



REPUBLIC OF KENYA



KENYA LAW
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**Muroki v Mwananchi Credit Limited & 5 others (Environment & Land Case
E353 of 2022) [2023] KEELC 21005 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E353 OF 2022
AA OMOLLO, J
OCTOBER 26, 2023**

BETWEEN

JOSEPH MUIGAI MUROKI PLAINTIFF

AND

MWANANCHI CREDIT LIMITED 1ST DEFENDANT

FIRST COMMUNITY BANK 2ND DEFENDANT

FRESHLINE FRUITS & VEGETABLES LIMITED 3RD DEFENDANT

MOHAMMED ABDI NUNO 4TH DEFENDANT

MAHDI ABDIKADIR AHMED 5TH DEFENDANT

SAKAR FATHEY SAKAR MUHAMED 6TH DEFENDANT

RULING

1. For determination is the application dated March 9, 2023 and brought under the provisions of Order 40 rule 7, and Order 51 of the [Civil Procedure Rules](#) and section 1A and 3A of the [Civil Procedure Act](#); and article 48 & 50 of the [Constitution](#) . The 2nd Defendant/Applicant sought to be granted the following;
 - i. Spent
 - ii. That this Honourable Court be pleased to discharge, vacate, set aside the ex-parte orders issued by the Honourable the Lady Justice A. Omollo issued on November 17, 2022 and all consequential orders against the 2nd Defendant/Respondent.
 - iii. That there be a stay of execution of the order issued on November 17, 2022 and any further proceedings (save for the application herein) and all consequential orders pending the hearing and determination of this application.



- iv. That the Honourable Court be pleased to discharge, vacate, set aside the ex-parte order issued on 17th November, 2022 and all consequential orders and the application dated 28th October, 2022 be struck out.
 - v. That the 2nd defendant/Respondent be allowed to defend the Application dated October 28, 2022.
 - vi. That the costs of the Application be in the cause.
2. The application was premised on the grounds listed on its face inter alia;
- a. That the ex-parte orders issued on 17th November, 2022 were granted on material misrepresentation and non-disclosure of facts by the Plaintiff/Applicant.
 - b. That the plaintiff/applicant never served the 2nd defendant/respondent with the said Application therefore the 2nd defendant was not present during the court proceedings.
 - c. That the orders granted are final orders and have the effect of doing away with the main suit before the 2nd Defendant/Respondent is given an opportunity to be heard contrary to article 50 of the *Constitution of Kenya*.
 - d. That the orders granted by the Honourable judge are prejudicial to the 2nd Defendant/Respondent as it was not given an opportunity to be heard.
3. The 2nd Defendant/Applicant also filed an affidavit sworn by Claris Ogombo in support of the application. Ms. Ogombo reiterated the facts pleaded on the face of the application. She deposed that this court has unfettered power and discretion to set aside *ex parte* orders obtained following non-disclosure of material facts and on misrepresentation.
4. The plaintiff filed a replying affidavit dated March 30, 2023 in opposition to the grant of the orders sought. He deposed that the Defendants were duly served with the pleadings and proceeded to annex copies of the affidavit of service. He also denied that he obtained the orders by misrepresentation of facts and urging that nothing has been pointed by the Applicant. The Plaintiff averred that the Applicant has not given any sufficient reasons for varying the orders.
5. The 2nd Defendant/Applicant filed written submissions dated May 8, 2023 in support of the application and cited several case law. The Applicant relied on the renowned case of *Shah v Mbogo & another* (1967) EA 116 where the Court of Appeal stated thus;

“The discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

And the case of *Patriotic Guards Ltd v. James Kipchirchir Sambu* (2018) eKLR holding thus;

“It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously...judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in the suit.”



6. I have also considered the further submissions by the 2nd Defendant/Applicant and the Plaintiffs submissions. The current application was brought on two main grounds;
 - a. That the Applicant was never served with the pleadings.
 - b. That the orders given are prejudicial to the Applicant as they are of a permanent nature.
7. The hallmark for setting aside *ex parte* orders includes proof that the aggrieved party was never served with the pleadings in question, in this instance, the application dated October 28, 2022. The 2nd Defendant/Applicant has pleaded and submitted that they were never served. It referred, this court to the provisions of Order 12 rule 2(a) of the Civil Procedures Rules that sanctions a court to issue *ex parte* orders where the court is satisfied that “notice of hearing was duly served.”
8. The Plaintiff/Respondent has annexed the affidavit of service by Peter Kinyanjui Muiruri to argue that they served all the Defendants. At paragraph 4 & 5 of the Affidavit of Service, Mr. Muiruri deposed thus;
 - “ 4. I personally met the legal officer of the 2nd Defendant and effected service by tendering copies of the documents (listed at paragraph 2).
 5. That the legal officer of 2nd Defendant accepted service acknowledge receipt and stamped copies of the hearing notice dated 31st October, 2023 (coming for hearing on 17th November, 2022) and the application dated 28th October, 2022.”
9. I have perused the said affidavit of service together with the copy of the order given on 31st October, 2022, bearing a receiving stamp of the 2nd Defendant with a date of 1st November, 2022. The 2nd Defendant/Applicant has not made any comment about the stamp appearing on the order confirming receipt nor applied to cross-examine the process server on how he served. In the absence of contrary evidence contesting service as presented by the Plaintiff, mere denial is not sufficient to persuade this Court.
10. The second ground is whether or not the Applicant will suffer prejudice unless the orders given on 17th November, 2022 are set aside. The Applicant submitted that the Plaintiff/Respondent had not established a *prima facie* case as set out in the cases of *Giella v Cassman Brown* and *Mrao Limited v. First American Bank & 2 others* (2003) KLR 125. The Applicant went further to submit that the Respondent’s application did not meet the threshold for irreparable loss or balance of convenience. Instead of addressing this court on the prejudice it would suffer unless the impugned orders are set aside, the Applicant submitted on the merits of an application which has not been set aside.
11. The Applicant also pleaded that the orders given were final and have the effect of doing away with the main suit before the Applicant is given an opportunity to be heard. The order that was issued and extracted is self-explanatory as it ends with the words “...pending hearing and determination of the main suit.”
12. The Applicant even deposed to being aware that the matter was listed for pre-trial conference before the deputy registrar on March 23, 2023. It needless to add that pre-trial hearing as envisaged under order 11 of the *Civil Procedure Rules* is to confirm that all the parties have filed their pleadings and documents in support of their case/defence. Thus, the right of the 2nd Defendant/Applicant to contest the claim has not been taken away. The temporary orders of injunction given are aimed at preserving the suit property in its current state until the suit is determined on merits.



13. Consequently, I hold that the 2nd defendant/applicant has failed to persuade the court to vary and or set aside its orders issued on November 17, 2022. The inescapable result is the notice of motion application, dated March 9, 2023 is dismissed with costs to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023

A. OMOLLO

JUDGE

