



Harun (Trading as Nelson Harun & Company Advocates) v Kalu Works Limited & another (Environmental and Land Originating Summons 181 of 2019) [2025] KEELC 3493 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 181 OF 2019
JG KEMEL, J
APRIL 29, 2025**

BETWEEN

**NELSON MUTURI DUMBEYIA HARUN PLAINTIFF
TRADING AS NELSON HARUN & COMPANY ADVOCATES**

AND

**KALU WORKS LIMITED 1ST DEFENDANT
BOOTH EXTRUSIONS LIMITED 2ND DEFENDANT**

RULING

(with respect to two motions dated the 6/9/24 and 1/10/24 filed by the 1st Defendant/Applicant and the Plaintiff/Respondent respectively)

1. Vide a motion dated the 6/9/24 the 1st Defendant moved the court and sought the orders as follows;
 - a. That pending the hearing of the application the hon court be pleased to set aside the judgement delivered on 9/4/24 and the consequent orders thereto.
 - b. Costs of the application be provided for
2. The application is premised on the extensive grounds annexed thereto and the supporting affidavit of Atul Kshertysworn on even date.
3. The deponent deposed that he is the Executive Director of the 1st Defendant, fully conversant with the facts of the case and hence competent to so swear the affidavit. Shortly thereafter the Plaintiff forwarded the judgment to him.



4. He avowed that the 1st Defendant is the registered proprietor of the suit land LR No 4953/1421 (original IR No 37819) delineated on Deed Plan No 115846.
5. That he learnt about the existence of the suit through whatsapp messages received from the Plaintiff informing him of the judgement delivered in the suit and demanding the payment of the sum of Kshs 20.6 Million decreed in the judgement in his favour.
6. He deposed that the 1st Defendant was never served with any of the pleadings in respect to the instant suit and was unaware of the existence of the suit and the eventual judgment. Equally that the 1st Defendant was unaware of previous proceedings and decisions in ELC 937 of 2013 Nairobi and Court of Appeal No 249 of 2015 between the Plaintiff and the 2nd Defendant
7. That pursuant to the judgement in the instant suit, the Land Registrar has been directed to register the Plaintiff as the proprietor of the suit land, (which land belongs to the 1st Defendant). That the 1st Defendant stands to lose its property in addition to payment of Kshs 20.6 Million to the Plaintiff without being afforded the opportunity to be heard. That the 1st Defendant has been condemned unheard and the court was urged to grant the application.

Interim orders of stay of execution

8. By consent of the parties the court granted orders of interim stay of execution in line with prayer No. a) above on the 8/10/24.
9. The Plaintiff opposed the application vide the Replying affidavit of 13/9/24 where he deposed at length to the litigation history of the suit land and his interaction with the 1st and 2nd Defendants.
10. The deponent refuted the allegations of the 1st Defendant. While maintaining that he knows Mr Kshetry very well he refuted his depositions and termed them as a furtherance of dishonesty, perjury, fraud and falsehoods against him. He stated that he acted for the Defendants and their related companies for many years. He reiterated that as the Group Managing Director, Mr Ksherty was fully aware of the existence of the suit. The 1st Defendant was represented by counsel and was served all through with mention and hearing notices as exhibited by the affidavits of service on record. The deponent alluded to various meetings and correspondences between him and the Defendants through Mr Ksherty in which the parties were discussing settlement of the dispute.
11. On the question of ownership of the suit property, he narrated the history as thus; on 10/6/2002 he received instructions through a letter marked as NMDH-8 from Booth Extrusions Limited to transfer the suit property from the 1st Defendant to the 2nd Defendant; the said letter forwarded the original title and the deed plan for the suit land and further indicated that the 2nd Defendant had purchased the land from the 1st Defendant in 1992 for the sum of Kshs 610,000/-; an internal memo (NMDH-9) of 9/9/92 directed a Mr Bhatia to register the suit land in the name of the 2nd Defendant; on 28/9/92 the 1st Defendant issued a debit note (NMDH-10) No 5069 the account of the 2nd Defendant was debited with an amount in the sum of Kshs 610,000/- being the purchase price;
12. In ELC 937 of 2013, the judgement of the court under para 33 held that the 1st Defendant had long relinquished its rights over the suit property in favour of the 2nd Defendant and finally the Plaintiff. That this verdict was upheld by the Court of Appeal in 249 of 2015 thus the rights of the parties were settled as far as the ownership of the suit land. That the question of ownership is now res judicata.



