Muriuki v Mwangi (Environment & Land Case 445 of 2017) [2022] KEELC 4758 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 4758 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 445 OF 2017

LN GACHERU, J

JUNE 23, 2022

BETWEEN

MARTIN KAMAU MURIUKI .... PLAINTIFF

AND

SIMON NJOROGE MWANGI .... DEFENDANT

RULING

1. The defendant/applicant herein Simon Njoroge Mwangi brought this application dated December 16, 2021, against the plaintiff/respondent, Martin Kamau Muriuki, and has sought for the following orders; -

   1) Spent

   2) Spent

   3) That the consent letter dated December 15, 2021, be adopted as an order of this court and 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 January 29, 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 January 16, 2020, 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 premised on the grounds that the defendant/applicant disputes the allegations made by the plaintiff/respondent and he has a good defence with triable issues.

3. That his former advocate after having been instructed, she did not inform him of any pleadings not filed nor of any that were missing from the court record. Further, that the said former advocate had informed him that the suit had been withdrawn. That after he was informed that the suit had been withdrawn, the original file was then released to him by his former advocate on March 2, 2020.

4. However, on December 3, 2021, persons unknown to him who included police officers visited his land and informed him of an eviction order which had been issued by the court and the police were to supervise the said eviction. That the defendant/applicant has a good defence which raises triable issues that require the hearing, and hence the reasons why he is seeking the setting aside and varying of the judgement and decree herein and all the consequential orders thereon; -

    1. The application is supported by the affidavit of the defendant Simon Njoroge Mwangi, who averred that sometimes in the year 2017, he was served with pleadings for this case. That he instructed Messers Waithira Mwangi & Co Advocates to represent him and she filed a notice of appointment dated November 21, 2017. Thereafter, she took over the conduct of this matter.

    2. That as a lay person, he relied entirely on advise/information conveyed to him by his former advocate in the handling of this case. That he would occasionally inquire about the case by visiting her office and also by calling the said office.

    3. That he is a farmer and illiterate and he lives in Gathaite area where the suit property; Makuyu/Makuyu/Block II/1287, is situated. Further that he has lived thereon since the year 2014, when he purchased the said land. That the plaintiff/respondent has expressed intention to evict him though he has been on the suit land since 2014, when he purchased it.

    4. That his former advocates never informed him about this suit proceedings, but had expressed to him that the suit and/or the case had been withdrawn and was not going on. That having been informed that the case was withdrawn, he knew the case was no longer going on and later the original files were released to one Kigo Ndung'u on March 2, 2020, by the said former advocate.

    5. That once the files were released, no one bothered to check or follow up with the case.

5. However, on December 3, 2021, some people went to the suit land with intention of carrying out an eviction while having in their possession eviction order with police supervision, which order had been issued by this court.

6. That he was shocked to learn about the eviction order, and when he visited the court on December 8, 2021, he learnt that the case proceeded without his participation. That as a result, there was both a judgement directing that he be evicted, which was issued on January 16, 2020, and that all along, he was unaware of the said eviction orders. That he is likely to suffer irreparably and be prejudiced, if the eviction order is enforced, as his family and himself will be rendered homeless and squatters.

7. He urged the court to allow his application by setting aside the *exparte* judgment and ordering re-hearing of the matter afresh. That his draft defence raises triable issues and that the suit should be heard and determined on merit. That the title held by the plaintiff/respondent ought to be interrogated and this can only be done if the *exparte* proceedings are set aside and the matter heard afresh. That he is in occupation of the suit land, where he has lived together with his family and if evicted, he will have no alternative place of abode.

8. This application is opposed by the plaintiff/respondent, Martin Kamau Muriuki, who filed a replying affidavit dated January 14, 2022, and averred that the defendant/applicant's application is misconceived, incurably defective and should be struck out with costs.

9. Further that the defendant/applicant was represented by an advocate who deliberately failed to file his defence and is now seeking to set aside a valid judgement and reopening of a concluded matter which is a blatant abuse of the process of the court. Further that the purported defence is just a mere denial, a sham and does not raise any triable issues.

10. That if the defendant/applicant was given his original file on February 3, 2020, he ought to have found out the reasons for such release and also ought to have inquired about the matters from his advocates.

