



Njiru v Mburu formerly known as Peter Waweru Mburu (Environment & Land Case 215 of 2020) [2022] KEELC 3852 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 215 OF 2020**

NA MATHEKA, J

JULY 26, 2022

BETWEEN

ELIZABETH WANJIRA NJIRU PLAINTIFF

AND

**PETER MURATHIME MBURU FORMERLY KNOWN AS PETER WAWERU
MBURU DEFENDANT**

RULING

1. The application is dated March 9, 2022 and is brought under Sections 1A, IB, 3A & 63(e) of the *Civil Procedure Act*, Cap. 21, Laws of Kenya; Order 10 Rules 11, Order 51 Rule 1, *Civil Procedure Rules*, 2010; Articles 50 & 159, *Constitution of Kenya*, 2010 seeking the following orders;
 1. That this Application be Certified as Urgent and service thereof be Dispensed with at the first instance;
 2. That this Honourable Court be pleased to grant an order of stay of execution of the Judgment and / or decree of this court made on the December 8, 2021 and together with all other consequential orders pending the hearing and determination of this Application;
 3. That this Honourable Court be pleased to vary and / or set aside its judgement and or decree made on the December 8, 2021 and any other consequential orders issued subsequent hereto;
 4. That this Honourable Court be pleased to give directions and make such other and / or further orders as it may deem fit in the circumstances of this case so as to meet the ends of justice;
 5. That Costs of this Application be provided for.
2. It is based on the grounds that the Applicant is aggrieved by the Order and/or Judgment made on the December 8, 2021 based on the fact he has been condemned unheard. As of the April 24, 2021 when it is alleged that he was served through the Standard Newspaper, the Defendant was out of Kenya in



the United Kingdom and only came to Kenya on June 15, 2021 as can be seen from his itinerary. That there are several mistakes and / or errors apparent on the face of the record: The title annexed to the supporting affidavit by the Respondent was not certified by the registrar as required by law. This is because the title the Plaintiff is holding is fake and that is why it does not disclose the stamp of the Registrar who signed it; it was never proven beyond reasonable doubt that the Respondent has ever developed my plot she is alleging to have developed. If anything only the Defendant's servant quarter made of a temporary structure stands on the subject plot; No single evidence of construction in terms of photographs was adduced before the court. This is because there are none and the Plaintiff does not reside on the subject land.

3. That the Applicant ordinarily lives in the United Kingdom and by the time the alleged advertisement was made through substituted service in the Standard Newspaper, there was no way he could have seen the advert and in any event if the Applicant was aware of the existence of any suit filed against him he could have defended the same to protect his interest as he has done when the same lady then calling herself Elizabeth Njiru who even collected the Defendant's discharge of charge from the Mombasa settlement office under the same name on January 25, 2022. That it is therefore only fair in the interests of Justice, Fairness, Equity, Constitutionalism, Principles of the Rules of Law and Natural Justice and Protection of Fundamental Rights and Freedoms enshrined in the Constitution of Kenya, 2010 that this Application be allowed as prayed. That this application is made timeously and any delay occasioned is inadvertent and explainable. In any event its success can lead the court to knowing the truth.
4. The Respondent stated that it is not true that the Applicant is the owner of the Plot. The owner of the plot is one Peter Waweru Mburu ID No. 857xxxx Serial No. 20945xxxx. Annexed is a copy of the identity card marked as "EWN-1". That there has never been a chain link in the plot neither has there been a caretaker in it. That for the Applicant to claim that there is an old lady called Elizabeth Wanjira Njiru who is deceased and presume that she is the one is extremely callous and offensive to me because she is not the only person in the world by that name. He owes her an apology for presuming that she died. Annexed is her Birth Certificate marked as "EWN-2". That the Applicant is a known gold-digger who masquerades to be living in the United Kingdom when he is actually operating along Mahi Mahiu in Nakuru County. If indeed the Applicant, changed his name from Peter Waweru Mburu to Dr. Peter Murathime Mburu, why has he not effected the same with the Lands Office so that the title can be issued in that name? The answer is obvious. He is not the owner of the Plot. That the Applicant should produce all the documents including the letter of allotment and the sale Agreement and the original title deed he claims to be having. That the Applicant is a stranger who has no claim whatsoever and who is seeking to tarnish her name yet he knows that she has been in the plot for more than twelve (12) years. That the service effected in the newspaper cannot be impugned because the same was served in time. The Applicant cannot be heard to say that he never saw the advertisement since the same was put in the Standard Newspaper which is widely read even digitally. That she used to sell building material on the site displayed her number 07212xxxxx for purposes of sale. The Applicant obtained that number and stated issuing her with threats and started sending text messages. That to date she is in possession of the plot and the Applicant has no right whatsoever to claim.
5. This court has considered the application and submissions therein. This court has unfettered discretion to set aside a judgment entered in default of appearance in Order 10 Rule 11, which provides;
 11. 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.



6. The principles for setting aside a default judgment are set out in the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where the court held that;

“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. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement 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.”

7. The Court of Appeal in the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & another* Civil Appeal No. 6 of 2015 (2016) eKLR held that;

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the Defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v Shah* (*supra*), *Patel v E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 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 justitiae*, 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.

8. This court has perused the court record and find that, this suit was filed by way of originating summons on the October 22, 2020. By an application dated January 22, 2021 the Applicant applied to have the summons served by way of advertisement in a daily newspaper. This order was granted by the court on the March 23, 2021 and the advert placed in the Standard Newspaper of Saturday April 24, 2021. On the 21st November 2021 the matter came up for hearing *ex parte* and judgement was delivered on the December 8, 2021. The Defendant never filed an appearance or defence in the matter. Be that as it may the Applicant/Defendant submitted that ordinarily lives in the United Kingdom and by the time the alleged advertisement was made through substituted service in the Standard Newspaper, there was no way he could have seen the advert and in any event if the Applicant was aware of the existence of any suit filed against him he could have defended the same to protect his interest. The Applicant has attached his passport to support this claim. I find that it is possible that the Applicant did not see the advertisement as he resides in the UK. I find that the application dated March 9, 2022 is merited and I grant the following orders;



1. That the judgement dated December 8, 2021 is set aside and all consequential orders.
2. That the Applicant is to file and serve his replying affidavit/defence within the next 14 days from the date of this ruling.
3. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

