



**Omar v Hinawy & another (Environment & Land Case
155 of 1993) [2023] KEELC 18318 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 155 OF 1993
NA MATHEKA, J
JUNE 19, 2023**

BETWEEN

SALIM MOHAMED OMAR APPLICANT

AND

**FARID MBARAK HINAWY, FREIYAN MBARAK HINAWY, FAWZIYA
MBARAK HINAWY (AS ADMINISTRATORS OF THE ESTATE OF MBARAK
ALI HINAWY), ZERABAI HASSANALI, SHIRINBAL ADAMALI DAR, SAID
ALI MOHAMED HINAWY 1ST RESPONDENT**

COMMISSIONER OF LANDS 2ND RESPONDENT

RULING

1. The Application is dated 4th July 2022 and is brought under Article 159 Of the Constitution of Kenya, 2010, Orders 12 Rule 7, 51 Rule 10 the *Civil Procedure Rules* 2010 and Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* seeking the following orders
 1. That this Honorable Court be pleased to certify this Application as urgent and dispense with service of the same in the first instance.
 2. That this Honorable Court be and is hereby pleased to stay any further proceedings pending hearing and determination of this Application inter-parties.
 3. That the Honorable Court be and is hereby pleased to vacate and/or set aside the proceedings and all consequential orders issued of 15th November, 1995 and the suit be reinstated with the Applicant being allowed to prosecute his case on merit.
 4. That this Honorable Court be pleased to direct the registrar to lift the restriction preventing the Applicant herein the sole proprietor of subject matter in this suit parcel No. Mombasa/Block XXXII/40 from transferring, taking possession, digging and/or obliterating the said



subject matter which has deprived him from using his owner parcel of Land being the sole proprietor hence he has been unable to enjoy and/or use the parcel of land for the last 29 years to date.

5. That the cost of this Application be provided for.
2. It is based on the grounds that the Applicant is the sole proprietor of subject matter in this suit parcel No. Mombasa/Block XXXII/40 with which he has been unable to enjoy and/or use for the last 29 years to date due to the restriction placed by this honorable court hence depriving him the right to own property as required by the Constitution of Kenya 2010. That the Honorable Court dealt with the matter herein when it was slated for hearing on the 28th June, 1993 when the matter was stood over by consent by Counsels present. That the matter had not been slated for any further hearing date when the Respondent requested for Judgement on 19th September 1995 which was issued on the 15th November 1995 as per the court proceeding where an interlocutory judgement was entered in favor of the Plaintiff against the Applicant as per the Plaint. That there has since been an order in place that was granted as per the Plaint dated 17th March 1993 restraining the Applicant from transferring the parcel of Land Title Number Mombasa/Block XXXII/40 to any third party which was registered against this Certificate of Lease. That there is now an order in place issued on 15th November, 1995 dismissing the Applicant's case herein for nonattendance. That the Applicant was not informed of the next hearing date that was on 21st July 1993 when the matter was last in court on the 28th June 1993. That as a consequence neither the Applicant nor his advocates on record appeared in court on the hearing date of 21st July 1993 and equally none of the Respondents and/or their Advocates attendant court for hearing on that day as per the Court proceedings. That as a result the 1st Respondents filed an application requesting Judgment on the 19th September 1995 which was granted on 15th November 1995. That the Applicant has never been served with any orders whatsoever to date not even for formal proof. That it is in the interest of justice and fairness that the orders issued on 15th November, 1995 be set aside and the suit herein be reinstated so that the Applicant can be allowed to prosecute his case so that it be determined on merit. That the Respondent will not suffer any loss if the orders sought are granted whereas the Applicant will be occasioned or subjected to extreme prejudice and injustice. That unless the orders sought are granted, the Applicant will suffer irreparable damage and loss and continues to lose his right to enjoy his property as the sole proprietor. That this Application has been filed without inordinate delay.
3. The 4th Respondent raised the following grounds of opposition with respect to the subject application that the Notice of Change of Advocates dated 4th July 2022 prepared by Bennette Nzamba & Co., Advocates and filed on the 5th July 2022 is in contravention of Order 9 Rule 9 of the Civil Procedure Rules, 2010, hence rendering the Subject Application incompetent and fatally defective. That there are no pending proceedings as the matter was determined by way of interlocutory judgment entered by the Court on the 15th November 1995. The Applicant has failed to demonstrate the legal threshold required to meet the Court's consideration in granting prayer 3 of the Application, both under equity and under the provisions of the Civil Procedure Rules, 2010. The Applicant has failed to satisfy the legal requirements for the grant of a mandatory injunction as prayed for under prayer 4 of the Application. The Subject Application is an abuse of the process of the Court and is in blatant disregard of the provision of the Civil Procedure Act and is intended to be a false re-start of the proceedings which had already been concluded almost 3 decades ago. In the absence of proof of service of the Application to the 1st, 2nd, 3rd and 5th Respondents, together with the Commissioner of Lands (all of whom are necessary parties to these proceedings), this Honourable Court cannot entertain a grant of the prayers sought for in the Application.



