



**Mbugua v Sigimo Enterprises Limited & another (Environment and Land Case Civil Suit 478 of 2017) [2023] KEELC 22453 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22453 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 478 OF 2017  
MD MWANGI, J  
DECEMBER 19, 2023**

**BETWEEN**

**LEAH NG'ENDO MBUGUA ..... PLAINTIFF**

**AND**

**VILLA CARE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SIGIMO ENTERPRISES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(In respect of the Notice of Motion dated the 24th August, 2023 seeking to set aside the default judgement against the 2<sup>nd</sup> Defendant/Applicant)

**Background**

1. This ruling is in respect to the 2nd Defendant/Applicant's application dated 24th August, 2023 filed under the provisions of Order 10 Rule 11 of the *Civil Procedure Rules*, Sections 1A & 1B and Article 159(2)(d) and (e) of *the Constitution*. The Applicant seeks the for orders that:
  - a. The Honourable Court be pleased to set aside the default Judgement entered on 1st February, 2022.
  - b. The Applicant be granted leave to file its Defence in terms of the Draft Defence annexed to this Application.
  - c. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it as well as the Supporting Affidavit of Muthoni Kamau, the in-house Counsel of the 2nd Defendant/Applicant Company. The basis of the Application is that the Plaintiff obtained default Judgement against the 2nd Defendant/Applicant for default in appearance. The entry of judgement was as a result of an inadvertent error on the part of



- the 2nd Defendant/Applicant's staff/employee who received the Summons to Enter Appearance and the Plaintiff on behalf of the 2<sup>nd</sup> Defendant but filed them away. Consequently, the 2nd Defendant/Applicant failed to enter appearance and/or file a statement of Defence as required.
3. The Applicant asserts that it has an arguable Defence and craves for an opportunity to be heard and defend the suit. The 2nd Defendant/Applicant avers that the crux of its Defence is that the Plaintiff admits in her own pleadings and the attached documentary evidence by way of the Swift Confirmation Slip that pursuant to the terms of the Letter of Offer dated 28th April, 2014, she paid the deposit to a company that is separate and distinct from the 2<sup>nd</sup> Defendant/Applicant herein.
  4. The 2<sup>nd</sup> Defendant/Applicant avers that it was merely a marketing agent of the project and it had no proprietary interest in the suit premises that it could have transferred to the Plaintiff as it was merely an agent of a disclosed Principal, the 1st Defendant who was the Vendor.
  5. The 2nd Defendant/Applicant denies receiving any monies from the Plaintiff to justify the claim for a refund against it. Consequently, the Plaintiff's suit is non-suited and misconceived as it discloses no cause of action as against the 2nd Defendant/Applicant.
  6. The 2nd Defendant/Applicant asserts that it is ready and willing to abide with such orders of reasonable throw-away costs as the court may direct. The Applicant urges the court to exercise its unfettered discretion and set aside the Judgement against it for ends of justice to be met.
  7. The 2nd Defendant/Applicant contends that its Defence raises triable issues as indicated in the attached Draft Defence. It is therefore in the interest of justice that the matter be determined on its merits. The Applicant further faults the award of interest at 14% per annum from the 2nd October, 2015 being the date the Plaintiff allegedly rescinded the Agreement as an issue that should have proceeded to Formal Proof hearing as it required the taking of evidence.

