Salamba & 2 others v Misigo & 3 others (Environment & Land Case 612 of 2016) [2023] KEELC 15893 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15893 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 612 OF 2016

AA OMOLLO, J

FEBRUARY 23, 2023

BETWEEN

ELKANA SALAMBA ..... 1ST APPLICANT

JOSHUA KIMKEMEI ..... 2ND APPLICANT

JOTHAM MATIVO(SUING AS TRUSTEES OF PENTECOASTAL ASSEMBLIES OF GOD) ..... 3RD APPLICANT

AND

ALLAN MISIGO ..... 1ST RESPONDENT

KEN KEYA ..... 2ND RESPONDENT

GEOFFREY RODENYO ..... 3RD RESPONDENT

AND

VINCENT MANANI WENDO (SUING AS TRUSTEES OF CALVARY PENTECOSTAL ASSEMBLIES OF GOD) ..... PROPOSED DEFENDANT

RULING

1. The Applicant filed a notice of motion dated 5th May 2022 is premised on the provisions of section 3A of the *Civil Procedure Act*, order 50(1) of the *Civil Procedure Rules*; articles 159 and 156 of the *Constitution*. It seeks for the following orders;

    1. Spent

    2. Spent

3. That this honourable Court be pleased to discharge/vary/set aside the orders issued by hon Justice S Okong'o on 21st March 2019 and all consequential orders flowing therefrom issued on 21st March 2019 pending the hearing and determination of this application.

4. That Vincent Manani Wendo a trustee of Calvary Pentecostal Assemblies of God be enjoined as a 4th Defendant in the suit.

5. That the costs of this application be provided for.

2. The application is supported by the grounds listed on its face and an affidavit sworn on 5th May 2022 by Allan Misigo. The grounds include, that hon Justice S Okong'o delivered a judgment and orders on 21st March 2019 after misrepresentation and concealment of facts by the Plaintiff. As such the court was misled to make the said orders without listening to all parties affected in Kangemi land. They added that the 4th defendant should be joined in the proceedings.

3. The Applicants stated that they have not in any way trespassed on the Plaintiff's parcel of land LR no 23240 situated in Kangemi as they are squatters on the Government land, which is riparian land where the 1st Defendant earn his livelihood by planting vegetables. The Applicants contended that they were not issued with any warrant of eviction and despite their letters to the surveyor seeking to point out beacons of the suit property and issuance of a report on the same, their property and structures were demolished.

4. In the supporting affidavit sworn by Allan Misigo on 5th May 2022, mr Misigo stated that he had authority to swear the affidavit on behalf of the intended 4th Defendant. That they have lodged this application because they are unhappy with the judgement that was rendered. He deposes that they have been condemned unheard which violates their right under article 25 of the *Constitution*.

5. The applicants filed further affidavits sworn by Allan Misigo & Vincent Manani Wendo on 13th October 2022 stating that the court has discretion to set aside exparte judgement. That there were no instructions given to the advocate known as Wangira Onkoba & co advocates to represent them in court therefore he acted without authority and never filed any document on their behalf. The Applicants state that they were not given a chance to defend themselves.

6. The motion is opposed by the plaintiffs vide replying affidavit sworn by rev Charles Adenya on 12th July 2022 denying the allegations put forward by the Applicants. mr Adenya deposed that the plaintiffs filed their suit against the Applicants on 8th June 2016 and served the 1st defendants with the pleadings. He deposed further that on 4th June 2016, the 1st to 3rd defendants filed a memorandum of appearance. He urged that an injunction order dated 24th August was issued in their presence but the defendants defied the same. The plaintiffs added that they brought a contempt application against the 1st to 3rd defendants and the court found them in contempt and were fined ksh 30,000.

7. The respondent continued to state that the defendants were served with a hearing notice dated 28th August 2018 for the hearing scheduled on 9th October 2018. That they were also notified of the judgement entered. Subsequently, the Respondent's advocates filed party and party bill of costs to which the Applicant's advocates participated in the taxation proceedings.

8. The respondent further contended that a party cannot be enjoined in proceedings where judgement has been delivered. That the Applicants have not annexed any document to show that the land is riparian and that the filed application is not properly on record having not been complied with order 9 rule 9 of the *Civil Procedure Rules*.