4. This court has considered the application and the submissions therein. Order 9 Rule 9 of the [Civil Procedure Rules](#), 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”

5. Clearly the provisions of Order 9 Rule 9 of the Civil Procedure Rules make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind the provision was well articulated in the case of [S. K. Tarwadi vs Veronica Mueblmann\(2019\)](#) eKLR where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

6. In the case of [Lalji Bhimji Shangani Builders & Contractors vs City Council of Nairobi \(2012\)](#) eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati Judge, in *Monica Moraa vs Kenindia Assurance Co. Ltd.* (2010) eKLR where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

7. In the present case interlocutory judgment had been rendered on the 15th November 1995 where there was a determination of the Court and therefore the provision of Order 9 Rule 9 were applicable herein.



8. Be that as it may, Order 10, rule 11 of the *Civil Procedure Rules*, on the other hand provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside, it states as follows:

“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.”
9. A reading of the above provisions shows that a court has the discretion to set aside a default judgment. In the case of *Patel vs EA Cargo Handling Services Ltd (1974) EA 75*, the Court held that:

“There are no limits or restrictions on the judge’s discretion 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 condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
10. In *Kenya Commercial Bank Ltd vs Nyantange & Another (1990) KLR 443* the court held that;

“Order IXA rule 10 of the Civil Procedure Rules donates a discretionary power to the court to set aside or vary an ex-parte judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just.”
11. In the case of, *Thorn PLC vs Macdonald [1999] CPLR 660*, the Court of Appeal highlighted the following guiding principles: -
 - i. while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
 - ii. any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
 - iii. the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
 - iv. prejudice (or the absence of it) to the claimant also has to be taken into account.
12. In the case of, *Tree Shade Motor Limited vs DT Dobie Co Ltd CA 38/98*, the Court held that even when ex-parte judgment was lawfully entered, the court should look at the draft defence to see if it contains a valid or reasonable defence.
13. In the present case, it was not disputed that the Defendants/Applicant were duly served with the plaint and summons to Enter Appearance and the firm of A.B. Olaba ESQ. Advocate filed a memorandum of appearance for the Applicant dated 31st March 1993 and filed in court on 1st April 1993. In the present case interlocutory judgment had been rendered on the 15th November 1995. This application was filed in court on the 5th July 2022. This is 27 years later! The delay is inexcusable. Secondly no draft defence has been provided for this court to consider if there are any triable issues. I am not persuaded that the Applicant has made out a case for the granting of the discretionary orders to set aside the interlocutory judgement entered herein. My considered opinion is that no reasons were advanced by the Applicants for the delay. This application is not merited and is an abuse of the court process and is dismissed with costs.
14. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH JUNE 2023.



N.A. MATHEKA
JUDGE

