Kariuki & another v Simple Pay Capital Limited & 2 others (Environment and Land Case Civil Suit E015 of 2023) [2023] KEELC 18988 (KLR) (17 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18988 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT E015 OF 2023

JA MOGENI, J

JULY 17, 2023

BETWEEN

JANET WANGECHI KARIUKI ..... 1ST PLAINTIFF

DOMINIC NJUGUNA KIARIE ..... 2ND PLAINTIFF

AND

SIMPLE PAY CAPITAL LIMITED ..... 1ST DEFENDANT

GARAM AUCTIONEERS ..... 2ND DEFENDANT

MWANGI MUTURU MAIRWE AGENCIES LIMITED ..... 3RD DEFENDANT

RULING

1. I have two applications before me one dated 26/04/2023 and one dated 17/05/2023. The Notice of Motion dated 26/04/2023 is filed under Order 51 Rule 1 and all other enabling laws, the Notice of Motion dated 17/05/2023 is filed under Section 3 of the of the *Civil Procedure Act* Cap 21 of Laws of Kenya, Order 19 Rule 2 (1) & (2) Order 51 Rule 1 of the *Civil Procedure Rules* and all enabling provisions of the law.

2. The 1st and 2nd Defendant/Applicant seeks orders that:-

    i. Spent

    ii. Spent

    iii. That upon hearing the instant Application the Honorable Court be pleased to direct that the Plaintiffs' Application dated 18th January 2023 be heard and determined on merit

    iv. That a consequence to prayer 3 above, the Honorable Court be pleased to set aside the ex parte orders issued on 23rd January 2023 and confirmed on 9th February 2023.

v. That this Honorable Court be pleased to grant any other order it deems fit and just

vi. That costs of and incidental to this Application be in the cause.

3. The sworn affidavit of the applicant dated 26/04/2023 was filed in support of the application. The grounds relied upon by the applicant are that the advocate for the applicant was served but he never attended court and therefore the ex parte orders issued by the court were not done so on merit since the applicant was not accorded hearing. Further that the orders were obtained by fraud and falsification of material facts underpinning the suit. Therefore the 1st and 2nd defendants will continue to suffer serious prejudice for the duration of the suit for mistakes of the former counsel who was instructed attend court and he never appeared. That the applicants should not be denied their constitutional right for fair hearing.

The Response

4. The ex-parte applicant filed a replying affidavit sworn on 15/ 05/ 2023. His response is that the application brought before to this Honourable court contain misrepresentation and half-truths and that the applicants should approach the court with clean hands. Michael Owamo who swore the replying affidavit avers that the application dated 18/01/2023 by the plaintiff was certified urgent on 23/01/2023 and prayer 2 was granted. That this Honorable Court ordered for the application to be served and to be heard on 9/02/2023.

5. The Plaintiff avers that all defendants were served 0n 24/01/2023 with the application and he hearing notice and affidavit of service was duly filed in court. That the CEO of the Applicant Mr Rashesh Adhyaru does not deny service at the same time he has not put evidence before this court to show that they had appointed Messrs Makalla Law Advocates LLP to represent them and they failed to do so. He further states that the Hearing Notice and the Court Orders were served upon the Applicant and not their advocates. That they were therefore aware of the hearing date.

6. Further that the application being unopposed and the court being satisfied that the defendants were served granted the prayers sought. That whereas the application has alluded to the orders being made through presentation of information obtained by fraud and falsification of materials presented before the court, no evidence has been presented to buttress the allegations which are of criminal nature and require and standard of proof that is beyond reasonable doubt.

7. That the Respondents/Applicant has not given sufficient reasons to warrant the orders sought and that it is only just and fair that the application is dismissed with costs to the Ex-parte Applicant/ Respondents.

8. The Applicants filed a further affidavit sworn on 17/05/2023 by Steve Ogolla the advocate a managing partner of Saruni & Stevens advocate. He avers that the 1st and 2nd respondents had misunderstood the purpose of the application dated 26/04/2023 by the applicant which was mainly to ask the court to set aside the orders issued by this court on 23/01/2023 and confirmed on 9/02/2023 since they were issued ex parte thus denying the 1st and 2nd defendants the right to defend themselves despite having been served.

