



**Hassan (Suing as the personal representative of the Estate of Yussuf Hassan Bakari) v County Government of Bungoma & 4 others (Environment & Land Petition E001 of 2021) [2023] KEELC 17510 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17510 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND PETITION E001 OF 2021**

**EC CHERONO, J**

**MAY 12, 2023**

**BETWEEN**

**HUSNAH MACCAH HASSAN (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF YUSSUF HASSAN BAKARI) ..... PETITIONER**

**AND**

**COUNTY GOVERNMENT OF BUNGOMA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY LAND REGISTRAR BUNGOMA ..... 2<sup>ND</sup> RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF LANDS ..... 3<sup>RD</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicant moved this Honourable *vide* a Notice of Motion dated February 27, 2023 seeking the following orders;
  - a. (spent)
  - b. That the firm of Makokha, Wattanga & Luyali Associates be granted leave to come on record on behalf of the 1<sup>st</sup> Respondent herein.
  - c. That the Honourable Court be pleased to grant Temporary stay of the court decree and all consequential orders obtained thereto pending hearing and determination of this application inter-parties.



- d. That the Honourable Court be pleased to set aside and or vary or review the judgment delivered on February 21, 2022 and all consequential orders obtained thereto and the 1<sup>st</sup> Respondent be granted leave to oppose the Petition dated March 17, 2021
  - e. That The Costs of this application be provided for.
2. The application is supported by grounds apparent on the face of the said application and the affidavit of George Kombo.

### **1<sup>st</sup> Respondent's Case**

3. In his affidavit in support of the application, the said George Kombo deposed that he is aware that the 1<sup>st</sup> Respondent was served with the petition herein dated March 17, 2021 and that the same was forwarded to the County Attorney one Cyril Wayongo Advocate to file the appropriate response and represent and the interests of the County in this matter. The said George Kombo further deposed that to the best of his information, the said County Attorney represented the County in this matter until he was placed on interdiction in the month of February 2023 when they realized that the said Cyril Wayongo had not filed any response to the Petition herein.
4. The deponent further stated that the County has been in occupation of the suit land for over 40 years since they acquired the same compulsorily and that it is only in the interest of justice that the 1<sup>st</sup> respondent is given a chance to present its part of the story. In conclusion, the applicant states that since the suit property is a public land and they have been having possession for over 40 years, the public stand to lose immensely and that the Petitioner will not suffer any prejudice that cannot be compensated by an award of damages as they have never lived on the land in dispute.

### **Petitioner's Case**

5. The Petitioner filed a Replying affidavit in response to the said application and deposed as follows;
  1. That the said application is grossly devoid of merit and has been inordinately delayed, frivolous, vexatious and a further attempt to delay the course of justice as well as waste judicial time.
  2. That every action taken in this suit was done in full knowledge of the 1<sup>st</sup> Respondent who acted in ignorance of the court's process and deliberate non-compliance with all and any directions that the court set.
  3. That upon filing this Petition, all the Respondents including the 1<sup>st</sup> Respondent was duly served on May 5, 2021 who acknowledged receipt by stamping on a copy of the same.
  4. That all directions and processes were done subsequently with full knowledge of the 1<sup>st</sup> Respondent who participated through its legal representative or proxies duly instructed by her.
  5. That since the 1<sup>st</sup> Respondent was served with all court processes and fully participated in court through their legal representatives though failed to file any response, they are now cunningly asking this Honourable Court to sit on appeal against the decision by Olao J of January 12, 2022 declining its request for more time to file a response and submissions.
  6. That after this Honourable court pronounced judgment on February 21, 2022, the 1<sup>st</sup> Respondent was duly notified of the entry of the said judgment and the decree which was also served upon them on 25<sup>th</sup> of March, 2022.



7. That the judgment delivered by this honourable Court on February 21, 2022 was not a judgment in default of filing defence but rather a merit judgment obtained regularly.
8. That the Applicant cannot be heard to blame its County Attorney for failure to file a response to the petition yet it is a county endowed with enormous resources, both financial and human to manage its legal affairs.
9. That the Applicant's County Attorney is an office in the county public service manned with a number of Advocates as well as external lawyers thus it is despondent for it to blame one individual for failing to attend to the petition herein.
10. That it is now trite law that court's discretion ought not be exercised in favour of an applicant on the grounds that he found himself in a predicament as a result of his advocate's alleged mistake as time has come for legal practitioners to shoulder the consequence of their negligent acts or omissions.