11. That the defendant/applicant did not explain the steps he took since the year 2017, when he was admittedly served with court summons and why he failed to follow up his matter. That he should not attempt to hide behind his illiteracy as an excuse for failure to file his defence.

12. Further, that the defendant/applicant's former advocate was aware of what was happening in court as the said advocate was served with all the hearing notices, but deliberately failed to attend court. Therefore, the plaintiff/respondent remedy lies elsewhere as all the hearing and mention notices were duly served as evidenced from the copies in the court file.

13. The plaintiff/respondent urged the court not to exercise its discretion of setting aside a valid and regular judgment and decree in favour of a dishonest defendant/applicant.

14. It was his further 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 litigations must come to an end. That this application is only meant to delay and circumvent the smooth dispensation of justice as clearly demonstrated herein. that if the defendant/applicant has an issue with his former advocates, the remedies lies elsewhere.

15. Therefore, the respondent urged the court to dismiss this application for being misconceived and an abuse of the court process.

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

17. The defendant/applicant through Wokabi Mathenge & Co Advocates,filed his written submissions dated February 3, 2022, and urged the court to allow the application.

18. It was submitted that the court should look at the application wholistically as it touches on the core elements of substance and merits and more importantly the right to fair hearing under the *Constitution* of Kenya 2010.

19. On whether the consent letter dated December 15, 2021, should be adopted, it was submitted that under order 9 rule 9 of the *Civil Procedure Rules*, once a consent to change advocate is executed and filed, and a notice of change is filed, the new law firm is properly on record.

20. On the issue of setting aside *exparte* judgment, the defendant/applicant relied on order 10 rule 11 of the *Civil Procedure Rules* 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."

21. The applicant also relied on various cases among them the case of *Philip Kiptoo Chemwolo & Mumias Sugar Co vs Augustine Kubende*(1982-1988)KAR where the court held;

> The court has unlimited discretion to set aside or vary judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances, both prior and subsequent and of the respective merits of the parties".

22. It was the defendant's/applicant's further submissions that the *exparte* judgement herein was not obtained regularly as there was no proof that the defendant and/or his advocates were duly served with the hearing notices.

23. Reliance was placed on the case of *Moniks Agencies Ltd vs 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".

24. The defendant/applicant further submitted that he has a defence on merit with triable issues. That he has a good defence which requires a hearing and thus the reasons he is seeking to set aside the exparte judgement and decree herein. Reliance was also placed on the case of *Patel v E A Cargo Handling Services* (1974) EA 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 on itself to fetter the wide discretion given 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 judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it " a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

25. On his part, the plaintiff/respondent filed his written submissions dated February 4, 2022,and submitted that the defendant/applicant does not deserve the orders sought herein.

26. It was the plaintiff's further submissions that the defendant/applicant was served with summons to enter appearance and he appointed an advocate who filed a notice of appointment on November 21, 2017. That the said advocate filed a replying affidavit dated December 15, 2017, and attended the pretrial conference.

27. That it is clear that the defendant/applicant's former advocate knew of the matter in court, but failed to follow up. Therefore, the defendant/applicant's remedy lies elsewhere against his former advocate.

28. The plaintiff/respondent relied on the case of *Ruga Distributors Ltd v Nairobi Butters Ltd* (2015) eKLR, where the court held;

> "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".

29. It was further submitted that the defendant/applicant is trying to evade or obstruct the course of justice by filing the instant application.

30. The plaintiff/respondent further submitted that the judgement and decree herein is regular and the defendant/applicant's former advocates failure to file any defence amounts to professional negligence and therefore the defendant/applicant should follow the said advocate up to shoulder the consequences.

31. Further it was submitted that in the event the court decides to set aside the valid judgment herein, then the court should order the defendant/applicant to pay appropriate costs of Ksh 50,000/= which should be exemplary and punitive in the circumstances.

32. The plaintiff/respondent also submitted that the defendant/applicant should be ordered to pay specified sum of money into court to await the final disposal of the matter.

33. The court has carefully considered the instant notice of motion application and the annextures thereto. The court too has considered the written submissions, general proceedings, the court records and finds that the issue for determination is whether the instant application is merited?

