



**Charterhouse Investment Limited v Charo & 5 others (Environment & Land
Case E047 of 2021) [2023] KEELC 16889 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E047 OF 2021**

**MAO ODENY, J
APRIL 19, 2023**

BETWEEN

CHARTERHOUSE INVESTMENT LIMITED PLAINTIFF

AND

KABIBI CHARO & 5 OTHERS DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated February 23, 2022 by the Defendants seeking the following orders;
 - a. Spent
 - b. That the interlocutory judgment entered herein on July 22, 2021 be set aside together with all consequential orders arising therefrom and the applicants be allowed to file their defence out of time
 - c. That costs of this application be provided for.
2. The application is based on the grounds set out on the face of the application and the supporting affidavit of Kabibi Charo the 1st defendant with the authority of the 2nd – 6th defendants who deponed that they were served with the suit papers and approached the firm of Momanyi Gichuki & Co Advocates with instructions to act for them, however they were unable to pay the instructions fees and hoped that the advocate would have filed response as they looked for money.
3. The Applicant further stated that this matter had been fixed for hearing of the application by consent on July 8, 2021 but the same could not proceed as the court was not sitting necessitating the plaintiff to take another date which was not served upon them.



4. The applicants urged the court to allow the application to enable them file a defence and be heard on merit.
5. In response, the plaintiff filed a replying affidavit sworn by Sophia Chemengen Too a director and shareholder of the plaintiff company who stated that the application is an afterthought and brought in bad faith with the intention of delaying the expeditious hearing and disposal of this suit.
6. The respondent further stated that despite being served with pleadings, the court order and summons to enter appearance, the defendants neglected or refused to enter appearance and file a defence within the prescribed time.
7. Ms Sophia Chemengen stated that the defendants were not condemned unheard as they were invited to court through summons to enter appearance sealed on May 26, 2021, but refused and or neglected to attend court.
8. That in addition, their excuse of being poor is a fallacy as they have changed advocates thrice and have not given any sufficient explanation as to why the application to set aside the default judgment is filed one year after judgment was entered hence the same should be dismissed.
9. The court directed that the application be disposed of by way of written submission but only counsel for the Plaintiff complied. counsel for the defendants did not file submissions.
10. Counsel submitted that the right to a fair hearing is a double edged sword and applies to both the defendants and the plaintiff and the defendants were indolent and defiant of the court's procedures.
11. Mr Ogada relied on the cases of *Pinnacle Projects Limited v Presbyterian Church of East Africa Ngong Parish & Another* [2018] eKLR and *Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR.
12. It was counsel's submission that the judgment entered was not drastic as the defendants were served with summons to enter appearance and failed to enter appearance within the prescribed time and relied on the case of *Board of Management St Augustine Secondary School v Chambalili Training Co Ltd* [2021]eKLR.
13. Counsel therefore urged the court the court to dismiss the application as the defendants have failed to give satisfactory reasons why the judgment should be set aside.

Analysis and Determination

14. The issue for determination is whether the defendants have met the threshold for setting aside interlocutory judgment.
15. This case was filed on May 17, 2021 contemporaneously with a Notice of Motion which sought for temporary injunction against the defendants from interfering with the suit land. The application was heard and allowed vide an order dated May 19, 2021 which was served upon the defendants together with summons to enter appearance.
16. It is not disputed that the order and the Summons to enter appearance were served upon the defendants. The defendants only claim that they instructed the firm of Momany Gichuki & Co Advocates to represent them and expected them to enter appearance and file defence as they look for fees which they never did.



17. I also notice from the record that on June 2, 2021 the defendants were represented by a Ms Nyaga who sought for time to respond to the application dated May 17, 2021 which the court granted her 7 days to file a replying affidavit.
18. On July 30, 2021 the matter came up for mention but counsel for the defendants was not present and the court gave directions that the matter proceeds for formal proof on October 12, 2021.
19. On October 12, 2021 Ms Nyaga told the court that she had just learnt that the matter had been slated for formal proof and that she had filed a memorandum of appearance on May 30, 2021 and prayed for a mention date.
20. On December 1, 2021 Mr Momanyi appeared for the defendants and urged the court to give him time to file an application for setting aside interlocutory judgment which application was opposed by Mr Ogada counsel for the plaintiff on the ground that on October 12, 2021 counsel had indicated that they had filed a memo of appearance on May 30, 2021 and did not file any defence. The court therefore gave a date for formal proof on February 24, 2022.
21. In the case of *Tree Shade Motors Ltd v DT Dobie & Another* [1995-1998] 1EA 324 where the court held that: -

"Even if service of summons is valid, the judgment will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgement aside."

22. Order 10 rule 11 of the *Civil Procedure Rules, 2010* gives the court unfettered discretion to set aside interlocutory judgment after satisfying the principles as enunciated in *Pitbon Waweru Maina v Thuka Mugiria* [1983] eKLR; *Phillip Kiptoo Chemwolo & Mumias Sugar Co Ltd v Augustine Kubende* [1982-88] KAR 1036.
23. Similarly, in the case of *Patel v East Africa Cargo Handling Services Ltd* [1974] EA 75 the court held that: -

"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 defence on 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"

24. In this case the applicant did not attach any draft defence for the court to consider whether it has any triable issues. The applicant has not also explained the inordinate delay in bringing this application. The applicant's advocate appeared in court on several occasions but did not take any action to file a defence within the stipulated period.



25. In the case of *Burbani Engineers Ltd v Spectre International Limited* [2015] eKLR, the court cited with approval the decision in *Isaac Awuondo V Surgipharm Limited & Another* [2011] eKLR where the Court of Appeal had the following to say:

“The law is now settled that if the defence raises even one *bona fide* triable issue, then the Defendant must be given leave to defend... We must however hasten to add that a triable issue does not mean one that will succeed.”

26. The court is left in an awkward situation where it has not glimpse of the proposed defence whether it has triable issues or not. The discretion to set aside interlocutory judgement must be exercised judiciously and should not prejudice or cause any injury to any party.

27. However, in the interest of justice I will exercise my discretion in favour of the defendants and allow them to file their defence within 15 days failure to which the order lapses and the court will proceed to write the judgment. The defendants to also pay thrown away costs of Kshs 30,000/ to the plaintiff within 15 days. Costs of the application in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF APRIL, 2023.

M.A. ODENY

JUDGE