13. On the question of receivership/administration of the 1st Defendant, the Plaintiff contended that if indeed the suit land belonged to the 1st Defendant, it would have been listed as one of the properties in a debenture that resulted in administration, a testament that the suit land was no longer the property of the 1st Defendant.
14. In conclusion he stated that the judgement of this court has been partially been executed and what remains is the payment of the mesne profits adjudged by the court in favour of the Plaintiff

The Plaintiffs application dated the 1/10/24

15. The Plaintiff filed the motion seeking orders that the court do discharge vary and or set aside the order in the nature of injunction made on 10/9/24. It was asserted by the Plaintiff that the orders granted by the court on 10/9/24 were granted on the basis of non-material disclosures and or deliberate suppression of facts. That Atul Ksherty failed to disclose that he is a director of both the defendants which companies share a common address with common directors and shareholders. Further that the defendants were represented by counsel throughout as evidenced in the affidavits of service annexed.
16. In opposing the application, the 1st Defendant filed grounds of opposition to the application dated the 1/10/24 and contended that the property owner cannot be dispossessed of the property even by a court of law, unless it is proved that they were parties to the proceedings in which the dispossession orders were made. Further, that a person who has no proprietary interest in a property cannot transfer the property to a third party. Therefore, the orders directing Booths to transfer a property it does not own are of no legal effect.
17. Further vide the Replying Affidavit sworn by Atul Ksherty sworn on 4/10/24, the Director of Kaluworks avers that the two companies are independent and separate legal entities and they should be dealt with as such. That the suit as against Booths is not a suit against Kaluworks and service on one is not service on both. That although the two entities presently have common directorship and shareholding, that was not always been the case. He avers that the documents adduced by the Applicant relate only to the current directorship and has no bearing on what the case was before or at the time when the previous two proceedings were instituted, prosecuted and determined.
18. He deposes that the directors and shareholders of the said entities are not engaged in the day to day affairs of the entities. That they are not aware of the cases filed against which company and which company and/or which orders have been issued against which company.
19. Further that a person without proprietary interest in in a property cannot transfer the property to a third party. Hence Booth could not transfer a property it does not own to another party. He therefore argues that although the orders issued in the two proceedings directed Booths to transfer the property which it did not own, Kaluworks was not under any obligation to comply with the said orders even if it had been made aware of the said orders.
20. The deponent avers that Kaluworks was put under administration on 27/5/21 and that it is only the administrator who could receive any service on behalf of Kaluworks. That the proceedings in this suit were not served upon the administrator- P V R Rao hence it never appointed any advocate to represent it. He further avers that on 25/8/22 the administration was terminated and the court appointed a Supervisor to deal with and defend all proceedings against the entity. Again, no service was affected upon the supervisor.
21. With regards to Booths Limited, the deponent avers that it was placed under receivership on 27/9/21 but still the proceedings in the instant suit were never effected upon the receiver. Consequently, the receiver never appointed an advocate to represent it. That although the receivership was subsequently



lifted on 8/2/424, Booths Limited was never made aware of the proceedings herein. That in absence of service upon both companies, the application ought to be dismissed with costs.

