 1st Defendant herein had not highlighted the exceptional circumstances and hence he was not deserving of a stay of execution.

16. That as was also held in the case of Mohammed Salim T/A Choice Butchery vs. Nasserpuria Memon Jamat 2013 eKLR, where the court upheld the decision of M/S Porttreitz Maternity vs. James Karanga Kabia Civil Appeal No. 63 of 1997, there ought to be a just cause for depriving the Plaintiff off the right to enjoy the fruits of the Judgment delivered in his favour. That the 1st Defendant had not given any unequivocal reason or any just cause why the Plaintiff should not be allowed to enjoy the fruits of his Judgment.
17. The Plaintiff further relied on the holding in the case of Kenya Shell Ltd vs. Kibiru & Another, Nairobi Civil Appeal No. 97 of 1986 to submit to that the 1st Defendant had not proved nor provided evidence in support of the claim that he would suffer substantial loss if stay of execution was not granted and therefore he was not be serving of the orders of stay. That substantial loss did not mean the normal and ordinary loss which every Judgment debtor is subjected to when he loses a case, but was in addition to the ordinary loss, something which the Defendant had not established and which would warrant the dismissal of his Application.
18. The Plaintiff also submitted that the Defendant had not furnished any security for the due performance of the orders as may ultimately be binding on him and neither had he indicated his willingness to offer security and to abide by orders, conditions and or directions that the Court may impose. Moreover, he was proven to be a contemnor who had disregarded the court order to vacate from the subject land within 30 days after delivery of the Judgment. That he was therefore underserving of protection from the court.
19. The Plaintiff's further contention was that the Judgment that the Defendant sought to stay had been delivered on the 5th January 2020 yet the present Application for stay was filed on the 16th September 2020, almost 9 months after the Judgment was delivered. No cogent explanation had been given for the delay. That the Application herein had not been filed timeously.
20. On the second issue as to whether the court should set aside the Judgment delivered on 5th January 2020, it was the Plaintiff's submission that courts are guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. Reliance was also placed on the provisions in the Civil Procedure Rules Order 12 Rule 2 to submit that the Defendant had been duly served and was fully cognizant that the matter was proceeding but he had failed to attend the hearing on the appointed day to testify and present witnesses. That the recourse to such a situation was set out under Order 12 Rule 7 of the Civil Procedure Rules, but in this case the Defendant failed to offer sufficient justifications for the court to utilize its discretion in setting aside its Judgment, as was held in the case of Patel vs. EA Cargo Handling Services Ltd (1974) EA 75.
21. That in setting aside a Judgment, the court is called upon to examine whether the Judgment was entered regularly or irregularly, and whether, in the case of a regularly entered Judgment, there were justifiable reasons for the Court to exercise its jurisdiction. Reliance was placed on the decision by the Court of Appeal in James Kanyita Nderitu & Another 2016 eKLR. That in the instant case, the Judgment of 5th January 2020 was a regular one as summons had been properly served, the Defendant indeed entered appearance and filed his defence, but deliberately decided not to participate in the trial fully.



22. That having so established that the Judgment herein was a regular one, the next consideration would be whether there were justifiable reasons for the court to exercise its jurisdiction in favour of the Defendant which would include;

i. Whether the Defendant has good reason for his failure to appear and whether the lapse of time in filing his Application was excusable.

23. On this issue, the Plaintiff submitted that the 1st Defendant had always been aware of the matter pending in court wherein he had always attended court, but he deliberately decided not to attend the hearing and subsequently decided not to file his submissions. That he had not adduced any plausible reasons why he never appeared for the hearing nor filed submissions. That the setting aside of Judgments was permitted only where there were valid reasons, but was not designed to aide parties who were after obstructing and delaying the cause of justice. That the impugned Judgment was delivered on 5th January 2020 whereas the current Application was brought almost nine months later with no explanation as to the delay.

ii. The second issue would be whether the defense raises triable issues.

24. The Plaintiff on this limb submitted that the defense was a mere denial and a sham calculated to cause undue delay to him from enjoying the fruits of successful litigation.

25. As to whether the orders were warranted in the light of the prejudice to be occasioned to the Respondent considering the interests of justice on the whole; the Plaintiff submitted that the Court of Appeal in the case of James Kanyita Nderitu (supra) had held that the respective prejudice each party was likely to suffer, and whether on the whole it was in the interest of justice to set aside the default Judgment, should be a consideration when called upon to set aside a regular Judgment.

