



Kiay & 2 others v Kiay (Environment & Land Case 42 & 32 of 2021 (Consolidated)) [2023] KEELC 22267 (KLR) (5 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 42 & 32 OF 2021 (CONSOLIDATED)
MN MWANYALE, J
DECEMBER 5, 2023**

BETWEEN

**VINCENT KIPKINYOR KIAY 1ST PLAINTIFF
WESLEY CHERUIYOT KIAY 2ND PLAINTIFF
SHADRACK KIPTARBEI KIAY 3RD PLAINTIFF**

AND

MOSES KIPYEGO KIAY DEFENDANT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 32 OF 2021**

BETWEEN

VINCENT KIPKINYOR KIAY PLAINTIFF

AND

MOSES KIPYEGO KIAY DEFENDANT

RULING

1. This Court has been invited to set aside the *ex parte* judgment delivered on June 15, 2023 together with the decree issued on July 11, 2023 and to issue stay of execution orders against the judgment and the said decree.
2. The above invite was made to the court *vide* the notice of motion application dated October 19, 2023, filed by Mr Vincent Kipkinyor Kiay who was the original plaintiff in ELC No 42/2021 and ELC No 32/2021 which two suits were consolidated and Mr Vincent Kipkinyor Kiay not only remained the



- Plaintiff thereof in the consolidated suits but also become the 1st defendant by virtue of a counterclaim filed in ELC No 42 of 2021.
3. At the time the orders for consolidation were issued on January 25, 2022, the applicant was represented by the firm of Arap Mitey, and Mr. Mitey advocate was present in court when the order for consolidation was made, and was given 21 days to file an Amended plaint pursuant to the consolidation and Mr. Choge for the original defendants was granted 14 days to file an amended defence.
 4. The matter was thereafter referred to the court annexed mediation as it involved close relatives, the parties being brothers.
 5. The Court annexed mediation process failed, but which time Mr Mitey Advocate had not filed the amended Plaint nor defence to the counterclaim, a hearing date for the main suit was given in the presence of Mr Tallam Advocate who held brief for Mr Mitey Advocate for the Plaintiff and on the first hearing date on February 6, 2023, neither Mr Mitey Advocate nor the applicant was present and accordingly the plaintiff case was dismissed for non – attendance, and in view of the fact that there was no defence to the counterclaim filed, the matter proceed on the counterclaim as undefended. A total of 3 witnesses testified on behalf of the defendant in support of the counterclaim and judgment initially reserved for June 8, 2023 but was deferred to June 15, 2023 and delivered on the said date. It is this judgment and the resultant decree that the Applicant seeks to set aside and to stay as set out in paragraph 1 of this Ruling.
 6. The grounds in support of the application are interalia,
 - (i) That the *ex parte* judgment was delivered on June 5, 2023 in favour of the defendants without the applicants knowledge and participation, if the decree was to be implemented, the applicant would loose his land that he bought using his money and inheritance given by his father.
 - ii) That it is fair that to set aside all the orders and allow the applicant to prosecute his case to its logical conclusion.
 - iii) No prejudice would be suffered by the defendant if the case was to start afresh.
 - iv) The applicant should not be condemned unheard and the mistake of Counsel should not be visited on the client.
 7. The application is supported by the annexed supporting affidavit of the Mr Vincent Kiyai, who reiterated the grounds in support of the application, and added that the Land in case Number 42/2021 being NANDI/KAPTEL/415 was purely his land while the land is number 32/2021, the Defendants should cede some acreage.
 8. In opposition to the application a replying affidavit was filed by Mr Shadrack Kiptarbei Kiyai deponed on October 30, 2023. In his reply the Respondent depones,
 - (i) that the applicant refused to appear for mediation despite requests by the mediator and the Court adjourned more than once to allow the applicant to pout his house in order, hence the applicant has been indolent, and he had no case before court.
 - (ii) that the judgment and decree is a true and correct reflection on the situation in the said parcels of land, and that none of the parties is on each other’s share.
 - (iii) on the strength of the above, the respondent argued the court to find the application as an abuse of the Court process.
 9. The matter proceeded for oral hearing on November 14, 2023.