22. Vide the Replying Affidavit sworn on 11/10/24 the Plaintiff avowed and reiterated his earlier averments that the 1st Defendant was acutely aware of the litigation that has been going on between the parties in this suit. Further he averred that the suit land has never been charged to any financial institution and was never subject of any receivership. That the rights over the suit land had been determined by the High Court way back in 2014 and affirmed by the Court of Appeal in 2017.
23. Atul Ksherty swore a supplementary affidavit on 11/10/24 and reiterated his averments as contained in the supporting affidavit sworn on 6/9/24 as well as the Replying Affidavit of 4/10/24. In brief he stated that he came to Kenya in 2021 and was later made a director of the Defendant companies around 2022, therefore unaware of the history of the suit land. Admitting that the defendants are separate and independent entities but share common directorships and shareholding. That the 2nd Defendant was placed under insolvency in 2021 and a receiver manager appointed who has confirmed that he was never presented with any claim from the Plaintiff. That the receivership of the 2nd Plaintiff was concluded on 5/2/24. That due to the receivership and administration of the defendant companies, he had no legal capacity to deal with the matters involving the dispute including the alleged deed of settlement as it was only the Receiver Manager who was clothe with legal capacity and not the directors of the companies.

Directions on written submissions

24. The court, directed that the application be canvassed orally in Court. Both parties complied and filed their respective submissions in support of their respective positions. The Court has had occasion to read through the submissions and considered the arguments raised by the parties.

Analysis and determination

25. I have considered the applications, the replies as well as rival submissions, in my considered view the issues for determination are as follows:
 - a. Whether the judgment delivered on the 9/4/24 should be set aside or reviewed;
 - b. Whether the Plaintiff's application dated 1/10/24 should be granted;
 - c. Who should bear the costs of the applications?

Whether the judgment delivered on the 9/4/24 should be set aside or reviewed;

26. The provisions of law with regards to setting aside judgment /orders are to be found under Order 12 Rule 7 of the Civil Procedure Rules provides: -

“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.”
27. Further the provision is buttressed by Order 51 Rule 15 of the Civil Procedure Rules which provides: -

“The court may set aside an order made ex parte”
28. It is trite that a judgement may be set aside on two scenarios; where the judgement is irregular and if regular, the Defendant has demonstrated triable issues in his defence. An irregular judgement is where the defendant was not served at all and the court will set it aside as of right. The rationale being simply



that it is against the rules of natural justice to condemn a man unheard, a tenet that is espoused in Art 50 of *the Constitution*.

29. The distinction between an irregular and a regular judgement was laid down in the case of James Kanyiita Nderitu & Another [2016] eKLR as follows;

“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 v Shah* [1968] EA 98, *Patel v E.A. Cargo Handling services Ltd* [1975] E.A. 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v 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.”

30. The legal threshold for setting aside a judgment was laid out in the case of *Patel Cargo v E. A Handling Services Ltd* [1974] EA75 and *Shah v Mbogo* (1967) EA 116 as follows;

“Whether there is a meritable defence; the prejudice that will be occasioned to the parties; and explanation for the delay in bringing that application to set aside judgement. Where the summons was served and the Defendant failed to file defence and or enter appearance within the timelines the Plaintiff obtains a regular judgment. This judgment may be set aside on reasonable terms and conditions which the Court would deem fit in the circumstance.”

31. In the case of *Tree Shade Motors Ltd v DT Dobie & Anor* [1995-1998] 1EA 324 it was held that even if service of summons is valid, the judgement will be set aside if defence raises a triable issue. Where a draft defence was tendered together with an application to set aside a default judgement, the Court hearing the application was obliged to consider if it raised a reasonable defence to the Plaintiff's claim. Where the Defendant showed a reasonable defence on the merits, the Court could set the ex-parte judgement aside.



