Maingi v Njuguna (Environment & Land Case 449 of 2017)
[2022] KEELC 4759 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 4759 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 449 OF 2017

LN GACHERU, J

JUNE 23, 2022

BETWEEN

JAMES WACHIRA MAINGI ..... PLAINTIFF

AND

BENSON KAMAU NJUGUNA ..... DEFENDANT

RULING

1. By a Notice of Motion Application dated 16th December 2021, the Defendant/Applicant herein Benson Kamau Njuguna, sought for the following orders;

    1. Spent

    2. Spent

    3. That the consent letter dated 15th December 2021, be adopted as an order of this Court consequently the Law Firm of Wokabi Mathenge & Co. Advocates be placed on record as acting for the Defendant in place of Waithira Mwangi & Co. Advocates.

    4. That interlocutory judgement entered on 11th May 2018, be set aside and the Defendant be granted leave to file and serve a defence and any attendant documents.

    5. That the proceedings and the consequential judgment delivered on 2nd July 2018, be set aside and the parties cases be reopened for hearing afresh on a priority basis with the Defendant and or the parties being granted leave to file such pleadings as may be necessary.

    6. That costs of this Application be provided for

2. The Application is supported by various grounds stated on the face of the Application and the Supporting Affidavit by Benson Kamau Njuguna.

    These grounds are;

a. That the Applicant dispute the allegations in the Plaintiff's pleadings and have a good defence to the same which raises triable issues.

b. After instructing his former Advocates, they neither informed me of any pleadings not filed and or were missing from the Court record. That based on their continued expression to him that the case had been withdrawn that he took it that this case was not going on. This had been conveyed to him around late 2019 or thereabouts.

c. Having been told that the case had been withdrawn awaiting resolution as to the question of how the titles held by the Plaintiff and other persons were procured, then all along he knew the case was no longer going on. What later on followed was the release of original files by the former Advocates including this one. The release of those files was on 2nd March 2020.

d. On or around 3rd December 2021, persons who were unknown to him and his neighbours some who included policemen visited the land where the Applicant resides and his adjacent to me are my neighbours who are also Defendants in suits, which have similar eviction orders issued, filed alongside this one. This was devastating and unusual since Applicant had not heard of any incident requiring Police intervention.

e. Upon seeking to know what was the purpose of their visit, he was informed by the police officers that they had a Court order which they intended to enforce. Upon further enquiring he was shown an eviction order issued by this Court in which the police were required to supervise and provide security during the eviction.

f. That the Applicant seeks to be heard and the proceedings preceding this Application be set aside, as the Applicant has a good defence that raises triable issues that would require a hearing hence, seeking the setting aside and varying of the judgement and the decree besides all other consequential orders issued.

3. In his Supporting Affidavit, the Applicant Benson Kamau Njuguna, repeated most of the averments made on the above grounds and further added that after he received the Court documents, in 2017, he instructed the Law Firm of Waithira Mwangi & Co. Advocates and as lay person, he relied on the advice entirely from the said Advocate.

4. That as a farmer and illiterate person, he was not able to read and understand English and that he lives within Gathaite area where the suit property Makuyu/Makuyu Block 11/1263, is located. Further that he has lived on the said suit property since 2010, when he purchased the same and that the Plaintiff has expressed intention to cause his eviction arising from an Order issued in this case on 2nd July 2018. He further averred that after he instructed his Advocates, after receipt of the Court documents, the Advocate later informed him that his case had been withdrawn. Further, the said Advocate later returned his file on 2nd March 2020, through Mr Kigo Ndung'u, one of the officials of Gathaite Farmers Ltd.

5. Further that he only became aware of the eviction order on 3rd December 2021, when Police Officers and unknown people went to the suit property with the intention of carrying out the eviction as per the eviction order shown to him being Exhibit 11B.

6. He further stated that he was shocked to learn that he was likely to be evicted from the suit property, where he had toiled and invested on it for years. That when he sought for an explanation from the Police, he later pleaded with the said Police Officers to allow him time to contact his former Advocate.

7. That he visited his former Advocates office on 6th December 2021, but she was not in the office. That then he visited the Court on 8th December 2021, and when the file was retrieved, he learnt that the matter proceeded for hearing and later determination without his participation. As a result, an exparte Judgement was delivered and further an eviction order was issued on 17th October 2019.

