



**Maguta v Mukiana (Environment & Land Case E27 of 2022)
[2023] KEELC 16519 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E27 OF 2022
MAO ODENY, J
MARCH 20, 2023**

BETWEEN

KIMANI MBUGUA MAGUTA PLAINTIFF

AND

FRANCIS M'TAARU MUKIAMA DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated July 20, 2022 by the Defendant/ Applicant seeking the following orders: -
 - a) Spent
 - b) That pending hearing and determination of this application the Court be pleased to set aside its orders dated June 13, 2022.
 - c) That pending hearing and determination of this application and further directions of this court be pleased to transfer this matter to subordinate court for determination.
 - d) Costs be in cause.
2. The application was supported by the affidavit sworn by Francis M'taarum Mukiana who deponed that he was served by the Respondent with an application dated April 21, 2022 which application did not indicate a hearing date hence he instructed his advocate to file a Notice of Preliminary Objection which was duly filed and served upon the Respondent.
3. The Applicant further deponed that he was never served with the hearing of the application to enable them attend court but was only served with the Hearing notice for formal proof dated June 15, 2022.



That upon perusal of the court file he found out that the court granted interim orders despite a notice of Preliminary Objection being on record.

4. It was the Applicant's case that the value of the suit premises is less than Kshs. 20 Million hence ought to be transferred to the subordinate court for hearing and determination.
5. In response the Respondent filed a Replying Affidavit sworn by Geoffrey Kilonzo on October 6, 2022 where he deponed that the Applicant was served with summons to enter appearance together with a plaint, list of witnesses, list of documents and an application dated April 21, 2022 on April 27, 2022. That the orders granted on June 13, 2022 in default of appearance and defence was lawfully obtained and setting aside, the Applicant must demonstrate sufficient cause or grounds which the court can grant the orders sought.
6. Counsel submitted that the Defendant is not keen on either setting aside the judgment or filing a defence hence the present application lacks merit as the Applicant has not shown whether he has a defence with triable issues for the court to consider and exercise its discretion.
7. Counsel also stated that the allegation by the Applicant that the value of the suit premises is less than Kshs. 20 Million is unfounded as the land is worth over Kshs. 50 Million.
8. Counsel agreed to canvas the application vide written submissions which were dully filed.

Applicant's Submissions

9. Counsel for the Applicant admitted that the application was served but not with a hearing notice and further that the affidavit of service by the process server does not mention anywhere that the application dated April 21, 2022 had a hearing date.
10. Mr. Obaga also submitted that the court did not consider the Preliminary Objection when the issuing the adverse orders and it was untrue that the Respondent's application was unopposed.
11. On whether the suit should be transferred to the lower court, counsel submitted that the plot is a small plot with controlled developments and the value is therefore restricted.
12. On whether filing of the Memorandum of appearance late is fatal, counsel relied on Order 6 rule 1 of the Civil Procedure Rules as well as the cases of *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission & Others* (2013) eKLR and that of *Beatrice Wanjiru Kamuri vs John Kibira Muiruri* (2016) eKLR.

Respondent's Submissions

13. Counsel for the Respondent on the identified issues for determination namely whether the Applicant was aware of the hearing date of the application dated April 21, 2022, whether the Applicant was to be served with any pre-trial Notice, whether the suit should be transferred to subordinate court.
14. On the issue as to whether the Applicant was aware of the hearing date for the Respondent's application dated April 21, 2022, counsel submitted that in order to set aside ex parte orders, the court must be satisfied that either the Applicant was not properly served or that the Applicant failed to appear in court at the hearing due to sufficient cause.
15. Mr. Kilonzo submitted that the fact that the Applicant filed a Notice of Preliminary Objection and lack of a hearing date on the application is not a basis for this court to allow the said application, that the application was properly served upon the Applicant, the same was not responded to thereby unopposed.



16. On the second issue, counsel submitted that the Applicant deliberately failed to enter appearance upon being served with summons to enter appearance and that the matter was properly slated for formal hearing. That it is trite law that if Defendant fails to enter appearance and/or defend a suit, the party waives his rights to be involved in the trial process.
17. On whether the suit should be transferred to the subordinate court, counsel submitted that the value of the suit premises is over 50 million which is above the pecuniary jurisdiction of the Magistrate's court.
18. Counsel also relied on the provisions of Section 107 and 109 of the *Evidence Act* submitting that the Applicant has not availed any material evidence to show that the claim before this court is less than 20 million and as such the application to have the matter transferred to the subordinate should be dismissed.

Analysis And Determination.

19. The issues for determination are whether this court should set aside its orders dated June 13, 2022 and whether this suit should be transferred to the subordinate court for hearing and determination.
20. The Applicant alleged that he was served with the application dated April 21, 2022 without a hearing date therefore was not able to attend court when the matter came up for hearing therefore it was heard ex parte.
21. It was counsel's submission that the Applicant upon receipt of the application instructed counsel to file a Notice of Preliminary Objection which was duly served upon the Respondent advocate.
22. It should be noted that the Applicant does not deny being served with the application and counsel for the Respondent confirmed that the Applicant was served with the application together with summons to enter appearance, the plaint, list of witnesses and list of documents which is also denied.
23. If service is not disputed and the Applicant has admitted that upon receipt of the application filed a Preliminary Objection, it means the Applicant and his counsel were aware of the application but failed to take necessary steps to attend court.
24. Counsel alluded to the fact that the court should have considered the Preliminary Objection as response to the application. When you file documents and leave them in the court file, they remain as such if the party does not move the court to consider them. Even if the court looked at the Preliminary Objection, it would have been the first to be dismissed as what counsel referred to as a Preliminary Objection does not fit the bill. Counsel even reproduced the Preliminary Objection to show the court that it should have considered it.
25. When counsel files a Preliminary Objection with words like the entire suit is vexatious, bad in law and otherwise an abuse of court process without stating why and how then follows it with "the purported transfer of lease is irregular as the plaintiff did not obtain mandatory consent from the Commissioner of Land", the plaintiff has not complied with the special condition of grant in that he has not submitted building plans to local government Authority, has not paid the requisite fees for transfer of grant,
26. Would you call the above a Preliminary Objection, my answer would be in the negative. Counsel have the habit of responding to applications with Preliminary Objections which is in order but they should choose whether the Preliminary Objection is on a pure point of law.
27. In an application to set aside an order the court has discretion to either allow or reject such an application and the legal threshold to consider before exercising the said discretion is whether the



Applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings.

28. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR the court held that:

“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. There cannot be a strait-jacket formula of universal application....”

29. In this case I have explained above the reasons advanced by the Applicant for not attending court and I am not satisfied that the Applicant has demonstrated sufficient cause upon which the court can exercise its discretion in his favour. I am equally not satisfied that the Applicant has shown what prejudice if any, he will suffer should the court refuse to grant the orders sought.

30. This court is equally not satisfied that the Applicant has set out a case for this court to transfer this suit to the subordinate court, what the Applicant has done is merely state what he thinks is the value of the land but none of the parties has presented before this court a valuation report to warrant a transfer and as such that prayer is equally declined.

31. The upshot is that the application dated July 20, 2022 is dismissed for lack of merit. Parties to fast track the case for hearing and determination, the Applicant is granted 14 days regularize his appearance and documents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF MARCH, 2023

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