### Analysis And Decision

6. I have considered the Notice of Motion application brought under certificate of urgency dated February 27, 2023, the supporting affidavit, the supplementary affidavit and grounds shown on the face of the said application. I have also considered the Replying affidavit by the Petitioner and the rival submissions as well as the applicable law. It is not in dispute that the 1<sup>st</sup> respondent was served with copies of Summons and other court processes in respect of this Petition. It is not also in contestation that the 1<sup>st</sup> Respondent did not file any response to the Petition and the matter proceeded to hearing *ex-parte* and undefended by the 1<sup>st</sup> defendant/Applicant.
7. It is also not in dispute that having confirmed service of Summons and the Petition as well as other court processes, the judgment delivered on February 21, 2022, is a regular judgment of this Honourable Court. In cases of irregular judgment, the court upon an application shall set aside the judgment *ex-debito justitiae* while in a case of regular judgment, the court has unfettered discretion in determining whether such an applicant has given sufficient reasons for failing to Enter Appearance and file defence within the timelines given under statute or the Rules set out thereunder.
8. In the case of *James kanyiita Nderitu & Another* (2016) KLR, the court of Appeal observed as follows;

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one which is irregularly entered. In a regular default judgment, the defendant will have been duly served with Summons to enter appearance or 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 judgment 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 Shab* (1968) EA 98, *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* (1986) KLR 492 and *CMC Holdings v Nzoia* (2004) 1KLR 173



9. 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 justitiae, 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. In addition, the court will not venture into consideration of whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”
10. I agree with the above decision by the superior Court which is also binding on me.
11. In the present case, the 1<sup>st</sup> defendant/applicant in its supporting affidavit has given reasons and explanation for the delay to enter appearance and file response within the stipulated period arguing that upon receipt of Summons to enter appearance and the Petition and other court processes, they forwarded to the County Attorney with instructions to defend the interest of the County. She further contends that it was not until the said County Attorney was interdicted in the month of February 2023 that they realized that the said Cyril Wayongo had not filed any response the Petition herein.
12. Under the overriding objective spelt out in Section 3 of the *Environment and land Court Act*, the principle objective of that statute is to enable the court to facilitate just, fair, expeditious, proportionate and accessible resolution of disputes. That objective was put in perspective by the Court of Appeal in the case of *Nicholas Salat v IEBC & 6 Others*, CA (Application) No 228 of 2013 where Ouko j (as he then was) where it was observed as follows;

“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may, in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”
13. I agree with the above two decisions of the court of Appeal which are also binding on me.
14. In an application for setting aside a regular ex-parte judgment, the court exercises its discretion in either allowing or rejecting the application. That discretion must be exercised upon reasons and must be exercised judiciously. The applicant has stated on oath that they were not aware that a default judgment had been entered against the 1<sup>st</sup> defendant/applicant until the officer handling the matter was placed under interdiction in February 2023. Those explanations under oath in my view are reasonable and excusable. The applicant also stated that they are likely to suffer prejudice if the default judgment is not set aside as they occupy the suit land and have been in occupation for more than 40 years. I also find those averments raise serious triable issues that require to go for trial. Having said that, it cannot be gainsaid that the Petitioner will suffer risk if the ex-parte judgment is set aside. However, I am persuaded



that the risk the 1<sup>st</sup> defendant/Applicant is likely to suffer if the default judgment is not set aside is higher than that of the Petitioner.

15 In view of all the matters aforesaid, I find the Notice of Motion application dated February 27, 2023 is merited and the same is allowed as follows;

1. The firm of Makokha Wattanga & Iyali Associates are authorised to represent the 1<sup>st</sup> defendant/applicant herein.
2. The judgment by this Honourable Court on February 21, 2022 and all consequential orders obtained thereto are hereby set aside.
3. The 1<sup>st</sup> respondent/Applicant is granted leave to file and serve a response to the Petition herein within 14 days from the date of this Ruling.
4. The 1<sup>st</sup> Respondent to pay the Petitioner/Respondent thrown away costs of Kshs 20,000/= within 21 days from the date of this Ruling.

**READ, SIGNED AND DELIVERED VIRTUALLY/IN THE OPEN COURT THIS 12<sup>TH</sup> MAY,2023.**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of;

Mr Kulowa H/B for Khaemba

Mr. Wekesa H/B for Makokha

Lusweti C/A