8. That he was unaware of the said eviction order until when the Police visited his land on 3rd December 2021. It was his contention that he was likely to be evicted from the suit land anytime and that such act would render him homeless and a squatter. It was his further contention that his former Advocate did not file a Defence and Consequently, an Interlocutory Judgement was entered.

9. Further, that his Advocate did not request for the supporting documents of his ownership of the suit property which he still holds todate. That he has filed a Draft Defence which raises triable issues and he urged the Court to set aside the *exparte* proceedings and Judgement and have the matter reheard afresh.

10. That the Court should consider setting aside the said *exparte* orders as his family resides on the suit property as was evidenced by the annexture marked Exhibit 5, being photographs of his home structures and that he is a person of meagre means and starting life afresh would be a tall order.

11. Further, that the Court should consider that he took urgent remedial action upon learning of the *exparte* Judgement and the consequential orders of this Court. That he need not to be blamed for the mistakes of his former Advocate. He also contended that the title held by the Plaintiff need to be interrogated and this can only be done once the *exparte* proceedings are set aside and the matter be reheard afresh. Therefore, the Defendant/Applicant urged the Court to allow his application.

12. The application is contested through the Replying Affidavit of James Wachira Mwangi, the Plaintiff herein sworn on 14th January, 2022. He averred that the application herein is misconceived, incurably defective and should be struck out with costs.

13. He further averred that the Defendant/Applicant herein was represented by an Advocate but he deliberately failed to file his Defence and is now seeking to set aside and re-opening of a concluded matter, which is blatant abuse of the Court process.

14. Further that the purported Defence is a mere denial, a sham and does not raise triable issues. That if indeed the Defendant/Applicant was given his original file as deponed by himself, he ought to have found out the reasons for such release and also ought to have made inquiries from his former Advocates.

15. He also averred that that the Defendant/Applicant has not explained the steps that he has taken since the year 2017, when he was served with Court Summons and why he failed to follow up his matter. That he should not hide behind illiteracy as an excuse for failure to file a Defence.

16. He contended that the Defendant/Applicant former Advocate was aware of what was happening in Court as they were served with all the notices, but they deliberately failed to attend Court. Further, that the Applicant's remedy lies elsewhere as all the hearing and Mention Notices were duly served. The Plaintiff/Respondent urged the Court not to exercise its discretion in favour of a dishonest Defendant/Applicant as all the Court proceedings and notices were served upon the Defendant/Applicant's former Advocates.

17. It was his contention that the Prayers and reliefs sought by the Defendant/Applicant are made in bad faith and are meant to deny the Plaintiff/Respondent the fruits of his Judgement and that litigation must come to an end. That this application is meant to delay and circumvent the smooth dispensation of justice. He urged the Court to dismiss the instant Application with cost.

18. The application was canvassed by way of written submissions.

19. The Defendant/Applicant through Wokabi Mathenge& Co. Advocates filed his written submissions on 22nd February 2022. It was submitted that the Consent Letter dated 15th December 2021, should be adopted as the Order of the Court as the Defendant/Applicant has complied with Order 9, Rule 9 of the *Civil Procedure Rules*. That the said Consent has been executed and filed, and thus the new Law Firm is now properly on record. That the said consent has been filed in Court and thus it should be adopted as the order of the Court.

20. On the issue of setting aside, of *exparte* Judgement, the Defendant/Applicant relied on Order 10 Rule 11 of the *Civil Procedure Rules*, which empowers Court to set aside an *exparte* Judgement in default of appearance and Defence. It provides as follows;

> "where judgement has been entered under this order the Court may set aside and vary such Judgement and any consequential decree or order upon such terms are just".

21. The Applicant relied on the case of *Elizabeth Kevere & Another v Lilian Atho & Another* (2020) eKLR, where the Court stated;

> "The discretion of the Court to set aside *exparte* default Judgement is conceded and both parties cited the Court of Appeal of Kenya: *Pithon Waweru Maina v Thuka Mugiria*(1983) eKLR, where Kneller J A observed as follows;
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> ".....The Court has a very wide discretion under the order and rule and there are no limits and restrictions on the discretion of the Judge except that if the Judgement is varied, it must be done on terms that's a just(See *Patel v E.A Cargo Handlings Services Ltd* (1974) E A 75".
>
> .....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 a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice (see *Shah vs Mbogo* (1969) EA 116".