34. There is no doubt that the suit herein proceeded *exparte* after the defendant/applicant failed to file his defence. Judgment was entered in favour of the plaintiff on January 16, 2020. The judgment of the court was to the effect that the defendant/applicant should vacate the suit property being Makuyu/Makuyu/Block II/1287, within 60 days and in default eviction to ensure.

35. It is apparent that the defendant/applicant did not vacate the suit property and on January 22, 2020, a decree was extracted with an order that the defendant be evicted from the suit property with the supervision of the OCS commanding the police station and the eviction be done by an authorized court bailiff.

36. However, the defendant/applicant filed the instant application on December 16, 2021, and alleged that he was not aware of the *exparte* judgement until December 3, 2021, when police officers and other persons went to the suit property to enforce a court order for his eviction.

37. This application has been brought after entry of judgement. The defendant/applicant was previously represented by the law firm of Waithira Mwangi & Co Advocates.

38. However, the instant application has been filed by Wokabi Mathenge & Co Advocates, after the entry of judgement.

39. One of the prayers is that the consent letter dated December 15, 2021, be adopted as the order of the court. The said consent is to the effect that the law firm of Waithira Mwangi & Co Advocates should be replaced by Wokabi Mathenge & Co Advocates.

40. Order 9 rule 9(b) of the *Civil Procedure Rules*, is very clear that;

> where there is a change of advocate or when a party decides to act in person having previously engaged an advocate after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court;
>
> a) ....
>
> b) Upon consent filed between the outgoing advocate and the proposed incoming advocate and party intending to act in person as the case may be".

41. The applicant herein has complied with the above provisions of order 9(b) rule 9 of the *Civil Procedure Rules*, since the consent has been executed and filed and thus the law firm of Wokabi Mathenge & Co Advocates is properly on record.

42. The applicant had also sought for stay of execution of the decree/orders issued arising from the judgment that was delivered on January 16, 2020, and any consequential orders pending the hearing and determination of this application. This prayer herein has been overtaken by events. It sought stay pending the hearing and determination of the application. This application is being determined now, and there is nothing to stay.

43. The defendant/applicant has further sought for setting aside of the interlocutory judgment entered on January 29, 2018, and that the defendant/applicant be granted leave to file and serve a defence and any attendant documents. It is evident that the defendant herein filed a notice of appointment of his advocate Waithira Mwang & Co Advocates on November 21, 2017.

44. However, the said advocate failed to file any defence. As a result, the plaintiff requested for interlocutory judgement on January 29, 2018 underorder 10 rule 10 of the *Civil Procedure Rules*. The said interlocutory judgement was entered on May 29, 2018, and the matter was set down for formal proof.

45. The defendant/applicant has come under order 10 rule 11 of the *Civil Procedure Rules* seeking to set aside the said interlocutory judgement and that he be allowed to file a defence.

46. Order 10 rule 11 of the *Civil Procedure Rules* provides;

> "where judgement has been entered under this order, the court may set aside or vary such a judgement and any consequential decree or order upon such terms as are just"

47. This is a judgement that was entered in default of filing a defence.

48. Therefore, the above judgement was a procedural or regular judgment that was entered in default of filing a defence.

49. After the said interlocutory judgement, the matter proceeded for formal proof and a judgment was entered on January 16, 2020. The question that the court should answer now is whether the exparte judgment entered on January 16, 2020, and all the consequential orders thereon should be set aside or not. The court say so because as a result of the interlocutory judgment, matter proceeded for formal proof and a judgment was delivered.

50. The provisions of law that guides the court on whether to set aside an *exparte* judgement are provided for under order 12 rule 7 of the *Civil Procedure Rules*, which provides;

> where under this order judgement has been entered or the suit has been dismissed, the court on application may set aside or vary the judgement or orders upon such terms as may be just".

51. It is evident that the power to set aside *exparte* judgement/order is discretionary and which discretion must be exercised judiciously. The court must use its discretion to come to a conclusion while also making sure that justice has been done to all the parties. See the case of *Shah v Mbogo & another* (1967) EA 116, where the court held;

> The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, but is not designed to assist a person who

has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice".

52. Further, it is clear that the court's discretion to set aside an *exparte* judgment is not restricted, but the same 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, where the court held;

53. There are no limits or restrictions on the judge's discretion to set aside or vary an *exparte* judgement, except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.