### **Replying Affidavit**

8. The application was vehemently opposed by the Plaintiff/Respondent by way of the Replying Affidavit of C. Odhiambo Omita, Advocate for the Plaintiff/Respondent sworn on the 6th September, 2023. The deponent avers that the Judgement and Decree entered by this court on 1st February, 2023 against the 2nd Defendant/Applicant was regular. Further, the Notice to Show Cause application was duly allowed by this court on 28th August, 2023. The Plaintiff/Respondent is now in the process of execution. There is therefore nothing to arrest since the matter has been overtaken by events.
9. The deponent avers that the Applicant never filed any response to the Notice to Show Cause and instead chose to file the instant application. Despite, acknowledging receipt of Summons to Enter Appearance and the Amended Plaintiff, the allegation that the documents were erroneously misfiled is an afterthought and a delaying tactic.
10. The Plaintiff argues that failure to enter appearance and file a Statement of Defence was deliberate and a calculated attempt to frustrate the Plaintiff's attempt to recover the money fraudulently obtained by the Applicant.
11. In giving the chronological account of events, the Plaintiff avers that the Applicant was served with the Amended Plaintiff and annexures on 16th November, 2021; which documents were duly received and stamped. The Applicant failed to enter appearance and a judgement in default was duly entered. The Plaintiff thereafter filed the Plaintiff's Party and Party Bill of Costs, which Bill was also duly served upon the Applicant through its official email address.



12. The taxation notice was subsequently served upon the Applicant. The Applicant did not file any document. On 8th March, 2023, the Applicant was again served with a Draft Decree for its review. Eventually, the Applicant was served with the Notice to Show Cause why execution should not issue on 31st July, 2023.
13. The deponent states that it is only after the receiving the Draft Decree that the Applicant instructed its counsel on record to file a Notice of Appointment dated 12th April, 2023. The Plaintiff argues that this shows that the Applicant was all along receiving the emails but chose to ignore them.
14. On the Draft Defence being arguable, the deponent states that the averments contained therein are merely sensational. In further response thereof, the Plaintiff avers that, vide a Letter of Offer dated 28th April, 2014, the Applicant offered to sell to the Plaintiff off Plan, a 3-bedroom apartment known as B4, proposed to be erected in Spring Hill Park, Tabere Crescent Road, Kileleshwa on LR No. 209/14990/22. The 2nd Defendant purported to act on behalf of the 1st Defendant.
15. The Plaintiff, acting on the directions contained in the Letter of Offer, paid the money into the account as directed by the 2nd Defendant/Applicant. The 1st Defendant has confirmed in its Witness Statement by one Mr. Daniel Ojjo, and acknowledged that it is the 2nd Defendant who received the funds.
16. The delaying tactic exhibited by the 2nd Defendant/Applicant herein is a deliberate attempt to subvert justice, which transgression cannot be cured by throw-away costs. The Plaintiff stands to suffer immense prejudice as the 2nd Defendant received the money in 2017, more than 6 years ago and has had the benefit of using the money and doing business with it.
17. The deponent states that equity aids the vigilant, not the indolent. The 2nd Defendant/Applicant slept on its rights and as such the application is unmerited and should be dismissed with costs.

### **Supplementary Affidavit**

18. The 2nd Defendant/Applicant filed a Supplementary Affidavit sworn by Muthoni Kamau on the 4th October, 2023. The deponent avers that the failure to enter appearance was not deliberate but an oversight on their part. The employee who was handling the matter left the Company without a proper handing over. The Applicant therefore prays for an opportunity to be heard on merit and defend the suit as it has been wrongly sued. The money was paid to Villa care Management Limited, which is distinct from the 2<sup>nd</sup> Defendant/Applicant Company yet it has not been made a party to the proceedings herein.
19. The deponent reiterates that the default judgement herein is irregular as the entry of the interlocutory judgement was done in excess of jurisdiction by the Deputy Registrar as an award of interest at 14% per annum from 2nd October, 2015. The Applicant insists this is an issue that should have proceeded to Formal Proof hearing as it required the taking of evidence on the interest period and the rate applicable. The application should therefore be allowed as prayed.

### **Court's Directions**

20. The court directed that the application be canvassed by way of written submissions. Both parties complied. The 2nd Defendant/Applicant filed its submissions dated 24th August, 2023 whereas the Plaintiff/ Respondent's submissions are dated 25th October, 2023. The court has had a chance to read through the said submissions.