22. It was his further submissions that the interlocutory and/or default Judgement herein was not obtained regularly as there was no proof that the hearing notices were effected upon the Applicant's former Advocates. That the said Hearing Notices were not annexed to the affidavit for the Court to ascertain the said allegations. Further that since the Interlocutory and *Exparte* Judgment were irregular, the same cannot be executed as they are not legal.

23. Further, that in the spirit of Article 50 of the *Constitution*, on the fair hearing, then the Applicant should be given an opportunity to defend his suit. He further relied on Article 159(2) (d) of the *Constitution*, and urged the Court to stay the execution of the *exparte* judgement and that he should be given an opportunity to file his defence.

24. It was further submitted that it was not clear whether the Plaintiff/Respondent complied with the provisions of Order 10 Rule 9, 10 & 11 of the *Civil Procedure Rules* on the service upon the Defendant, filing of affidavit of services as proof of such service. That in this case, it is not clear whether the Applicant's former Advocates were properly served. The Applicant relied on the case of *Moniks Agencies Ltd v Kenya Airports Authority (KAA)* (2019) eKLR, where the Court held;

> "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 be reasonably be compensated by Costs for any delay occasioned should be

considered and finally it should be remembered that to deny the subject a hearing should be the last resort of a court".

25. On whether the Defendant/Applicant has a Defence or merit with triable issues, the Applicant submitted that the Draft Defence filed alongside the instant application is a good Defence which raises triable issues. That the Defendant/Applicant should be allowed to file the said Defence and the matter goes for interparties hearing. He thus sought for setting aside and/or varying of the exparte judgement, the Decree and all consequential orders herein so that the matter can go for trial.

26. Reliance was placed on the case of *Philip Kiptoo Chemwolo & Another v Augustine Kubende* (1986) eKLR where the Court held;

> .....I think a distinguished equity judge has said.....
>
> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

27. The Defendant/Applicant also relied on the case of *Jomo Kenyatta University of Agriculture & Technology vs Musa Ezekiel Oebal* (2014) eKLR, where the Court set aside the interlocutory/default Judgment where the Defendant's Defence raised triable issues.

28. The Court had quoted in an approval the case of *Patel v E A Cargo Handling Services* (1974) E A 75, where the Court held;

> "The main concern of the Court is to do Justice to the parties and the Court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the Court will not usually set aside the Judgement, unless it is satisfied that there is Defence on the merits..."

29. On his part, the Plaintiff/Respondent filed his written submissions, on the 7th February, 2022, and urged the Court to dismiss the Defendant/Applicant's application.

30. It was submitted that the Defendant/Applicant was served with Summons to Enter Appearance and his Advocate filed a Notice of Appointment. However, the said Advocate failed to file a Defence. Further that the said Advocate had filed a Replying Affidavit dated 15th December 2017, and later attended pre-trial conference. Therefore, it was his submissions that the said former Advocate knew of this matter, but failed to follow it up. It was his further submissions that the Defendant/Applicant remedy lies in claiming against his former Advocates. The Plaintiff/Respondent relied on the case of *Ruga Distributors Ltd vs Nairobi Bottlers Ltd* (2015) eKLR, where the Court stated as follows;

> Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal.

31. Further, it was submitted that the Judgement herein being a Regular one, the Defendant/Applicant is just trying to evade, obstruct and/or delay the course of justice. Further, that if the Court was to find in favour of the Defendant/Applicant, the Court should order the Defendant/Applicant to pay costs of 50,000/= as exemplary and punitive measures in the circumstances.

32. This Court has carefully considered the instant Notice of Motion Application and the rival Written Submissions. The sole issue for determination is whether the instant application is merited.

33. From the Court records, it is clear that the matter proceeded exparte after the Defendant/Applicant failed to file his Defence. An Interlocutory Judgment was entered and matter proceeded for formal proof. Thereafter exparte judgment was issued in favour of the Plaintiff on 2nd July 2018. In the said Judgement of 2nd July 2018, the Court held;

> "The Defendant by himself, family members, employees, agents and whomsoever claiming under him to vacate the land Makuyu/Makuyu Block II/1263, within 60 days and in default, eviction to issue in accordance with the provisions of law. Costs were to be met by the Defendant"

34. The Defendant/Applicant has alleged that he was not aware of the said exparte Judgement, until when the Plaintiff/Respondent attempted to carry out his eviction on 3rd December 2021, in the presence of Police Officers.

