



**Mbuthia & 2 others (Suing for and on Behalf of Mpeketoni Jua Kali Saving and Credit Cooperative Society Limited) v Kilonzi & 4 others (Environment & Land Case 16 of 2020) [2023] KEELC 22063 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22063 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 16 OF 2020  
MAO ODENY, J  
DECEMBER 7, 2023**

**BETWEEN**

**BENSON CHEGE MBUTHIA ..... 1<sup>ST</sup> PLAINTIFF  
SIMON MUCHIRA GACHOKI ..... 2<sup>ND</sup> PLAINTIFF  
LUCAS NG'ANG'A JOHN ..... 3<sup>RD</sup> PLAINTIFF  
SUING FOR AND ON BEHALF OF MPEKETONI JUA KALI SAVING AND  
CREDIT COOPERATIVE SOCIETY LIMITED**

**AND**

**DANIEL KILONZI ..... 1<sup>ST</sup> DEFENDANT  
CHARLES MAINA MTIVA ..... 2<sup>ND</sup> DEFENDANT  
PETER IKENYE KWERI ..... 3<sup>RD</sup> DEFENDANT  
JOHN MACHARIA ..... 4<sup>TH</sup> DEFENDANT  
PETER NJAU ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 20<sup>th</sup> February 2023 by the Defendant/Applicants seeking the following orders:
  - a. Spent.
  - b. That pending the hearing and determination of this Application inter partes this honourable court be pleased to set aside and or vary its judgment entered on the 6<sup>th</sup> February 2023 for the



Plaintiffs against the Defendants in default of appearance together with any resultant decree and/or orders.

- c. That pending the hearing and final determination of this application inter partes this honourable court be pleased to issue a temporary injunction restraining the Plaintiffs/ Respondents whether by themselves, servants or agents, or advocates or any of them or any person claiming under them from claiming ownership, selling, alienating, disposing of, transferring, wasting, trespassing, fencing, encroaching, erecting temporary and/or permanent structures and/or interfering in any way or from adversely dealing with all that commercial plot known as Plot No. 707 situated at Mpeketoni Jua Kali area within Lamu county.
  - d. That this honourable court be pleased to grant the Defendants/applicants herein leave to file their defence and defend the suit on the merits.
  - e. That this honourable court be pleased to make such further orders as may be just to meet the ends of justice and to safeguard and protect the interest of the Defendant/Applicants and the dignity of this honourable court.
  - f. That costs of this application be in the cause.
2. The application was premised on the grounds outlined on the face of it and the supporting affidavit of Daniel Kilonzi dated 20<sup>th</sup> February 2023 who deponed that they discovered that an ex-parte judgment had been entered against them when they received a letter on 11<sup>th</sup> February 2023 from the Plaintiff's Advocate.
  3. He further deponed that they have a good defence that Plot No. 707 situated in Mpeketoni Jua Kali area, within Lamu County is a public land. He annexed a copy of the draft defence and further deponed that the application was filed without any delay; and was apprehensive that the Plaintiffs/respondents will proceed with execution.
  4. In response, the Plaintiffs/Respondents filed a Replying Affidavit sworn by Benson Chege Mbutia on 13<sup>th</sup> March 2023 and deponed that the Defendant/Applicants admitted being served with the memorandum of appearance but chose to not file a defence as required or participate in the proceedings. He averred that the summons to enter appearance were served upon the Defendant/Applicants on 21<sup>st</sup> February 2020.
  5. Parties agreed to file written submissions which were duly filed

#### **Defendant/applicants' submissions**

6. The Defendants relied on Article 159 (20 of *the Constitution* and the case of *Winnie Wambui Kibinge & 2 Others V Match Electricals Limited* [2012] eKLR and submitted that failure to file a defence was a mistake on their part since they were not fully conversant with the court forms and procedures. They urged the court to take into consideration the circumstances and set aside the judgment.
7. The Applicants further submitted that they filed the application timeously and urged the court not to condemn them unheard and relied on Section 1A of the *Civil Procedure Act* and Order 10 rule 11 of the *Civil Procedure Rules*.
8. The Defendants/Applicants also submitted that since their defence raises triable issues, the court should endeavor to avoid injustice and relied on the cases of *Shah v Mbogo and another* [1967] EA 116; *Patel v EA Cargo Handling Services Ltd* [1974] EA 75; and *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* [1982-1988] KAR.



