



REPUBLIC OF KENYA



**Kiere v Karaithi & 6 others (Environment & Land Case E84 of 2021)
[2023] KEELC 21046 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E84 OF 2021
A OMBWAYO, J
OCTOBER 19, 2023**

BETWEEN

PATRICK GITHINJI KIERE PLAINTIFF

AND

MICHAEL MAINA KARAITHI 1ST DEFENDANT

NYANDARUA PROGRESSIVE AGENCIES CO LTD 2ND DEFENDANT

ELIUD SAMUEL WAWERU 3RD DEFENDANT

PETR KINYANJUI NGUGI 4TH DEFENDANT

JESSEE KAMERIA NGWIRI 5TH DEFENDANT

JOSEPHAT MUREITHI MURUTHI 6TH DEFENDANT

PETER WANJOHI KARANJA 7TH DEFENDANT

RULING

1. Mr. Michael Maina Kariithi (herein after referred to as the applicant) has come to this court seeking orders that this court grants the 1st defendant contemnor and the 2nd Respondent contemnor leave to file their responses and written submission to the plaintiff's application dated 15th May 2023 with a timelines given by the court. That the court be pleased to vary the directions in the ruling delivered on 11th July 2023. The application is based on grounds that the applicants cannot comply with strict timelines of the court because counsel for the applicant herein could not reach his client and when the matter came up for mention a ruling date had been given without hearing the applicant. The applicants beseeched the court to hear him and states that he is not in contempt of court.



2. Patrick Githinji Kiarie on his part states the application is incompetent unintelligible, falsely defective bad in law and abuse of court process. That the prayer for review is not supported by any law or facts as required under Order 45 rule 1 of the [Civil Procedure Rule 2010](#).
3. That the applicant has not averred or demonstrated that there is discovery of new a matter that is important and held not be discussed after due diligence . There is no appeal before court.
4. The respondent states that the applicant was aware of the hearing date of the application because his advocate was aware. The applicant counsel was served with the application direct and therefore was aware of the hearing date. The applicants counsel was even aware of the ruling date.
5. The law on setting aside of ex parte orders is found under Order 12, rule 7 of the [Civil Procedure Rules, 2010](#) which provides thus:

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

6. This provision is amplified by Order 51, rule 15 which provides that the court may set aside an order made ex parte. In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause.
7. Order 10 Rule (2) of the [Civil Procedure Rules](#) provide for Affidavit of Service upon non-appearance as follows: -

“Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.”

8. Order 10 Rule 11 provides for setting aside of judgment entered under Order 10. In *Ali Bin Khamis v Salim Khamis Korobe & 2 Others*, [1956] 23 EACA 195, it was held inter alia that an order made without service of summons to Enter Appearance is a nullity which must be set aside ex debito justitiae. This position was confirmed by the Court of Appeal in CA No. 6 of 2015 [James Kanyita Nderitu v Maries Philotas Ghika & Another](#) [2016] eKLR where it was held:

“We shall first address the ground of appeal that faults the learned Judge for setting aside the default judgment and consequential orders in the circumstances of this case. From the onset, it cannot be gainsaid that a distinction has always existed between the 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, but for one reason or another, he had failed to enter appearances 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 the default judgment, and will take into account such as the reason for the 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 (see *Mbogo & Another v Shab* (supra); *Patel v EA Cargo Handling Services Ltd* [1975] EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).



In an irregular 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 considerations of whether the intended defence raises triable issue. Or 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. (See *Onyang'o Oloo v Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh v Election Tribunal, Kotch*, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

9. In *Frigonken Ltd v. Value Park Food Ltd*, HCC No. 424 of 2010, the High Court stated:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process”.

10. Earlier in *Kabutha v. Mucheru* HCC No. 82 of 2002 Nakuru (Musinga J, (as he then was) had expressed the principle thus:

“[with] respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an *ex parte* judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.”

11. In the instant case before me, the Applicant herein was properly served with the application dated 15th May, 2023 and was even aware of the ruling date. I have considered the application on record, the rival submission and do find that the applicant counsel was served with the application for contempt together with the directions of the court. The applicant counsel was given 14 days to file a response and a further 7 days to file submission upon service by the respondent.

12. Submission were served on 14th June 2023. The applicants counsel was aware of the ruling date thus 22nd June 2023 but did not file any response or even move to court to review its timelines. I do find that the applicant behaved like the Alaskan fox in winter that went into hibernation and did not come out in time when winter had come to an end. The applicant is guilty of laches and ignoring court directions hence the court cannot exercise its discretion in his favour. The application is dismissed with costs.



RULING DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 19TH OCTOBER 2023.

A. O. OMBWAYO

JUDGE