26. That in the instant case, were the 1st Defendant's Application granted, the Plaintiff stood to suffer delay in enjoying the benefits of a regularly entered Judgment. That he would be denied the right to use and occupy his land which was a clear infringement of his rights as protected under Article 40 of *the Constitution*.

27. That the court's discretion to set aside its ruling as was held in the case Shah vs. Mbogo & Another (1967) EA 1116, was not restricted but ought to be exercised so as not to cause injustice to the opposite party. That the lack to defend the matter was not reason enough to set aside Judgment.

28. On their third issue of determination as to whether the court should order the Officer Commanding Police Station Kericho to render assistance in the eviction of the Defendant, the Plaintiff submitted that as per the Judgment of the court, it had been clear that the Defendant was to vacate from the subject parcel of land within 30 days wherein he had failed to do so. The Plaintiff having been successful in the case needs to be allowed to enjoy the fruits of his Judgment and the OCS Kericho should oversee the eviction orders as was held in Pamela Onyango Osano v Geoffrey Momanyi [2021] eKLR.

29. That an order that had been issued by a court of competent jurisdiction was to be obeyed unless and otherwise it has been discharged. In this case, the said order for eviction had not been discharged and therefore the Defendant had an obligation to obey it. That a person who had disobeyed valid court orders with impunity could not again seek protection of the same court. To uphold the dignity of the court the OCS Kericho ought to be directed to render assistance in evicting the Defendant.



Determination.

30. I have considered, both the Applications herein the supporting affidavits as well as the Plaintiff's written submissions. I have also considered the fact that the Plaintiff herein did not file his submissions despite there having been directions to do so.
31. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an Applicant who fails to file his submissions on an Application as ordered by the court is deemed as a party who has failed to prosecute his Application and therefor that Application is liable for dismissal. The filing of submissions having been ordered, and this court having extended time for compliance without compliance, the failure by the Plaintiff to exercise the leave granted to him to file written submissions clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness on his part in the prosecution of the matter. I shall therefore proceed to determine the two unopposed Applications on their merits.
32. It is not lost that the ex-parte Judgment in the current matter was delivered on the 5th February 2020 wherein it had been declared that the Plaintiff was the rightful proprietor of the suit parcel of land No. Kericho/Kapsaos/971, and the Defendant, his legal representatives, assigns or anyone claiming on their behalf had been directed to vacate the parcel of land within 30 days of delivery of Judgment failing which they would be forcefully evicted therefrom.
33. Vide an Application dated the 16th September 2020, the Defendant moved the court seeking orders for stay of execution of the Judgment and a further order seeking to set aside the said Judgment and all its consequential orders. Subsequently the Plaintiff in his Application dated the 4th February 2022, sought for eviction orders against the Defendants, the 30 days having elapsed.
34. I find the issues for determination arising therein as:
 - i. Whether the ex-parte Judgment should be set aside.
 - ii. Whether there should be stay of execution.
 - iii. Whether eviction orders should issue.
 - iv. Who should bear the costs of the Application
35. Setting aside a Judgment is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) the 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered.”



36. The Court of Appeal for Eastern Africa in the case of Mbogo vs. Shah [1968] EA 93, held that for the court to set aside a Judgment, the court must be satisfied about one of the two things namely:-
- a. either that the Defendant was not properly served with summons; or
 - b. that the Defendant failed to appear in court at the hearing due to sufficient cause.
37. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court on 11th May 2016. It is clear that the 1st Defendant herein prosecuted the matter in person and that on the 4th April 2019, a hearing date was taken by consent for the 11th June 2019 on which day the 1st Defendant was absent wherein Counsel for the Plaintiff had informed the court that the 2nd Defendant, who was the 1st Defendant's grandmother had passed away.
38. The matter proceeded irrespective wherein the Plaintiff closed his case and parties were directed to file their submissions and a mention date to confirm compliance was slated for the 4th July 2019. There was no appearance for the 1st Defendant wherein a date for Judgment was fixed for the 4th October 2019. Judgment had however been delivered on the 5th February 2020.
39. I find that the law applicable for setting aside Judgment or dismissal is Order 10 Rule 11 of the Civil Procedure Rules which stipulates that;
- “Where Judgment has been entered under this Order the court may set aside or vary such Judgment and any consequential decree or order upon such terms as are just”.
40. It is trite law that the decision whether or not to set aside an ex-parte Judgment is discretionary and that the said discretion is intended to be exercised to avoid injustice and 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, as was held by the Court of Appeal held in the case of Shah vs Mbogo & Another [1967] EA 116.
41. In his Application, the Defendant has not explained why he decided not to present himself before court to argue his case on defence. I find that the turn of events was not explained and therefore there was no sufficient cause to warrant the exercise of the court's discretion.
42. The Supreme Court of India in the case of Parimal vs. Veena 2011 3 SCC 545 attempted to describe what sufficient cause constituted when it observed that:-
- “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”
43. The test to be applied is whether the Defendant honestly and sincerely intended to be present when the suit came up for hearing. 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, the Defendant did not demonstrate sufficient cause why he never defended his defence despite the indulgence by the court and there having been sufficient notice.

