



**Kemei & another v Mohamud & another (Environment & Land Case 60 of 2014) [2023] KEELC 811 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 811 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 60 OF 2014  
MC OUNDO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**SOLOMON KIPKOECH KEMEI ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPH KIPLANGAT RONO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MOHAMUD MOHAMED MOHAMUD ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL OIL CORPORATION OF KENYA LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Pursuant to delivery of judgment in this matter on the March 10, 2022, the 1<sup>st</sup> Applicant has now filed an Application by way of Notice of Motion dated April 14, 2022 brought under the provisions of Order 10 Rule 11, Order 22 Rule 22, Order 51 Rule 1 and 15, of the *Civil Procedure Rules*, Sections 1A, 3A and Section 80 of the *Civil Procedure Act*, and all enabling provisions of the law where he has sought for orders of stay of execution of the ex-parte judgment entered against him and that all consequential orders be set aside so that the suit be heard on merit and he can be afforded an opportunity to be heard.
2. The Application is supported by the grounds set on its face as well as on the sworn affidavit of his Counsel, his Supporting Affidavit and Supplementary Affidavit which were sworn on the April 14, 2022 and October 5, 2022 respectively.
3. The said Application was opposed vide the 1<sup>st</sup> Respondent's Replying Affidavit dated the June 8, 2022 in which the 1<sup>st</sup> Respondent sought for the said Application to be dismissed for reasons that the Plaintiffs' case had been closed way back in 2019 wherein the Applicant had been treating them to a circus of adjourning the matter on the grounds that he was on a business trip abroad. That the court had been lenient to the Applicant where he had sought several adjournments and had not adhered to the orders of the court. That the matter had been filed in court in 2014 had been pending in court for more than six years. That the Applicant had been delaying the process of the court simply because



he was enjoying the property without paying rent that had fallen due. That no sufficient cause and triable defence had been laid out by the Applicant to warrant the setting aside of the judgment. That the Applicant was out to frustrate the Respondents from the enjoying the fruits of the judgment.

4. By consent, on September 26, 2022, parties agreed to dispose of the Application by way of written submissions.

#### **1<sup>st</sup> Applicant's submissions.**

5. Pursuant to giving a brief history of the matter in question the Applicant framed two issues for determination as follows;
  - i. Whether the Application was merited.
  - ii. Should the court set aside the ex-parte judgment?
6. In response to the first issue thereto, the Applicant submitted that indeed the Application was worth being allowed since he had not been given an opportunity to be heard before judgment was delivered on November 9, 2021(sic) That when the matter came up for hearing of the defense case, the 1<sup>st</sup> Defendant, whose evidence was crucial was out of the country on a business trip. That the Defendant was never served with a judgment notice and was not therefore present when the judgment was delivered, and that it was therefore in the interest of justice that the instant Application be allowed to enable him advance his defence as filed.
7. Reliance was placed on the decided case in [\*Richard Nebarpi Leiyagu v Independent Electoral Boundary Commission and 2 Others \[2013\] eKLR\*](#), [\*SM v HGE \[2019\] eKLR\*](#) and [\*Project Ltd v Presbyterian Church of East African, Ngong Parish & Another \[2019\] eKLR\*](#) to submit that a fair hearing in this case translated to the Defendant/Applicant being given an opportunity to be heard so that the case could be determined on merit.
8. That the 1<sup>st</sup> Defendant/Applicant in his supporting affidavit had provided evidence of his travel documents to confirm that indeed he had been out of the country and therefore was unable to attend court when the matter came up for defence hearing.
9. That the Defendant/Applicant had brought this Application to court without delay which translated to show his desire to have the issues raised in this matter heard on merit.
10. That he had also brought this Application in good faith and without malice, and had continued to abide by the terms of the lease agreement and paid the outstanding amount and an excess of six months' rent to demonstrate his willingness to resolve the issues raised in this case, on merit.
11. That the Plaintiffs would not be prejudiced if this Application was allowed considering that the Defendant/Applicant had paid rent in excess of six months.
12. That the right to be heard and the principles of natural justice as provided in the [\*Constitution\*](#) was the corner stone of the entire justice system and hence the Defendant/Applicant ought to be allowed to defend this suit and the issues raised therein be determined on merit.
13. That Article 159 of the [\*Constitution\*](#) as well as Section 3A of the [\*Civil Procedure Act\*](#) recognize the need to focus on substantive justice as opposed to strict adherence to procedural justice if the same was done to avert an injustice or if it would promote fairness. That the defence had raised triable issues worth of the court's ears.



