



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISC. APPLICATION NO. E364 OF 2020

CHARLES MUIRURI NG'ANGA.....1ST APPLICANT

MICHAEL GATITU.....2ND APPLICANT

VERSUS

BENSON MBITHUKA.....RESPONDENT

RULING

1. The live prayers in the motion dated 9th September, 2020 by **Charles Muiruri Ng'ang'a** and **Michael Gatitu** (hereafter the Applicants) are seeking orders that:

”3. The Defendant/Applicant be granted leave to enter appearance and file their defence in CMCC No. 10651 of 2018 and the suit be heard afresh inter partes.

4.The exparte judgment entered on 24th July, 2019 in CMCC No. 10651 of 2018 and all the consequential orders against the Defendant/Applicant be set aside.

5.... there be stay of execution of the exparte judgment entered on 24th July, 2019 pending hearing and determination of CMCC No. 10651 of 2018.

6.The proposed defence, list of witnesses and documents accompanying defence attached thereto be deemed duly filed and served upon payment of requisite court fees.” (sic).

2. The motion is expressed to be brought under Article 49 of the Constitution of Kenya, Order 10 Rules 6, and Order 51 Rule 1 of the Civil Procedure Rules, inter alia. On grounds, among others, that default judgment was entered in **Milimani CMCC No. 10651 of 2018** against the Applicants; that thereafter **Benson Mbithuka**, the Respondent had commenced execution by the attachment of the Applicants' motor vehicle registration no. **KAQ 963 C**; and that the Applicants have a good and arguable defence, hence the exparte judgment in **Milimani CMCC No. 10651 of 2018** ought to be set aside.

3. The motion is supported by affidavits of **Charles Muiruri Ng'ang'a** (hereafter 1st Applicant) and **Purity Waikwa**, counsel for the Applicants. The motion was opposed by way of a replying affidavits sworn by the Respondent.

4. In a ruling allowing the preliminary objection raised by the Applicants concerning the capacity of the Respondent's erstwhile counsel Mr Kibiku, to practice as an advocate, **Mboghli J** (as he then was) ordered that the execution proceedings against the Applicants be vitiated and set aside entirely, the warrants of attachment be recalled, and the Applicants' attached motor vehicle be released. He directed that the outstanding matters in the motion proceed to hearing.

5. By her affidavit in support of the motion, counsel swore that the present cause emanates from **Milimani CMCC No. 10651 of 2018** in which the Respondent sued the Applicants; that the firm of **Kairu McCourt & Advocates** had been instructed by the Applicants' insurer, but defaulted in filing defence, and consequently, judgment was entered on 24th July, 2019. That subsequently the Applicants' insurer had instructed the firm of **Kimondo Gachoka & Advocates** to take up the conduct of the matter. Counsel asserted that the Applicants had a viable defence and that the and the proceedings and judgment entered in **Milimani CMCC No. 10651 of 2018** ought to be set aside. The 1st

Applicant's affidavit repeats the depositions in his counsel's affidavit.

6. The Respondent he took the view that issues raised in the motion are sub judice and the motion ought to be struck out as a similar motion dated 25th August, 2020 had been filed by the Applicants in the lower court suit; that Order 10 Rule 11 of the Civil Procedure Rules gives the court of first instance the unfettered discretion to set aside ex parte judgment and any recourse to the superior court can only be by way of appeal. He proceeds to depose to matters concerning the merits of the motion which in my view will be of no moment in the determination of the matter at hand.

7. The court directed that the motion be canvassed by way of written submissions. The Respondent complied but the Applicants did not file submissions despite being granted more time to do so. The pertinent portion of the Respondent's submission was to the effect that under Order 10 Rule 11 of the Civil Procedure Rules, the discretion to set aside the ex parte judgment in the lower court should be exercised by the court which entered the said judgment in the first instance. He cited several decisions, including **Anne Wanja Mwangi v Samson Muriithi Muriuki [2019] eKLR** and **Board of Management St. Augustine Secondary School v Chambalili Trading Co. Ltd [2021] eKLR**. The court was urged to dismiss the motion with costs.

8. The court has considered the material canvassed in respect of the motion. It is asserted by the Respondent that a similar motion had been filed in the lower court by the Applicants and hence the plea of sub judice. Given the undisputed facts of the matter and the provisions of section 6 of the Civil Procedure Act, the plea of sub judice is well taken in my view. To my mind, however, the matter is much more straight forward. The sole issue upon which the motion turns is whether this court can in the first instance entertain an application to set aside an ex parte judgment entered in a suit before the lower court.

9. The jurisdiction of this court, both original and appellate is circumscribed by the Constitution and statute. The provisions of Order 10 of the Civil Procedure Rules anticipate that the court seized of a matter will be moved to enter judgment in default of defence or to set aside such judgment in accordance with Order 10 Rule 11. This court, not being seized of the lower court suit cannot be moved in a miscellaneous cause as done in this case, to assume a jurisdiction which properly resides in the court of the first instance. No authority is required for the proposition that the discretion to set aside its own judgment rests in the first instance in the lower court, and to this court in its appellate jurisdiction.

10. The motion dated 9th September 2020 is therefore incompetently before this court. The filing of the motion in this court represents a flagrant abuse of the process of the court. That is true whether a similar motion had been filed before the trial Court or not. In expressing its displeasure, this court will proceed to strike out the said motion and all other motions subsequently filed herein by the Applicants, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 18TH DAY OF NOVEMBER 2021.

C. MEOLI

JUDGE

In the presence of:

Miss Waikwa for the Applicants

Mr Kibiku h/b for Mr Kamau for the Respondent

C/A: Carol