35. From the Court records, it is clear that the Plaintiff/Respondent filed an application dated 21st February 2019, seeking for eviction of the Defendant/Applicant herein. The said Application proceeded exparte and the Court observed on Para 4 that the Respondent despite being duly served with the said application, as per the Return of Service dated 6th March 2019, failed to file a response and or attend Court.

36. Therefore, the said application was allowed wholly on 17th October 2019.

37. It is the Defendant/Applicant's allegations that on 3rd December 2021, Police Officers in Company of unknown persons went to the suit property to enforce an eviction order that had been issued by the Court. The Defendant/Applicant alleges that he was not aware of such eviction order. He thereafter filed the instant application.

38. The application was filed after the entry of Judgement. The Defendant/Applicant was formerly represented by Waithira Mwangi & Co. Advocates. This application has been filed by Wokabi Mathenge & Co. Advocates. Therefore, Order 9 Rule 9 of the *Civil Procedure Rules* is applicable herein.

39. This Order states as follows;

> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

40. It is evident that there is a consent letter dated 15th December 2021, which has been signed by both Advocates. The Defendant/Applicant has prayed for the said consent letter to be adopted as the order

of the Court. Since the said consent letter has been executed and filed, this Court finds that Order 9 Rule 9(b) has been complied with. Therefore, this Court finds and holds that the Law Firm of Wokabi Mathenge & Co. Advocates, is properly on record.

41. On prayer No. 2, the Defendant/Applicant has sought for stay of execution of the Decree/Order that was issued herein arising from the Judgement that was delivered on 2nd July 2018. The said stay was to be issued pending the hearing and determination of this application. The prayer sought for stay pending the determination of the application. The application is being determined now and his Court finds that this prayer has been overtaken by event and there is nothing to stay.

42. Further the Defendant/Applicant has sought for setting aside of the Interlocutory Judgement entered on 11th May 2018 and thereafter the *exparte* Judgement delivered on 2nd July 2018.

43. Therefore, it is clear that the Defendant/Applicant is seeking to set aside a Judgement in default of filling a Defence.

44. The Application herein is anchored among other provisions of Law under Order 10 of the *Civil Procedure Rules* which governs the issues of consequences of non-appearance, Default of Defence and failure to serve a party.

45. However, Order 10 Rule 11 grants the Court discretion to set aside or vary a judgment that has been entered in default of Defence.

46. It is trite that setting aside of an Interlocutory Judgement/or *exparte* for that matter is the discretion of the Court. However, such discretion is unfettered and should be used judiciously and not capriciously See the case of *Kenya Pipeline Co. Ltd vs Maguta Production Ltd* (2014) eklr where the Court held;

> ".... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit."

47. From the various cited case that this Court has referred to, it is clear that the principles upon which the Court's discretion to set aside an interlocutory judgement/order are settled. In such application, the overriding interest of the Court is to do justice to the parties.

48. Further, the discretion is to be exercised in order to ensure that a litigant does not suffer injustice or hardship as a consequence of *interalia* as excusable mistake or error on his part or his Advocate.

49. From the Court record, it is evident that the Defendant/Applicant filed a Notice of Appointment of his Advocates being Waithira Mwangi & Co. Advocates on 21st November 2017. However, the said Advocates failed to file a Defence and an interlocutory Judgement was entered on 11th May 2018, as provided by Order 10 Rule 10 of the *Civil Procedure Rules*. Thereafter, the matter was set down for formal proof and an *exparte* Judgement was finally issued on 2nd July 2018.

50. The instant application is based under Order 10 Rule 11 which provides;-

> 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."

51. The interlocutory judgement was entered in default of filing a Defence. Therefore, the said Judgement is a Regular one. As noted above, the matter proceeded for formal proof and an *exparte* Judgement was

also issued on 2nd July 2018. This *exparte* Judgement has drastic Orders/effects against the Defendant/Applicant herein.

52. The issue now is whether the said interlocutory and *exparte* judgements should be set aside.

53. As already stated by the Court, the power to set aside an *exparte* Judgement is discretionary. This discretion is not restricted but should be exercised so that it does not cause injustice to the opposite party. (See the case of *Patel v E A Cargo Handling Services Ltd* (1974) EA 75.