## Plaintiff/respondents' submissions

9. Counsel for the Plaintiff/Respondents outlined the difference between a default regular and irregular judgment stipulated under Order 10 rule 11 and relied on the cases of *James Kanyiita Nderitu and another v Marios Philotas Ghikas and another* [2016] eKLR; and *Fidelity Commercial Bank Ltd v Owen Amos Ndungu and another* HCC No. 241 of 1998 UR. Counsel submitted that service was effected in this case therefore making the judgment a regular one and that in the absence of any logical explanation of inaction on the part of the Defendant/Applicants, there would be no basis to set aside the judgment.
10. Counsel argued that article 159 of *the Constitution* should not be used to overlook the rules of procedure and cited the case of *Ecobank Kenya Limited v Minolta Limited and 2 others* [2018] eKLR. Counsel urged the court to be guided by the test outlined in the case of *Abdalla Mohamed and another v Mbaraka Shoka* [1990] eKLR to determine the present application.

## Analysis And Determination

11. The issue for determination is whether the Applicants have met the requirements for setting aside ex parte judgments.
12. Order 10 rule 11 of the *Civil Procedure Rules* is the guiding provision of the Law with regards to setting aside of an ex-parte Judgments The order provides: -

Setting aside judgment [Order 10, rule 11.]

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.

13. Further and as rightly submitted by the Plaintiff/Respondents there are two type of ex-parte judgments: regular and irregular. The difference between the two was highlighted by the Court of Appeal in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* (*supra*), where the court held as follows:-

“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 the case. From the outset, it cannot be gainsaid that a distinction has always existed between a 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 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 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 factors 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (*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 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 justitiae*, as a matter of right...”

14. In the case of *Kimani v MC Connell* (1966) EA 545, the Court held that where a regular judgment has been entered the court will not usually set aside the judgment unless it is satisfied that the defence raises triable issues.
15. Further in the case of *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) e KLR, the Court stated the purpose of clothing the court with discretion to set aside *ex-parte* judgment as follows:

“To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice...”
16. The Plaintiff/Respondents instituted this suit against the Defendant/Applicants on 19<sup>th</sup> February 2020. There was no dispute that the Defendant/Applicants were served with the summons to enter appearance and all other pretrial documents and hearing notices. The court record shows several affidavits of service sworn and filed by Awadh Salim Hiyesa, a licensed court process server and by Mr. Alfred Omwancha, counsel for the Plaintiff/Respondents. I have no doubt that service was indeed properly effected. The matter proceeded undefended and on 6<sup>th</sup> February 2023, this court delivered judgment in favour of the Plaintiff/Respondents. It follows therefore that the judgment herein is a regular one.
17. In the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR, the Court held that: -

“It is trite that the test for the correct approach in an application to set aside a default judgment are; firstly, whether there was a defence on merit, secondly, whether there would be any prejudice and thirdly what is the explanation for the delay. This guide was set in the court of appeal case of Mohammed & another —versus Shoka [1990] 1KLR 463
18. An application for setting aside judgment should be filed without undue delay. This application was filed approximately 15 days after *ex-parte* judgment was delivered. I find that the same was filed timeously.
19. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* E&L NO. 200 OF 2012[2014] eKLR the court stated that unreasonable delay depends on the circumstances of the case. The court stated:

“The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.”



20. The other issue is whether the Applicants have a defence with triable issues. In the case of *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75 the court described a defence on merit as follows;

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means as Sherridan J put it ‘triable issue.’”

21. In the case of, *Sebei District Administration v Gasyali & others* (1968) EA 300 Sheridan J. also observed that:

“The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”

22. I have perused the draft defence and find that it has triable issues that should not be ignored. It would be in the interest of justice to hear the case on merit. I therefore grant the following specific orders:

- a. Court’s judgment delivered on 6<sup>th</sup> February, 2023 be and is hereby set aside
- b. The Defendant /Applicants to pay thrown away costs of Kshs 30,000/ within 30 days to the Plaintiffs.
- c. The draft statement of defence shall be deemed to be properly filed upon payment of the prerequisite Court filing fees and complying with (a) above.
- d. Failure to comply with the order, the same lapses.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 7<sup>TH</sup> DAY OF DECEMBER 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