54. Taking into account the above provisions of law, and the decided cases and the instant facts of this case, the question is whether the defendant/applicant herein is deserving of the orders of setting aside the *exparte* judgment herein that was delivered after he failed to file a defence and attend court.

55. There is no doubt that an *exparte* judgement was entered on January 16, 2020, after the matter had gone for formal proof. The defendant/applicant's advocate who had filed a notice of appointment, was served with hearing notices, but the defendant and his advocate failed to appear in court. After the court had considered the plaintiff's evidence, an *exparte* judgement was entered in favour of the plaintiff herein.

56. The defendant/applicant has not disputed that pleadings herein and the hearing notices were served. It is the applicant averments that once he appointed and/or instructed his former advocate, the said advocate failed to file any defence and follow up with the matter. That he was not aware of the said *exparte* judgement herein until December 3, 2021,when police officers went to supervise his eviction.

57. However, the defendant/applicant as a litigant had a duty to check on the progress of his case and ensure that the same has been prosecuted promptly. In case of *Savings & Loans Ltd v Susan Wanjiru Muritu* Nairobi HCC No 397 of 2002, the court held as follows;

> whereas it would constitute a valid excuse for the defendant to claim that she had been let down by former advocate, 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 mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to consistently check with her/ his advocate the progress of her case..."

58. The defendant/applicant herein had a duty to check the progress of his case and it is clear herein that the applicant failed to do so. Therefore, the defendant/applicant has not given sufficient cause or reasons of why he failed to file his defence and/or attend court.

59. However, the court takes cognizes of the fact that it is supposed to exercise its discretion judiciously and ensures that the end of justice has been met and that no party should suffer prejudice. See the case of *CMC Holdings Ltd v Nzioka*(2004) IKLR, where the court held that;

> In an application for setting aside exparte judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously"

60. Even if there are no sufficient reasons given for non attendance, the court should look at the draft defence and consider whether the same raises triable issues.

61. The defendant/applicant has alleged that he has been on the suit property since the year 2014. That the plaintiff's certificate of title needs to be interrogated since the company that sold it had leadership squabbles that led to establishment of parallel offices.

62. As has been held by courts severally, in an application for setting aside *exparte* judgment, the court should look at the nature of the defence, even if there is no cause for non-attendance and a litigant should not be deprived an opportunity of pressing on his defence. See the case of *Kenya Commercial Bank Ltd v Reuben Waweru D Kigathi and another* Nairobi HCC No 325 of 1999, where the court held;

> " The court has unlimited discretion to set aside or vary judgment entered by default of appearance, but as usual with all discretionary powers the same discretion must be exercised judiciously and upon reasons......where the judgment is regular, the court will not usually set aside the judgement, unless it is satisfied that there is a defence on the merits and a defence on the merits does not mean a defence that must succeed, but one that raises triable issues, that is an issue which raises *primafacie* defence and which should go for trial for adjudication."

63. The defendant/applicant has averred that the plaintiff's title might have been acquired fraudulently and/or illegally. The defendant/applicant should be given his day in court, given that the orders that were issued through the *exparte* judgment herein is to evict him from the suit property. The said orders were obtained *exparte* and are drastic orders.

64. For the above reasons, the court finds and holds that there is a draft defence attached to the defendant/applicant's application and which defence raises triable issues. Consequently, the court is inclined to set aside the *exparte* judgement that was entered on January 16, 2020.

65. However, as provided by order 12 rule 7 of the *Civil Procedure Rules*, the said setting aside should be done upon such terms as may be just. The *exparte* judgment herein was entered on January 16, 2020. The plaintiff has attempted to enforce the said *exparte* judgement. For the above reasons, the court finds that the plaintiff is entitled to throw away costs of 50,000/= payable before the commencement of the suit.

66. Consequently, the court allows the defendant/applicant's notice of motion application dated December 16, 2021, in terms of prayers no 3,4 & 5 with costs to the plaintiff/respondent. The plaintiff is also entitled to costs of 50,000/= to be paid before the suit commences for hearing.

67. Further the defendant/applicant herein is directed to file his defence within the next 14 days from the date hereof. The suit should thereafter be set down for hearing expeditiously.

68. 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 Bwnwonga for the Plaintiff/ Respondent

Absent for the Defendant /Applicant

L.GACHERU

JUDGE

23/6/2022