



**Waweru v Maina (Environment & Land Case E15 of 2022)
[2023] KEELC 21043 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21043 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E15 OF 2022
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

MARGARET MUMBI WAWERU PLAINTIFF

AND

VERONICA WAMBUI MAINA RESPONDENT

RULING

1. This is a ruling on an application dated 14/3/2023 filed by the defendant under order 45 of the [CPR](#), sections 3 and 3A and 80 of the [CPA](#). It seeks orders that the court's orders issued on 7/3/2023 be reviewed set aside and expunged to allow the applicant to be heard and to tender evidence for the just determination of the case.
2. The grounds upon which the application is premised are at its foot and in the supporting affidavit of the applicant. They boil down to the following: that the applicant was not heard during the hearing held on 14/2/2023 and judgment in the matter was entered against her on the March 7, 2023; that the non-attendance of the applicant and her counsel was due to factors beyond her control in that the applicant suffered logistical and financial disadvantages and could not issue sufficient instructions to her advocate with the consequence that the appropriate pleadings were not filed; that on various occasions the applicant and her representative were not able to join the court's virtual platform due to technical faults and challenges; and that the judgment entered against her is prejudicial to her.
3. The motion is opposed by the plaintiff *vide* her affidavit dated 22/5/2023. In that affidavit she states that grounds of review under order 45 are limited and in any event the applicant has not fulfilled them; that she is aged and any delay in the execution of her judgment is prejudicial to her; that the applicant and her advocate willfully ignored the court proceedings; that the applicant has not placed any evidence before court to demonstrate that she encountered any difficulties in attending court proceedings; that if the applicant's counsel had insufficient instructions he ought to have appealed; that it is curious that



- the applicant appeared and instructed the advocate less than a week after the judgment was read and that in any event the replying affidavit she had filed demonstrated the weakness of her case.
4. The motion was disposed of by way of written submissions on the order of court and the applicant filed her submissions on 10/7/2023 while the respondent filed hers on 4/7/2023. I have had consideration of the said submissions.
 5. In the present application the only issue that arises for determination is whether the orders sought should issue.
 6. The respondent faults the applicant for coming under Order 45 and seeking to have judgment reviewed. However, the same application has sought that the judgment be set aside and no application should be dismissed solely because a party brought it under the wrong provisions of the law. It would appear from the grounds for the application that the main purpose of the application is to set aside the judgment and enable the applicant to be heard on her defence on its merits. It is also a fact that the hearing took place in her absence. The plaintiff had also had her adverse encounter with procedure when she failed to attend court for her application on 13/6/2022 whereupon her application dated 24/3/2022 was dismissed for non-attendance prompting her to file a reinstatement application dated 14/6/2022.
 7. In this matter the defendant filed a replying affidavit dated 17/5/2022 in response to the application dated 24/3/2022 by the plaintiff. after that there are no other documents filed on her behalf in the court file. The application she was responding to in her affidavit was withdrawn and the suit went to hearing ex parte leading to the judgment that she now impugns.
 8. This court has noted that there is no defence in the record filed on her behalf. There is no indication of what defence the applicant wishes to file perchance she is accorded an opportunity by this court to have the judgment set aside and her case heard on the merits.
 9. The grounds upon which the court exercises its unfettered discretion to set aside judgment include a consideration as to whether the defendant has a defence or a proposed defence with triable issues. In this court's view diligence demanded that the applicant should have at least annexed the proposed defence to the application and seek court's leave to file it. Where no defence had been originally filed by an applicant a judgment can not be set aside on the basis of an application that does not attach a proposed defence. Consideration of the potential merits of the defendants defence can not be had in the present case owing to the absence of that defence or even a draft proposed defence and this court is seriously handicapped and it must dismiss the application on that ground alone. The upshot of the foregoing is that the application dated 14/3/2023 is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