14. On the second issue for determination as to whether the court should set aside the ex-parte judgment, the Applicant submitted that indeed the judgment should be set aside to give him an opportunity to advance his defence so that the case could be heard on merit. That although the decision as to whether or not to set aside an ex parte judgment was discretionary, the court ought to proceed with caution to avert an injustice.
15. That in order to set aside the judgment the court must be satisfied either;
  - i. That the Defendant was not served with summons or
  - ii. That the Defendant failed to appear in court at that the hearing due to a sufficient cause or
  - iii. That the Applicant has an arguable case in this case, defence
16. That in the instant case, the Defendant/Applicant had a defence that raised triable issues which ought to be determined on merit. That he had been outside the country on a business trip when the matter came up for defense hearing on November 9, 2021 and although the same was brought to the attention of the court, the matter proceeded in his absence. That the 1<sup>st</sup> Defendant was a crucial defence witness upon whose testimony the entire defence was anchored. That failure to take into account his testimony would thus occasion a great injustice to him. That in the case of *Wachira Karani v Bildad Wachira [2016] eKLR* the issue of sufficient cause had been demystified.
17. That the court should find that the failure to attend court by the Defendant on November 9, 2021 when the matter came up for defense hearing and on the March 10, 2022 when the matter came up for judgment was an excusable mistake and thereafter allow his Application. That the mistake for non-attendance ought not to be punished as against the Defendant/Applicant who had shown interest in participating and conducting the case, and more so if such a decision would cause irreparable harm to him.

#### **Plaintiffs'/Respondents' submissions**

18. The Plaintiffs' submission in opposition of the 1<sup>st</sup> Defendant/Applicant's Application was to the effect that it was trite law that the decision whether or not to set aside an ex-parte judgment was discretionary and that the said discretion was intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but was not designed to assist a person who had 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 v Mbogo & Another [1967] EA 116*.
19. The Respondents framed their issues for determination as follows;
  - i. Whether the ex-parte Judgment should be set aside.
  - ii. Whether there should be stay of execution.
  - iii. Who should bear the costs of the Application?
20. They proceeded to submit that the Application was an afterthought, reactionary and brought on flimsy and timorous grounds that were only meant to delay the legal court processes and deny them the fruits of the judgment that was delivered in their favour on March 10, 2022. That the Applicant had been riding on the discretion of the court to adjourn the matter for close to one year despite being warned by the court as evidenced by the court record.
21. The Respondents further submitted that the Applicant had shown unwillingness and disinterest in prosecuting his case. That on September 28, 2021, the court, with consent of his Counsel had fixed



- the defence hearing for November 9, 2021, on which day, his Counsel had sought for an adjournment on the same ground that the Applicant was out of the country for a business trip. The Application had been vehemently opposed and the Applicant had been denied an adjournment wherein his case had been closed.
22. That the judgment in this matter had been delivered more than six years after the filing of the case due to the conduct of the Applicant throughout the proceedings, whose intention was to frustrate the wheels of justice from taking off. That there was no sufficient cause to set aside the judgment as was held in *Wachira Karani v Bildad Wachira* [2016] eKLR. That the Applicant's Defence only contained mere denials and did not raise any triable issues. That the Application was therefore frivolous, unmerited, founded on inertia and otherwise a waste of the court's precious time and thus a candidate for dismissal with costs. Reliance was placed on the case of *Nicholas Stephen Okaka & Another v Alfred Wanga Wesonga* [2022] KEHC 9804 (KLR)
  23. That the assertions by the Applicant's Counsel that they were not aware when the matter came up for Judgment as the same was not diarized was false and misleading. That Counsel having been present in court, there was no obligation on the side of the Respondents to serve the notice. That it was also evident that when the Court directed the parties to file their submissions, the Applicant again failed to comply. That the allegation by the Applicant that they had been denied an opportunity to be heard did not hold water as several opportunities were availed by the Court to the Applicant to prosecute their case but they had failed to do so. The Respondents relied on the case in *Nicholas Stephen Okaka* (supra)
  24. That the conduct displayed by the Applicant throughout the proceedings had been nothing short of frustrating the wheels of justice from taking off and therefore he must be prevented from further holding down this matter.
  25. On the issue as to whether there should be stay of execution, the Respondents' submission was that having found that the Applicant were not deserving the exercise of the Court's discretion to set aside the ex-parte judgment delivered on March 10, 2022 and all the consequential orders, it therefore followed that he did not deserve an order for stay of execution and the Court should disregard the prayer for stay of execution.
  26. As to who should bear the costs of the Application, the Respondents submitted that costs followed the events of the suit and thus the Applicant should be condemned to pay the costs incidental to the Application.