9. The defendants/applicants submitted that this court has discretion to set aside the impugned judgement and relied in the case of *Esther Wamaitha Njihia & Two Others v Safaricom Ltd* and *Shah v Mbogo* and *Ongom v Owota*. They argue it would be a miscarriage of justice to deny parties who have expressed their desire to be heard the opportunity of prosecuting their case. To support the argument, the Applicants referred this court to the case of *Richard Nchapai Leiyangu v IEBC & 2 others* which was cited with approval by the Court of Appeal in *Harrison Wanjohi Wambugu v Felista Wairimu Chege* and *Cecilia Wanja Waweru v Jackson Wainaina Muiruri* where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution.

10. The Applicants also submitted that they have established there is sufficient cause to set aside the interlocutory judgement entered against them. Under this argument, they cited *inter alia* the case of *Wachira Karani v Bildad Wachira* [2016]eKLR, where it was held that "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 of 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..."

11. The Applicants also submitted that the court should look at the circumstances of the case in ascertaining as to whether the application constitute inordinate delay given the impugned judgement was entered on 21st March 2019. Relying in the case of *Utalii Transport Company Limited & 3 Others v Nic Bank Limited & another* [2014] eKLR thus;

> " Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

12. The Applicant also stated that failure to grant the orders sought will infringe on the defendant's right to fair hearing citing the case of *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR.

13. The Plaintiffs/Respondents filed their submissions dated 7th November 2022 while 1st and 4th defendants filed submissions dated 2nd October 2022.The plaintiffs submitted that the advocates M/S Njiru Boniface & Company advocates are improperly on record as per Order 9 rule 9 of the *Civil Procedure Act* and that the defendants have not demonstrated why they have taken 3 years to bring the motion to set aside the judgement delivered on 21st March,2019 hence the same should be dismissed with costs and cited the case of *Nzoia Sugar Company Limited v West Kenya Sugar Limited* (2020)eKLR and *ICEA Lion General Insurance Company v Chris Ndolo Mutuku* (2020)eKLR and *The Chairman Kenya National Union of Teachers and another v Henry Inyangala & 2 others*.

14. After analysis of the pleadings in respect of the application and the submissions filed in support thereof, I frame the following for determination:

    a. Whether the judgement issued should be set aside?

    b. Whether the 4th proposed defendant should be enjoined to the suit?

c. Cost

15. Order 10 Rule 11 of the *Civil Procedure Rules* provides as follows:

> " 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."

16. In the case of *James Kanyiita Nderitu & another* [2016] eKLR, the court of Appeal stated thus:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance but failed to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & another v Shah* (1968) EA 98, *Patel v E.A. Cargo Handling services Ltd* (1975) EA 75, *Chemwolo & another v Kubende* (1986) KLR 492 and *CMC Holdings v Nzioka* [2004] I KLR 173.
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> In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion

17. In the instant case, the 1st – 3rd defendants/Applicants deny service of the summons and pleadings despite there being on record a memorandum of appearance dated 20th June 2016, and a statement of defence dated 21st June 2016 and filed on 4th May 2016 filed through the firm of Wangira Okoba & Company advocates on their behalf. The Plaintiff's counsel argued that the 1st to 3rd defendants through their counsel, the 1st to 3rd defendants were part of the proceedings when the injunction orders were issued on 24th August 2016 and the subsequent contempt of court proceedings hence they cannot deny service.

18. From the court record, on 18th August 2016 and 31st October 2016, mr Wangira advocate who had filed appearance on behalf of the 1st to 3rd defendants intimated to court that he had not managed to take instructions from the defendants. The Applicants had opposed the application for injunction *vide* a replying affidavit sworn by the 3rd defendant on 26th June 2016. The 3rd defendant at paragraph 2 deposed that he was swearing the affidavit on his behalf and on behalf of the 1st and 2nd defendants. The 1st and 3rd defendants then appeared in Court on 22nd November 2016 for sentencing pursuant to their conviction of being in contempt of court orders. In mitigation, the two defendants stated they did not continue with building after being served with the court order.

19. The record further show that after the sentencing, the matter was fixed for directions on 13th December 2012 and on which date a hearing was set. It is noteworthy that when the matter came up for hearing

on 22nd November 2016, mr Wangira advocate informed he court that the residents of the informal settlement were also present in court.

20. If the 1st to 3rd defendants and the occupiers of the suit land had not been served with pleadings (though the record shows otherwise), then the court proceedings on conviction and sentencing that took place on 22nd of November 2016 changed that status as they became aware of the case. Secondly, if the firm of Wangira & co advocates had not received any instructions to respresent the 1st to 3rd defendants, then the 1st and 3rd defendants would not have allowed him to represent them during the sentencing proceedings. It is therefore false for the 1st defendant to depose that there was no retainer between them and the firm of Wangira & co advocates.