9. The second application dated 17/05/2023 was filed under Section 3 of the of the *Civil Procedure Act* Cap 21 of Laws of Kenya, Order 19 Rule 2 (1) & (2) Order 51by the Plaintiff/Applicant seeks the following Orders:

a. This Honorable Court be pleased to summon the 1st Defendant/ Respondent Executive Officer Rashesh Adhyaru for cross-examination on the contents of his Supporting Affidavit sworn on 26th April 2023.

b. The Cost of this Application be borne by the defendants.

10. Plaintiffs' application dated 17/5/2023 is opposed. There is a Replying affidavit sworn by Rehash Adhyaru on 20/6/2023.

11. The 1st and 2nd Defendants /Applicants' written submissions were filed on 21/06/2023 and 14/7/2023 while the Plaintiff/Respondent's submissions were filed on 5/7/2023.

12. The Court 22/05/2023 directed that both applications be canvassed by way of written submissions and reserved 17/07/2023 for the delivery of the ruling by the court.

Submissions

Analysis, Issues and Determination

13. I have carefully considered the application, the supporting affidavit, the annextures thereto, the replying affidavit, further affidavit the rival submissions and the authorities submitted by both counsels and find that the issues for determination are:

a. Whether the ruling should be set aside?

b. Whether the 1st and 2nd respondent/applicants should be granted leave to cross-examine the CEO of the 1st and 2nd defendant/applicant?

c. Who bears the cost of the application?

14. The law on setting aside of ex parte orders is found under Order 12, Rule 7 of the *Civil Procedure Rules, 2010* which provides thus:

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

15. This provision is amplified by Order 51, rule 15 which provides that the court may set aside an order made ex parte.

16. In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. This was enunciated in the Ugandan case of *Philip Ongom, Capt v Catherine Nyero Owota* Civil Appeal No. 14 of 2001 [2003] UGSC 16 (20 March 2003).

17. In the instant case, the Applicant herein was properly served with the application dated 18/01/2023 and the hearing notice of 23/01/2023 for the hearing of the application on 9/02/2023. The pertinent question therefore is whether the Applicant's non-compliance with respect to filing his replying affidavit in due time and non-attendance of court on 9/02/2023, constituted an excusable mistake, or was meant to deliberately delay the cause of justice, and whether the explanation given for these failures qualifies as sufficient cause.

18. In *Ongom v Owota* (*supra*) the Court stated thus:

> " ...However, what constitutes "sufficient cause", to prevent a defendant from appearing in court, and what would be "fit conditions" for the court to impose when granting such an order, necessarily depend on the circumstances of each case."

19. In the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others* Civil Appeal No. 147 of 2006, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

> " It is difficult to attempt to define the meaning of the words "sufficient cause." It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputable to the Appellant."

20. It was observed by the Court in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 that a court has unfettered discretion to set aside its judgment. In the case the Court stated that:

> " There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, the defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan J. put it " a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

21. The courts' discretion to set aside judgment is therefore unfettered.

22. In *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR the court held that:-

> " It is trite that the test to correct approach in an application to set aside a default judgment are: firstly, whether there was defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the Court of Appeal in the case of *Mohammed & Another v Shoka* [1990] KLR 463.

23. Has the Applicant satisfied the test laid down in the above case?

24. Does the applicant have defence on merit?

25. In *Patel v Cargo Handling Services* the Court of Appeal considered the meaning of defence and held that:

> " In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J. put it, a triable issue."

26. In the instant suit, the Applicant herein has not annexed a draft response to the application dated 18/01/2023. In my considered view, there is therefore no response nor counter to the averments raised in the supporting affidavit of the ex-parte applicant.

27. On the issue of delay, I find that Order to the application was granted on 9/02/2023 whereas the instant application was filed on the 26/04/2023; 2 months after the prayers for the application were granted. I find the delay of 2 months lapse not to be unreasonable.

28. The applicant herein was served with the application for by the 1st and 2nd Plaintiffs/ Respondents with all other court documents in person as stated by plaintiffs and not through his former advocate. He does not dispute service. He acknowledges service of the court documents.

29. The court was satisfied that service was effected upon the applicant/1st and 2nd defendants herein, it proceeded to hear the substantive application dated 09/02/2023. The Applicant does not dispute service of the court documents. He did not file any response to the application and did not appear in court for hearing and mentions of the application. Upon failure of the Applicant/1st and 2nd defendant to attend court, the court proceeded to hear the application ex-parte and gave its ruling on 09/02/2023. This prompted the Applicant herein to file the instant application.