44. I have gone further and considered the Defendants' joint defence in which they had denied the contents contained in the Plaint stating that the whole transaction amounted to fraud since nobody was aware of the transaction and nobody had participated in the same. The Defendants had sought to raise a Preliminary Objection on the points of law in view of having the suit struck out. The Defendant in his Application, thus averred that his defence had raised triable issues.
45. The Court of Appeal in the case of Richard Nchapi Leiyagu v Independent Electoral & Boundaries Commission & 2 others [2014] eKLR expressed itself as follows:-

“ we agree with the noble principles which goes further to establish that the court’s discretion to set aside ex parte Judgment or Order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice.”
46. In the present suit, I find that the Defendant deliberately failed to prosecute his case and thereby refusing to avail himself for the court process. The Application is an afterthought, a waste of judicial time and an abuse of the court process intended to vex the Respondent/Plaintiff and put him to expense. The Respondent/Plaintiff is being gravely prejudiced by the Applicant/ Defendant and therefor there is need for the court to balance the rights of both parties and to exercise its discretion in dispensing justice. The Defendant had been given several opportunities to be heard but decided not to be present. Such a party only has themselves to blame when the Court in the exercise of its discretion decides to, as was in the instant case, proceed their absence notwithstanding and thereafter render its Judgment.
47. On the issue as to whether there should be stay of execution, having found that the Defendant was not deserving the exercise of the Court’s discretion to set aside the ex-parte Judgment delivered on 5th February 2020 and all the consequential orders, it therefore followed that he does not deserve an order for stay of execution.
48. The Defendant’s Application dated the 16th September 2020 is herein dismissed.
49. Turning to the second Application dated the 4th February 2022 wherein the Plaintiff seeks that as part of the enforcement of the Judgment of the court of 5th February 2020, and the ensuing decree, that there be eviction orders against the Defendants and their legal representatives, assigns or anyone claiming on their behalf who had been directed to vacate the parcel of land within 30 days upon delivery of Judgment and who had failed to vacate from the suit land.
50. The Plaintiff sought that the police officer commanding station at Kericho to render assistance to him to ensure compliance of the eviction against the Defendant/Respondent to vacate land parcel No. Kericho/Kapsaos/971 in accordance to the court’s decree dated 4th August 2020.
51. The issue for determination herein is whether the Application for eviction is tenable.
52. It is clear from the Judgment delivered on the 5th February 2020 that the court having found that the Plaintiff was the rightful proprietor of the suit parcel of land No. Kericho/Kapsaos/971, directed the Defendant and their legal representatives, assigns or anyone claiming on their behalf to vacate from the said the parcel of land within 30 days failing which they would be forcefully evicted therefrom. It was almost two years, since Judgment was delivered and when the Application was filed wherein the



Defendant had not vacated the suit land. It is the obligation of every person in respect to whom an order is made by a court of competent jurisdiction to obey it unless the said order is discharged. The Defendant was required to give vacant possession of the suit property to the Plaintiff or be evicted therefrom. They are still in occupation despite not having offered any explanation as to why they have not complied with the court orders. Indeed what is clear is that the Defendant is in contempt of the court orders.

53. I find that the Plaintiff's Application is merited and proceed to allow the same with the result that the OCS Kericho is hereby ordered to oversee the eviction of the Defendant from land No. Kericho/Kapsaos/971 in accordance to the provisions of Section 152G of the *Land Act*.
54. Cost of the Applications shall be on a lower scale since the same was undefended.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23RD DAY OF FEBRUARY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