21. Subsequent to the proceedings of November 2016, this matter came up severally in court including on 21st November 2017 when a hearing date was fixed in the presence of ms Serem counsel holding brief for Wangira for the defendants. Mr Wangira opted to withdraw from acting for the defendants on the date of the hearing but the trial judge declined to adjourn the matter hence the case proceeded with the Plaintiff's case only. The court record describes the 1st to 3rd defendants for neglecting to participate in the proceedings before the judgement was made.

22. Despite the observations highlighted, and because the intended 4th defendant was not yet a party to this case, this court has unfettered discretion to set aside a judgement on the grounds that the defence raises any triable issues and whether on the whole it is in the interest of justice to set aside the default judgment.

23. The impugned judgement was delivered in the absence of the Applicants hence time for purposes of considering if there was delay in bringing the application would run from when they were served with notice of the judgement. The Applicants' advocate appeared before court on 5th October 2021 during the taxation of the Plaintiff's bill of costs and. The Applicants through their counsel is deemed to have become aware of the judgement when the bill was served on them. This application was brought in May of 20022 which is approximately 8-10 months and which in my opinion is a slight delay which can be excused.

24. The next issue for consideration is whether the defence filed by the 1st -3rd Applicants raises any triable issues. In paragraph 4, the three defendants pleaded and denied that the land they occupy is part of the Plaintiff's land parcel no 23240 and denied descending on the suit land on 28th May 2016 or any other time. The 1st to 3rd defendants also denied constructing temporary structures on parcel no 23240 and they put the plaintiff to strict proof. At paragraph 4 of the draft defense it is pleaded thus, "In response to paragraph 6 of the Plaint, the 1st & 4th defendants denies any allegations of illegal encroachment to the suit property as alleged or at all and the plaintiffs shall be put to strict proof thereof."

25. The Plaintiff's claim before the court is for trespass and in my opinion the defence raised by the defendants that they are not in occupation of the suit land is triable issue. It would serve the interests of justice to give the defendants a chance to present their case. The plaintiff can be compensated by way of damages in regard to the inconvenience the re-opening of the case will cause to him.

26. On the issue of joinder, Order 1 rule 3 of the *Civil Procedure Rules* provides thus;

> " All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

27. Further, the Court of Appeal in Tanzania in *Tang Gas Distributors ltd v Said & others* [2014] EA 448 on this issue stated that,

> " the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."

28. Although this case had been concluded and probably pending execution, having found that the 1st to 3rd defendants defence raises issues that entitle them to be heard, the plaintiff will not suffer any prejudice with the 4th defendant being joined to these proceedings. The intended 4th defendant line of defence is similar to that of the 1st to 3rd defendants. The similarity of their defence is captured in the fact that the draft defence is a joint defence with the 1st defendant. It is also the 1st defendant who swore an affidavit in support of their prayers for joinder.

29. The plaintiff submitted that the application did not comply with order 9 (9) of the *Civil Procedure Rules*. It is indeed true that the 1st to 3rd Applicants had an advocate on record and their current advocate who filed application ought to have sought leave of the court before bringing the application. However, the omission in my view is not fatal since the purpose of order 9 is to secure the interests in terms of legal fees of the previous counsel. There is nothing stopping Wangira & co advocates from taxing his advocate-client costs if he so choose. I decline to strike out the present application for non-compliance with order 9(9) of the *Civil Procedure Rules*.

30. The Court of Appeal in the case of *Tobias M Wafubwa v Bishop Ben Butali* 2017 eKLR observed that: -

> " We would go further to add that provided that where the failure to comply with rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the *Constitution* and the overriding principle could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings.

31. In light of the background of the case given and the analysis of the facts and submissions rendered, I will allow the application dated 13th May 2022 so that the interests of justice is served on the whole. The plaintiff is awarded thrown away costs Kenya Shillings Eighty Hundred Thousand only (ksh 80,000/-) to be paid within sixty days from the date hereof. In default, execution shall issue. The costs of this application is awarded to the plaintiff/respondent in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2023

A. OMOLLO

JUDGE

In the Presence of

Mr Moindi for Plaintiff/respondent

N/A for the defendants/applicants