54. Is the Defendant/Applicant herein deserving of the orders for setting aside?

55. It is evident that the matter proceeded *exparte* and an *exparte* Judgement with drastic effects upon the Defendant was issued on 2nd July 2018. The said matter proceeded without the Defendant and or his Advocate. The said Advocate had filed a Notice of Appointment, but failed to file a Defence. The Defendant/Applicant said failure to file a Defence was an error on the part of his Advocate. He pleaded with the Court not to punish him for the mistakes of his Advocates. If indeed the former Advocate failed the Defendant/Applicant herein, then such mistake should not be visited upon the Defendant. See the case of *Concord Insurance Co. Ltd v Susan Nyambura* High Court Appeal No. 251 of 2002(Nairobi) (2002) LLR 7285(CAIC) where the Court of Appeal held;

> Mistakes of Counsel in normal circumstances ought not to be laid at the door of the litigant especially where it is shown that the Applicant has always wanted to appeal."

56. It is evident that there were several *exparte* applications that were made towards enforcement of the *exparte* judgement. The Defendant/Applicant has not disputed that the said applications were not served upon him/advocates but has averred that since he had appointed an Advocate, he expected the said Advocate to have dealt with such issues.

57. The Defendant/Applicant has also averred that his former Advocate had been alluded that the suit had been withdrawn and that she even returned the original files to them. That he only learnt of the *exparte* judgment on 3rd December 2021. These averments were not wholly disputed by the Plaintiff/Respondent.

58. As this Court stated early, it is supposed to exercise its discretion judiciously and ensures that end of justice has been met and that no party should suffer prejudice (See the case of *Philip Kepto Chemwolo & Another* (*Supra*).

59. Section 3A of the *Civil Procedure Act* Provides as follows;

> "Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

60. From the above provisions of law, the Court is called upon to make such orders that are necessary for the end of justice to be met.

61. Further, even where there is a regular Judgement, the same can be set aside for sufficient reasons, and if the Draft Defence raises triable issues. The Court has considered the Draft Defence filed by the Defendant/Applicant herein and finds that it indeed raises triable issues. The Defendant/Applicant has alleged that he purchased the suit property and has been in occupation of the same since the said purchase for value. That the Plaintiff has never been in occupation.

62. Having looked at the draft Defence and noting that it has triable issues, the Court finds that the Defendant/Applicant should be given an opportunity to advance his Defence. See the case of *Kingsway*

Tyres and Automart Ltd vs Rafiki Enterprises Ltd; Appeal No. 230 of 1995, where the Court of Appeal held;

> "Notwithstanding the regularity of an *exparte* judgment, a Court may set aside the same if Defendant shows he has a reasonable Defence on merits".

63. The Court finds the Defendant/Applicant herein Draft Defence raises triable issues and the same should be interrogated through interparties hearing.

64. Given that the Defendant/Applicant has alleged that he purchased the suit property and that the eviction orders where obtained *exparte* and have drastic effects of removing him from the suit property before he is heard, the Court finds his application is merited.

65. Therefore, it is prudent to set aside the Interlocutory Judgement of 11th May 2018 and the *exparte* Judgement of 2nd July 2018, and all the consequential orders therefrom.

66. Order 12 Rule 7 of the *Civil Procedure Rules* provide that the setting aside should be done upon such terms that may be just. The Judgement herein was issued on 2nd July 2018, and it is evident that that the Plaintiff/Respondent has prosecuted several applications in Court towards enforcement of the said Judgement.

67. This Court finds and holds that the Plaintiff is entitled to throw away costs of Ksh. 50,000/= payable before commencement of the re-opened suit.

68. Having carefully considered the instant Application and the Reply thereto, the Court finds and holds that the Defendant/Applicant Application dated 16th December 2021, is merited and the same is allowed entirely in terms of prayers No. 3,4 & 5, with throw away costs of 50,000/= payable to the Plaintiff/Respondent.

69. Further the Defendant/Applicant is directed to file his Defence within a period of 14 days from the date hereof and the suit should be set down for hearing expeditiously.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE, 2022.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo - Court Assistant

Mr Bwonwonga for the Plaintiff/Respondent

N/A for the Defendant/Applicant

L. GACHERU

JUDGE

23/6/2022