## Issues for Determination

21. Upon careful consideration of the application, the grounds thereto together with the rival affidavits of the parties both in support and opposition, the parties' submissions, the authorities relied on and the law, I find that the issues for determination are as follows:
- a. Whether the judgment should be set aside;
  - b. Whether leave to file defence should be granted;
  - c. What orders to issue and who to bear the costs of the application?

## Analysis and determination

### a. Whether the judgment should be set aside;

22. I have considered the Application and the submissions of the parties in their totality and I find that the applicable provisions of law is Order 10 Rule 4 (1) and (2) of the [Civil Procedure Rules, 2010](#) which provide as follows:

“4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”

23. However, Order 10, rule 11 of the [Civil Procedure Rules](#), provides that ex-parte interlocutory judgment in default of appearance or defence may be set aside. It reads 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.”

23. From the reading of this provisions, the court has the discretion to set aside a default judgment. In the case of, *Patel -v- 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.”

24. I need to state at this juncture that in cases of irregular judgment, the Court will set it aside ex debito justitiae - as of right. As the Court of Appeal observed in [James Kanyita Nderitu & Another \[2016\]](#)



eKLR, there is little option for a court but to set aside such a (irregular) judgment. The Court stated that:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance 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 judgement 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another -vs- Shah* (1968) EA 98, *Patel -vs- E.A. Cargo Handling services Ltd* (1975) E.A. 75, *Chemwolo & Another -vs- Kubende* (1986) KLR 492 and *CMC Holdings -vs- Nzioka* [2004] I KLR 173.

In an irregular default 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 justiae*, 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.”

25. It is evident that the 2nd Defendant/Applicant herein was duly served with the Summons to enter Appearance and the Amended Plaintiff. The Applicant admits that the failure to enter appearance/file a defence was an inadvertent mistake/error on its part. It is therefore my finding that that the judgment entered on delivered on 1st February, 2022 was regular.
26. While it is the right for a party to be heard in any matter, where such a party has been given an opportunity that it has squandered a satisfactory explanation must be offered for such a judgement to be set aside. Thought the court has an unfettered discretion in determining whether or not to set aside default judgment, ‘the court will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has lapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment.’ An application to set aside a regular judgement is not ‘a walk in the park’.



27. In the case of, Kenya Commercial Bank Ltd -v- Nyantange & Another (1990) KLR 443 Bosire J, (as he then was) 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.”

28. Similarly, in the case of, Thorn PLC -v- Macdonald [1999] CPLR 660, the Court of Appeal stipulated 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.

29. In the instant case, the reason advanced by the Applicant's is that there was an inadvertent mistake/ error on its part caused by its former employee who filed away the documents without forward it them for necessary action.

30. I have had the benefit of reading through the draft defence, and in my opinion it does indeed raise triable issues. It would be in the interest of justice that the parties be afforded an opportunity to be heard fully on the merit of their respective claims.

31. It is therefore appropriate that the default Judgement entered on 1st February, 2022 be set aside on the following conditions:

- A. The 2nd Defendant's statement of defence shall be deemed to be properly filed upon payment of the prerequisite Court filing fees;
- B. The 2nd Defendant shall file and serve the said statement of defence within 7 days of this Ruling;
- C. The 2nd Defendant shall pay the Plaintiff a sum of Kshs. 30,000/= as throw-away costs within 30 days from the date of this Ruling;
- D. In default of compliance the order vacating the interlocutory judgment shall automatically lapse without further reference to the to Court;
- E. The Plaintiff is granted costs of this application.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**M. D. MWANGI**

**JUDGE**

**In the virtual presence of:**



Mr. Kariuki h/b for Mr. Gachugi for the 2<sup>nd</sup> Defendant/Applicant

Mr. Odhiambo for Plaintiff/Respondent

N/A for the 1<sup>st</sup> Defendant

Court Assistant – Yvette

**M.D. MWANGI**

**JUDGE**

