



**Ongwenya & 2 others v Kenya National Highway Authority (Environment & Land Case 272 of 2016) [2022] KEELC 2703 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2703 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 272 OF 2016**

**JM ONYANGO, J**

**MAY 11, 2022**

**BETWEEN**

**JOHN KABINGA ONGWENYA ..... 1<sup>ST</sup> PLAINTIFF**

**FRANCIS AMENYA NDUBI ..... 2<sup>ND</sup> PLAINTIFF**

**LILLIAN MORAA MONGARE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... DEFENDANT**

**RULING**

**Introduction**

1. The Defendant/Applicant filed a Notice of Motion under Certificate of Urgency dated November 19, 2021 seeking an order that the Defendant be restrained from executing the decree emanating from the judgment delivered by this court on the April 13, 2021. The Applicant also prayed that the judgment be set aside and the Applicant be given a chance to call its witnesses and present its case.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Constantine Ogari, Advocate dated sworn on the November 19, 2021. The main reasons advanced in the grounds and Supporting Affidavit for the Defendant's failure to attend Court on the hearing date is that the Defendant was unaware of the hearing date. It has been alleged that the Defendant's advocates only found out that judgment had been delivered in the matter when they were prompted for an update by their client.
3. In his supporting affidavit, mr Ogari depones that he perused his file and did not locate any hearing notice therein. he further depones that the defendant had filed a strong defence, witness statements and a bundle of documents in rebuttal to the plaintiff's claim. he depones that there may have been inadvertence on their part which should not be meted on their client. he avers that the parties to these



proceedings are litigating over the same subject matter in kajiado HCCC No. 27 of 2019 and there is a danger that the courts could issue conflicting decisions.

4. He laments that the judgment has conferred ownership rights to the plaintiffs over public property. he further depones that the defendant is a public entity seeking to ensure the maintenance of public roads and protection of land reserved for future roads and their expansion for the citizens of kenya as whole he avers that it would offend all notions of justice if the rights of a party were prejudiced without being afforded an opportunity to be heard as provided under Article 50 of the Constitution of Kenya and urges the court to exercise its discretion in favour of the Applicant.
5. The application is opposed by the Plaintiff/Respondent through his Replying Affidavit sworn on the December 23, 2021 in which he depones that the firm of Ogetto Otachi & Co Advocates was served with a Hearing Notice informing them of the hearing date. a copy of the hearing notice bearing the stamp of the said advocates is annexed to the plaintiff's affidavit. he avers that there is no good reason why the said advocates failed to attend court.
6. He depones that his advocate sent the Defendant's advocates a copy of the decree for approval under Certificate of posting but the same was returned unclaimed. He then sent the decree by courier and states that there is no reason why it should not have reached them. He is of the view that the application is a waste of judicial time.
7. The court directed that the application be argued by way of written submissions and both parties have filed their submissions which I have considered.

#### **Issues for Determination**

8. The singular issue for determination is whether the judgment delivered on April 13, 2021 should be set aside.

#### **Analysis and Determination**

9. The principles for setting aside an ex-parte judgment are now well settled. In the case of Yamko Yadpaz Industries Ltd vs Kalka Flowers 2013 KLR Justice Havelock citing the Court of Appeal decision in Maina Vs Mugiria stated as follows:

“The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:

- a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.
- b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. *Shah v Mbogo* 1967 EA 116 at 123.
- c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the



exercise of his discretion and as a result there has been injustice. *Mbogo v Shab* 1967 EA 93.

- d) The court has no discretion where it appears there has been no proper service *Kanji Naran v Velji Ramji* 1954 21 EACA 20.
- e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, *Smith v Middleton* 1972 SC 30.

10. In the instant case, it is clear that the Defendant’s advocates were served with a Hearing Notice. Despite the denial in the Supporting Affidavit sworn by Constantine Ogari, I note from the submissions that counsel for the Defendant has explained why they did not appear in court on the hearing date, the reason being that it was during the Covid-19 pandemic when most offices had scaled down their operations and the Hearing Notice was not brought to their attention in good time. In his Supporting Affidavit, counsel ought to have owned up to his mistake rather than appear to be blaming the court for having proceeded with the hearing in their absence.

11. In his submissions counsel for the Defendant has relied on the case of *Patel v E.A Cargo Handling Services* (1974 ) E.A 75 where the Court held as follows:

“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a Defence on the merits, in this respect, a defence on the merits does not mean a defence that must succeed. It means a triable issue which raises a prima facie defence which goes for adjudication”.

12. I have looked at the Defendant’s Defence and I am of the view that it raises triable issues. In the circumstances and in the interest of justice, I am inclined to exercise my discretion in favour of the Defendant in order for the case to be determined on the merits. However, since justice cuts both ways, the Plaintiff must be compensated for the inconvenience by way of thrown away costs.

13. Accordingly, I find merit in the application and I allow it and make the following orders:

- a) The ex-parte judgment dated April 13, 2021 is hereby set aside.
- b) The Defendant/Applicant shall pay thrown away costs of Kshs. 20,000/= to be paid before the hearing date.

**DATED, SIGNED AND DELIVERED AT KISII THIS 11<sup>TH</sup> DAY OF MAY, 2022.**

**J.M ONYANGO**

**JUDGE**