### **Determination.**

27. The Application before court seeks to set aside the judgment, of the March 10, 2022 and stay execution consequential thereto. I have considered the same, the submissions for and against allowing it the authorities and the law herein. 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'
28. I have considered the reasons that were presented by the 1<sup>st</sup> Applicant seeking to set aside the judgment delivered on March 10, 2022, so as to defend the same. I have also considered the averments and submissions herein for failure to prosecute their defence. I have keenly perused the affidavits filed in support of the Application to find out whether the Applicant had valid reasons for the said failure.
29. I find the issues for determination being;



- i. Whether the ex-parte Judgment should be set aside.
  - ii. Whether there should be stay of execution.
  - iii. Who should bear the costs of the Application
30. In their Application to set aside the judgment, the 1<sup>st</sup> Applicant has stated that he had not been given an opportunity to be heard before judgment was delivered. That when the matter came up for hearing of the defense case, he was out of the country on a business trip yet his evidence was crucial. That he was never served with a judgment notice and was therefore not present when the judgment was delivered. That in the interest of justice therefore, the instant Application ought to be allowed to enable him advance his defence as filed.
31. Setting aside a judgment is a matter of the discretion of the court, as was held in the case of *Esther Wamaitba Njibia & 2 others v 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 EA 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 v 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.’
32. The Court of Appeal for Eastern Africa in the case of *Mbogo v 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.
33. I took time to peruse the entire record of events that had taken place and each action since the suit was instituted in court until the entry of the Judgment herein and I am satisfied that the Applicant was guilty of inaction. It is indeed evident that on the December 11, 2018 when the matter came up for hearing, the 1<sup>st</sup> Applicant’s Counsel had sought for an adjournment as he had not effected service upon the 2<sup>nd</sup> Defendant.
34. On the March 14, 2019, when the matter was next scheduled for hearing, again the 1<sup>st</sup> Applicant’s Counsel sought for an adjournment for reason that he wanted to consult with his client in regard to the exit of the 2<sup>nd</sup> Defendant from the case. Despite opposition from the Plaintiff on the adjournment, the court obliged Counsel and an adjournment was granted.
35. On May 13, 2018, the Plaintiff’s case proceeded for hearing and was closed. The matter was then scheduled for Defence hearing which was subsequently fixed for hearing for the October 26, 2020 on which day the Applicant’s Counsel had addressed the court as follows:
- ‘The Defendant is not here. Give us another date’



36. Hearing was thus re-scheduled for the January 19, 2020 wherein the Applicant's Counsel again addressed the court as follows;

' It was coming up for defence hearing. Unfortunately, we had not informed our client of today's hearing we had also lost his contact and I have just been given the same but upon reaching our client, he informed me that he was in Nairobi and could not make it.'

37. The matter was taken out of the day's cause list for hearing and rescheduled for defence hearing on the March 18, 2021 wherein the defence was put on notice that the said hearing would proceed without any further adjournment. The Covid-19 pandemic then happened and courts were closed. However on the July 21, 2021 after things had normalized and the courts were operational, a mention date had been taken for the September 28, 2021 on which day by consent, parties had fixed the defence hearing of the matter for the November 9, 2021.

38. Came the hearing day, and the court was informed yet again that the Applicant 'was out of the country for a business trip'.

39. The court directed the defence to proceed or close its case the Application for adjournment having been denied. Counsel for the Applicant then closed their case and sought for a date to confirm the filing of the submissions.

40. The matter was scheduled for mention for the February 2, 2022 to confirm compliance and to fix a date for judgment wherein on the said day the Applicant's Counsel nor the Applicant were either present in court nor had they complied with the court's directions to file submissions. The Judgment date was scheduled for March 10, 2022 and on which day the judgment had been delivered.

41. I have asked myself whether deciding to go 'out of the country for a business trip' despite having sufficient notice of the hearing day, constituted sufficient cause, or whether it was meant to deliberately delay the cause of justice and I find that the turn of events was inadequately explained and did not constitute sufficient cause to warrant the exercise of the court's discretion.

42. The Supreme Court of India in the case of *Parimal v 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 Applicant honestly and sincerely intended to be present when the suit came up for hearing. Sufficient cause is thus the cause for which the Applicant could not be blamed for their 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 Applicant did not demonstrate sufficient



cause why he never defended his defence despite the indulgence by the court and there having been sufficient notice.

44. In its impugned judgment, at para 34 the court considered the Applicant's undefended defence wherein it noted as follows'

'The 1<sup>st</sup> Defendant herein, entered appearance on the August 27, 2015 and filed his defence dated September 8, 2015 on the equal date wherein he denied the contents of the Plaint stating that he was a stranger to the allegations therein and seeking that since the Plaintiffs were not entitled to the reliefs claimed, that the suit herein be dismissed.'

45. The question therefore is whether this is the kind of defence the Applicant claims in this Application, is triable and/or raises triable issues.

46. 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.'

47. In the present suit, I find that the Applicant 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 Applicant had been given several opportunities to be heard but decided not to be present and or take a business trip. 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. He therefore ought not to hold a court of law at ransom by refusing to proceed with the hearing of the case only for him to claim that his rights to be heard were denied or violated. Having found as such, I see no need to venture into the second issue for determination.

48. The court is not powerless to grant relief, when the ends of justice and equity so demand, to this effect, I find that the Application dated April 14, 2022 has no merit and proceed to dismiss it with costs.

**DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