30. The 1st and 2nd defendant/Applicant attributes his non-attendance in court to the mistake of his then counsel; that he was served and received notices without acting on them and or appearing during the hearing therefore he ought not be punished as a result of commissions and/or omissions of the advocate who was on record for him.

31. I find that the Applicant has failed to explain the failure to attend court adequately. It has been held that a litigant should not suffer due to the transgressions of their advocate. However, litigants are also duty bound to ensure that their Agents/Advocates attend court and prosecute the case as they should. In Savings and Loans Limited v Susan Wanjiru Muritu (Nairobi) (Milimani) HCC NO. 397/2002 Kimaru J. observed that:

> " Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue his or her case. The court cannot set aside dismissal of a suit on the sole ground of mistake by the counsel for the litigant (or) on account of such advocates failure to attend the court. It is the duty of the litigant to constantly check with the advocate the progress of her case."

32. Further, in *Shah v Mbogo* [1979] EA 116 the court stated that:

> " The discretion [to set aside an ex-parte judgment] 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 the person who has deliberately sought whether evasion or otherwise to obstruct or delay the course of justice."

33. In the instant Application, the Applicant has failed to convince the court that he made follow up of his case with his advocate. Even when he was served with the hearing notice on 23/01/2023 notifying him that the matter was coming up in court on 09/02/2023, he did not put any effort nor make a follow up with his lawyers. The applicant has also failed to demonstrate that he was in communication with his advocates regarding the application, hence this court's reluctance to act solely on the basis of allegations of default made against the advocates. In this court's view, the applicant deliberately sought to evade the application and thus obstructed the cause of justice and he intended to delay the course of justice and keep the ex-parte applicant away from the seat of justice.

34. Courts have held that clients cannot continue to hide behind failure of their advocates to perform certain actions on their part. I do not find the applicants' former advocate blameworthy for the predicament the applicant now finds himself in. Besides there was no record to show that the applicant had instructed any lawyer to act for him.

35. As to whether the applicant will suffer any prejudice if the application is not granted, I find that the applicant has not demonstrated what kind of prejudice he will suffer in his application and the supporting affidavit.

36. Consequently, I find that the application dated 26/04/2023 devoid of merit and proceed to dismiss it in its entirety with costs to the ex-parte applicant.

37. On the second application which is a Notice of Intention to Cross Examine the deponent of the Supporting Affidavit, Rashesh Adhyaru, the Court finds that the 1st and 2nd respondent wishes to Cross Examine the deponent on the Affidavit dated 26/04/2023. That means the supporting affidavit in support of Notice of Motion dated 24/04/2023, and the Notice of Motion dated 24/04/2023.

38. However, the Court has declined to set aside and or review the application of the Notice of Motion dated 24/04/2023. Therefore, we now have only affidavit which is in tandem with the Plaint.

39. Order 19 Rule 2 grants the court power to order attendance of a deponent for Cross Examination. However, the Court finds that with declining to set aside the ruling for the application dated 18/01/2923 there is no inconsistency in the Affidavits and there would be no reason to summon the deponent Rashesh Adhyaru in court for Cross Examination. Being guided by provision of Sections 1A and 1B of the *Civil Procedure Act*, the court should ensure that the judicial time is saved and that matters before the court are dealt with expeditiously. By summoning the deponent to Court for cross examination, the Court may fall in a trap of having a mini trial or trial within a trial. That would not augur well in furtherance of the overriding objective of the Act as provided by Section 1A of the *Civil Procedure Act*.

40. Having now declined to set aside the ruling dated 09/02/2023 the Court finds that there is no basis laid down to warrant the summoning of the deponent, Rashesh Adhyaru for Cross Examination. For the above reasons the Court declines to allow the Notice of Motion Application for Notice of Intention to Cross Examine dated 17/05/2023.

41. Consequently, I make the following orders:

    a. The application under determination dated 24/05/2023 has no merit and is dismissed.

    b. Similarly, the Application dated 17/05/2023 is equally dismissed.

    c. Costs will abide the outcome of the main suit

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2023.

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Aswani together with Mr Ogolla for 1st and 2nd Defendants

Ms. Ahono holding brief for Mr Owano for Plaintiffs

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE