Ndegwa v Mwangi (Environment & Land Case 451 of 2017)
[2022] KEELC 4754 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 4754 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 451 OF 2017

LN GACHERU, J

JUNE 23, 2022

BETWEEN

PAULINE WANJIKU NDEGWA ..... PLAINTIFF

AND

MARGARET MAGIRI MWANGI ..... DEFENDANT

RULING

1. The Defendant/Applicant herein Margaret Magiri Mwangi has brought this Application dated 16th December 2021 against the Plaintiff/Respondent, Pauline Wanjiku Ndegwa and 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 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 13th February 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 31st May, 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 premised on the grounds set on the face of the Application and Supporting Affidavit of the Applicant, Margaret Magiri Mwangi.

Among the grounds are;

That the Defendant/Applicant disputes the allegations made by the Plaintiff/Respondent in her pleadings and she has a good Defence for the same, which raises triable issues. Further that after instructing her former advocate, she failed to inform her that no pleadings had been filed or were missing from the Court files. Again, that the said former Advocate had informed her that the suit had been withdrawn and she took it that the case was not going on.

3. Further that having been told that the case had been withdrawn awaiting only resolution as to the question of how the titles held by the Plaintiff and other persons were procured, she knew the case was not going on.

4. That thereafter the original files were released to them by their former Advocate on 2nd March 2020.

5. However, on 3rd December 2021, persons unknown to her who were in company of Police Officers visited the suit land and informed her and her adjacent neighbours of an eviction order that had been issued by the Court. That the Police Officers were to supervise the said eviction and they showed her the eviction order. That the Defendant/Applicant has a good Defence, which raises triable issues that require a hearing and thus the seeking to set aside and vary of the exparte Judgment and all its consequential Orders thereon.

6. The Application is also supported by the Affidavit of Margaret Magiri Mwangi, who averred that in the year 2017, she was served with court documents. That she instructed Waithira Mwangi & Co. Advocates to represent her, who filed a Notice of Appointment on 2st November 2017. Thereafter, the said Advocates took conduct of the matter.

7. She deponed that as a lay person, she relied entirely on the advice conveyed to her by the said Advocate and that the said Advocate would occasionally brief her about the case.

8. She also deponed that she is an illiterate farmer who does not understand English and she lives in Gathaite area where her suit property Makuyu/Makuyu Block II/1286, is located. That she has lived on the suit property since the time she purchased it. Further that the Plaintiff has expressed intention to evict her through an order emanating from the exparte Judgement of 31 st May 2018.

9. She contended that after instructing her former advocate, she never informed her about any pleadings not filed and/or were missing from the Court record. Further, that the said advocate had expressed to her that the said case had been withdrawn and was not going on. That having been informed that the case was withdrawn, she knew the case was no longer going on and that even the original file was released to one Kigo Ndung'u on 2nd March 2020, by the former Advocate.

10. It was her contention that on 3rd December 2021, some people in the company of Police officers went to the suit property-Makuyu/Makuyu Block II/1286, with intention to evict her and her adjacent neigbours. That in their possession, they had an eviction order that had been issued by the Court and the Police were to supervise the said eviction.

11. hat she was shocked to learn about the eviction order and she proceeded to her former Advocate office on 6th December 2021, and she did not find her. Further that she visited the Court Registry on 8th December 2021, and learnt that the case had proceeded without her participation. The said eviction order had been issued on 17th October 2019, and all along, she was unaware of the said eviction orders.

12. She contended that she was likely to suffer irreparably and would be prejudiced if the eviction order is enforced as her family and herself would be rendered homeless and squatters.

13. She urged the court to allow her application of setting aside the exparte Judgement and order re-hearing of this matter afresh. She also contended that the Draft Defence raises triable issues and that the suit should be heard and be determined on merit. Further, that the Plaintiff's title ought to be interrogated and this can only be done if the exparte proceedings are set aside and the matter be heard afresh. She further averred that she is in occupation of the suit property where she lives with her family and if she is evicted, they have no alternative place of abode. That the Plaintiff does not stand to be prejudiced as she does not live on the suit land.

14. The Application is opposed vide the Replying Affidavit sworn by Pauline Wanjiku Ndegwa,the Plaintiff herein.

15. She averred that the Defendant/Applicant's Application is misconceived, incurably, defective and should be struck out with costs. She also alleged that the Defendant/Applicant herein was represented by an Advocate, but she deliberately failed to file a Defence and is now seeking to set a valid Judgement and reopening of an already concluded matter which is a blatant abuse of Court process. She further averred that the Draft Defence by the Defendant/Applicant is a mere denial, a sham and does not raise any triable issues.

16. It was her contention that the Defendant/Applicant was allegedly given her original file on 2nd March 2020, and she ought to have sought out reasons for such release of the file and also ought to have inquired from her advocate about the progress of the matter.

17. Further that the Defendant/Applicant has not explained the steps that she had taken since the year 2017, when she admittedly was served with the Court Summons and also why she failed to follow up the matter with her advocate or the Court. The Respondent contended that the Applicant should not attempt to hide behind her illiteracy as an excuse for failure to file her Defence. It was her further contention that the Defendant/Applicant former Advocate was aware of what was happening in Court as he had been served with all the hearing Notices, but she deliberately failed to attend Court.

18. She alleged that the Defendant/Applicant remedy lies elsewhere, if she has an issue with the conduct of her former advocates, as all the hearing and mention Notices were duly served. Therefore, the Plaintiff/Respondent urged the Court to exercise its discretion and decline to set aside the valid and regular Judgement/Decree in favour of a dishonest Defendant/Applicant.

19. Further 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 her Judgement. She contended that litigation must come to an end and the Application herein is only meant to delay and/or circumvent the smooth dispensation of justice as clearly demonstrated. The Plaintiff/Respondent urged the Court to dismiss the Defendant/Applicant's Application herein for being misconceived and an abuse of the Court process.

20. The instant Application was canvassed by way of written submissions.

21. Through Wokabi Mathenge & Co. Advocates, the Defendant /Applicant filed her submissions on 3rd February 2022, and pleaded with the Court to allow her Application.

22. It was her submissions that the Court ought to wholistically consider the Application as it touches the core elements of substance and merits and more importantly the right to fair hearing as envisaged under Article 50 of the Constitution of Kenya 2010.

23. It was submitted that the consent dated 15th December 2021, should be adopted as it complied with the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. That once a consent to change an advocate is executed and filed, and a Notice of change is filed, the new Law Firm is properly on record.

24. On the issue of setting aside exparte Judgment, the 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."

25. The Applicant also relied on various cases among them the case of *Philip Kiptoo Chemwolo & Mumias Sugar Co. v 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".

26. It was the Applicant's further submissions that the Judgement herein was not obtained regularly as there was no proof that the Defendant and/or her advocates were duly served with the hearing notices.

27. Reliance was placed 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".

28. The Applicant further submitted that she has a Defence on merit with triable issues. That she has a good Defence which requires a hearing and thus the reasons why she 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."

29. On her part, the Plaintiff/Respondent filed her Written Submissions dated 4th February 2022, and submitted that the Defendant/Applicant does not seek the orders sought herein.

30. It was the Plaintiff's submissions that the Defendant/Applicant was served with Summons to Enter Appearance and she appointed an advocate who filed a Notice of Appointment on 21st November 2017. That the said advocate filed a Replying Affidavit dated 15th December 2017, and attended the Pretrial Conference.

31. That it is clear that the Applicant's former advocates knew of the matter in Court, but failed to follow up. Therefore, the Applicant's remedy lies elsewhere against his former advocate.

32. 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".

33. It was further submitted that the Defendant/Applicant is trying to evade or obstruct the course of justice by filing the instant Application.

34. 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 up the said Advocate to shoulder the consequences.

35. 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.

36. 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.

37. 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?

38. 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 31st May 2018. The Judgment of the Court was to the effect that the Defendant/Applicant should vacate the suit property being Makuyu/Makuyu/Block II/1286, within 60 days and in default eviction to ensure.

39. It is apparent that the Defendant did not vacate the suit property and on 21st February 2019, the Plaintiff/Respondent filed an Application for eviction of the said Defendant/Applicant from the suit property. The said Application was allowed on 17th October, 2019.

40. However, the Defendant/Applicant filed the instant Application on 16th December 2021, and alleged that she was not aware of the exparte Judgement until 3rd December 2021, when Police officers and other persons went to the suit property to enforce a Court order for her eviction.

41. This Application has been brought after entry of Judgement. The Defendant/Applicant was previously represented by the Law Firm of Waithira Mwangi & Co. Advocates.

42. However, the instant Application has been filed by Wokabi Mathenge & Co. Advocates, after the entry of Judgement.

43. One of the prayers is that the consent letter dated 15th December 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.