Applicants Submissions: -

10. It is the applicants submission through Mr. Maiyo Learned Counsel, that the matter proceeded without the Applicant's knowledge/participation, since Mr. Mitey Advocate skipped proceedings to the detriment of the Applicant and hence the applicants predicament is a result of omission of Counsel and applicant has been condemned unheard. Applicant is likely to lose his land. Applicant is ready to abide by any directions including payment of costs of the application, as the application is made timeously in good faith and in the interests of justice so as to ensure Applicant ventilates his case. In support of the application and submissions, the Applicant place reliance on the decision in Mombasa Civil Appeal No. 6 of 2015 – *James K Nderitu and another vs Marious Philetas Gilas and another*.
11. In reply to the said submissions Mr. Choge, learned counsel for the respondent, who submitted and placed reliance on the replying affidavit of Shadrack Kiay. He further submitted that the application was not filed timeously and that at all time the Applicant was represented by Counsel, but the case belonged to him, and he never appeared in Court.
12. The applicant is not on the suit land. The applicant failed to file a defence to the counterclaim and the plaintiffs suit was dismissed hence there is no suit to be set down for hearing as the plaint was dismissed and there was no defence to counterclaim, and the applicants hangs in the air as there is no suit by the plaintiff applicant to heard. It is further submitted that there was indolence on the part of the Plaintiff.
13. In a brief rejoinder, the Applicant's Counsel Mr Maiyo submitted that for ends of justice to be reached the Applicant ought to be heard as execution is imminent. He urged the Court to allow the application.
14. Before turning to the issues for determination, it is important to note a few undisputed facts herein, to wit, that the applicant was the plaintiff in the both Kapsabet suit E 32/2021 and E 42/2021 and that the suits were consolidated and Kapsabet 42/2021 became the lead file.
15. pursuant to the consolidation, the Applicant was to file an amended plaint to reflect the consolidation which he did not do.
16. The defendant/respondent filed an amended defence introduced a counterclaim. The applicant did not file a defence to the counterclaim at the hearing, due to non-attendance of the plaintiff/applicant his suit the original plaints were dismissed, and since no defence there was no defence to counterclaim. The counterclaim proceeded undefended.

Issues for Determination: -

17. Only one issue for determination presents itself to the court whether the application is merited and the applicant is entitled to the reliefs sought?
18. In the decision in the case of *James K. Nderitu and Another vs Marious Philotas Ghikas and another* 2016 (eKLR) the Court of Appeal emphasized on the distinction that exists between a default judgment that is regularly entered and one that is irregularly entered. The court stated

“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 to judgment and to grant him leave to defend



the suit. In such 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 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 others. See *Mbogo and another vs Shar, Patel v EA Cargo handling services, Chemwolo and another vs Kubende, CMC Holdings v Nzioki*

In an irregular default judgment, on the other hand, judgment will have 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....”

19. From the application, and record herein, the judgment sought to be set aside is a regular default judgment, in that after the consolidation and amendment of the defence, a counterclaim was pleaded, and no defence was filed against the same, yet the Applicant was represented by Counsel.
20. the principles of setting aside the regular default judgment are enumerated in the passage of the preceding paragraphs and the Court shall consider the reason for failure to file the defence, length of time lapsed, whether the intended defence raises triable issues and the prejudice to each party in exercising its discretion.
21. In his application under consideration, the Applicant has not alluded to the non- filing of the defence to counterclaim, and has not also filed a draft defence to show any triable issues the Court may have to consider.
22. The Applicant seeks to set aside judgment but has not sought leave to file a defence to the counterclaim and has not sought leave to reinstate his suit that was dismissed.
23. The Applicant has not also explained why he did not file the amended plaint pursuant to the consolidation and the defence to counterclaim yet the Court did exercise discretion and extended time on 6/10/2022 and again on 6/12/2022.
24. If the application as drafted is to be allowed, is there any suit to be considered by the Court noting no prayers for reinstate of the suit and leave to file the defence to counterclaim have been requested by the Applicant?
25. The answer is there is no suit for the Court to consider, and given that there is no draft defence for Court to consider whether they are triable issues, and having previously exercised discretion in favour of the Applicant by extending the Applicant time to file the defence to counterclaim on two occasions, the Court finds the instant application as lacking merit and the same is dismissed with costs to the Respondent.
26. The interim stay of execution orders issues on 14/11/2023 are hereby lifted.

RULING, DELIVERED AND DATED AT KAPSABET THIS 5TH DAY OF DECEMBER, 2023.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

PARA 1.



Mr. Maiyo holding brief for Mr. Kipkenda for the Applicant

PARA 2.

No appearance for Mr. Choge for the Respondent

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