32. This suit was filed on 11/12/2019. The Defendants entered appearance through the law firm of Michuki & Michuki Company Advocates on the 16/12/2019. On the 25/10/21 the firm of Gathaiya & Associates came on record on behalf of the 2nd Defendant. There is no evidence that the said counsel ceased acting for the defendants.
33. It is the case of the 1st Defendant that it was never been served with any pleadings in relation to suit herein and was totally unaware of its existence and the Judgment thereto. That the Applicant only became aware when the Plaintiff served its Director with a Whats app message requiring payment of a sum of Kshs. 20.6 Million granted as Mesne Profits. He states that the 1st Defendant was equally not aware of the other suits referred to by the Court in its Judgment as it never participated in the said proceedings.
34. The Plaintiff on the other hand contends that the Applicant was well aware of the existence of the suit having been represented by counsel and served throughout the proceedings. That its previous Group Managing Director was fully aware of the Judgment in the two previous suits and in fact reached out to him through their then Advocate, David Michuki seeking concessions for an amicable resolution of the suit herein. That a Deed of Settlement was executed but the said Director requested that another company be included to avoid freezing of the Applicant's accounts by banks due to financial constraints. Consequently, the Deed of Settlement was duly amended. However, the then Director, Mr. Tiwary alleged that the suit property had been undervalued hence he refused to append his signature.
35. The Plaintiff maintains that he effected service of all pleadings and hearing notices on the applicant by email pursuant to the Covid Practice and Procedure Rules. That he in fact, held several meetings with the current Applicant's Director Mr. Atul Kshetry with a view of settling the matter amicably. That he shared the Judgments of the previous suits with him on the 23rd May, 2023 which he duly acknowledged. The Plaintiff asserts that the Applicant entered appearance when the suit was filed in the year 2019 and cannot therefore claim that it was not aware. He contends that the 1st and 2nd Defendants share Directors, who were aware of the suits and cannot deny knowledge of the existence of the suit.
36. I have perused the record and am satisfied that the 1st Defendant was represented throughout the proceedings by counsel and was duly served as shown by the return of services on record which remain unchallenged by the 1st Defendant.
37. It therefore follows that the Court entered a regular judgment in this case which can only be set it aside upon satisfaction that there is a meritable defence; the prejudice that will be occasioned to the parties; and explanation for the delay in bringing that application to set aside judgement.
38. It is to be noted that the Applicant has not attached a draft copy of its intended defence to this suit so as to satisfy this court that the defence raises triable issues. Courts have taken the position that failure to annex a draft defence to an application to set aside a default judgment is fatal to such an application. I am guided by the decision in Harun Rashid Khator suing as the representative of Rashid Khator (Deceased) v Sudi Hamisi & 11 Others [2014] eKLR wherein it was held that: -
- “Failure to annex a draft defence on an application to set aside a regular ex-parte judgment is fatal to such an application.”
39. On the question of appointment of a receiver manager, the court notes that the receiver manager was appointed in 2021 way after the Court in 2014 adjudged the suit land in favour of the Plaintiff and the said verdict confirmed by the court of appeal in 2017, a position that was reiterated by this court in its judgement of 9/4/24 to the effect that the rights of the parties had been settled by the Court of appeal



in COA 249 of 2013. On this ground I am not persuaded that it is a ground to justify the setting aside of the judgement of this court.

40. It is therefore my finding that the 1st Defendant's application dated 6/9/24 is not merited and is hereby dismissed.

b. . Whether the Plaintiff's application dated 1/10/24 should be granted;

41. The Plaintiff's application dated 1/10/24 seeks to discharge, vary or set aside the order in the nature of injunction made on 10/9/24.

42. From the records, the 1st Defendant's application dated 6/9/24 came up for directions on 10/9/24. Upon reading the application, I directed as follows;

It Is Hereby Ordered:

1. That the application be served forthwith for hearing interpartes on the 8/10/24
2. That upon service the respondent shall be at liberty to file and serve responses within 7 days thereof
3. That the applicant shall have 5 days to file any further affidavits if need be from the date of service
4. That thereafter parties shall be at liberty to file and exchange their brief written submissions (not more than 5 pages each) 5 days before the hearing date aforesated.

43. The Plaintiffs application has been overtaken by events in view of my decision above.

c. Who should bear the costs of the applications?

44. Considering that both applications have been dismissed, I exercise my discretion and direct that each party bears the costs of their respective application.

Final orders for disposal

45. The upshot of the foregoing is that;

- a. The 1st Defendant's application dated 6/9/24 is unmerited and is hereby dismissed.
- b. The Plaintiff's application dated 1/10/24 is spent/dismissed.
- c. Any interim orders previously granted be and are hereby discharged.
- d. Each party to bear their own costs of the application.

46. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29th DAY OF APRIL, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Plaintiff is present in person

Ms. Maina HB for Dr. Arwa for the 1st Defendant



NA for the 2nd Defendant

CA – Ms. Yvette

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