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".

44. 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.

45. The Applicant had sought for stay of execution of the Decree/Orders issued arising from the Judgment that was delivered on 31st* May 2018, and any consequential orders pending the hearing and determination of this Application. This prayer herein has been overtaken by events. It sought stay pending hearing and the determination of the Application. This Application is being determined now and there is nothing to stay.

46. The Defendant/Applicant has further sought for setting aside of Interlocutory Judgment entered on 11th May 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 21st November, 2017.

47. However, the said Advocate failed to file any Defence. As a result, the Plaintiff requested for Interlocutory Judgement on 11th May 2018, under Order 10 Rule 10 of the Civil Procedure Rules. The said Interlocutory Judgement was entered on 11th May 2018, and the matter was set down for formal proof.

48. The Defendant/Applicant has come to Court under Order 10 Rule 11 of the Civil Procedure Rules, seeking to set aside the said Interlocutory Judgement and that she be allowed to file a Defence.

49. 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"

50. This is a Judgement that was entered in default of filing a Defence.

51. Therefore, the above Judgement was a regular Judgment that was entered in default of filing a Defence.

52. After the said Interlocutory Judgement, the matter proceeded for formal proof and an Exparte Judgment was entered on 31st May 2018. May be the question that the Court should answer at this Juncture is whether the exparte Judgment entered on 31st May 2018, 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 an exparte Judgment was delivered.

53. The provisions of law that guides the Court on whether or not 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".

54. It is evident that the power to set aside exparte Judgement/Order is discretionary and which discretion must be used 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".

55. 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;

51. There are no limits or restrictions on the judge's discretion to set aside or vary an ex-parte 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.

56. Taking into account the above provisions of law and the decided cases and the instant facts of the 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 she failed to file a Defence and attend Court.

57. There is no doubt that an exparte Judgement was entered on 31st May 2018, after the matter had gone for formal proof. The Defendant/Applicant 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 her favour.

58. Further, it is evident that several Applications have been filed by the Plaintiff /Respondent herein in pursuant of enforcement of the said exparte Judgement. The Defendant/Applicant has not disputed that pleadings for the said Applications were served upon him. It is the Applicant's averments that once she appointed and/or instructed her former advocate, the said Advocate failed to file any Defence and follow up with the matter. That she was not aware of the said exparte Judgement herein until 3rd December 2021, when Police Officers went to supervise her eviction.

59. However, the Defendant/Applicant as a litigant had a duty to check on the progress of her 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..."

60. The Applicant herein had a duty to check the progress of her case and it is clear herein that the Applicant failed to do so. Therefore, the Applicant has not given sufficient cause or reasons of why she failed to file her Defence and/or attend Court.

61. 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"

62. 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.

63. The Defendant/Applicant has alleged that she has been on the suit property from the time she purchased the same. That Plaintiff's certificate of title needs to be interrogated as the Company that sold the land to her had leadership squabble and they had parallel offices.

64. 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."

65. The Defendant/Applicant has averred that the Plaintiff's title was acquired fraudulently and/or illegally. The Defendant averred that she bought the suit property and therefore, the Defendant/Applicant should be given her day in Court, given that the orders that have been sought herein is to evict her from the suit property. The said orders were obtained exparte and are drastic orders, capable of removing her from the suit property without having been heard. See the case of *J M K vs M W M & Another* [2015] eKLR, where the Court held;

> " The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made"

66. Further in *Onyango v Attorney General*[1986-1989] EA 456, Nyarangi, JA held;

> " I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly..... "A

> decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

67. For the above reasons, the court finds that there is a Draft Defence attached to the Applicant's Application and which Draft Defence raises triable issues. Taking into account all the above, the Court is inclined to set aside the exparte Judgement that was entered on 31st May, 2018.

68. However, as provided by Order 12 Rule 7 of the Civil Procedures Rules, the said setting aside should be done upon such terms as may be just. The Exparte Judgment herein was entered on 31st May 2018. The Plaintiff has filed several other Applications towards enforcement of the said 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 re-opened suit.

69. Consequently, the Court allows the Defendant/Applicant's Application dated 16th December 2021, in terms of prayers No. 3,4 & 5 with costs to the Plaintiff/Respondent. The Plaintiff is entitled to throw away costs of 50,000/= to be paid before the suit commences for hearing.

70. Further the Defendant 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.

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