



REPUBLIC OF KENYA



**Nyukuri & another v Omochar & 5 others (Environment & Land  
Case 160 of 2015) [2022] KEELC 2530 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2530 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 160 OF 2015**

**FO NYAGAKA, J  
JULY 21, 2022**

**BETWEEN**

**PETER ELIMA NYUKURI ..... 1<sup>ST</sup> PLAINTIFF**

**DAVID NYONGESA WAMALWA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LEONARD KINGASIA OMOCHAR ..... 1<sup>ST</sup> DEFENDANT**

**KENNEDY SIMIYU SITOKO ..... 2<sup>ND</sup> DEFENDANT**

**PROTUS SIMIYU MUNIALO ..... 3<sup>RD</sup> DEFENDANT**

**ANDREW BOAZ JUMA ..... 4<sup>TH</sup> DEFENDANT**

**MOURICE TABALIA ..... 5<sup>TH</sup> DEFENDANT**

**PATRICK NJOGINDA ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Application before me is a Notice of Motion dated 30/05/2022. It is brought under Sections 2 and 3A of the [Civil Procedure Act](#) and Order 10 Rule 11 of the [Civil Procedure Rules](#). It seeks the following orders:
  - (1) That the ex-parte judgement entered herein be set aside with all its consequential orders.
  - (2) That the defendant/applicants be granted leave to file their defence.
  - (3) That in the meantime pending hearing and determination of this application this Honourable Court be pleased to issue orders for stay of execution of the court's judgement
  - (4) Costs be pro-vided for.



2. It is grounded on three points stated on its face. These are basically that the Defendant/Applicants were not served with the pleadings; they have a good defence; and the interest of justice demands that the orders be granted. It was supported by the Affidavit of one, Leonard Wamocha, the 1<sup>st</sup> Defendant. The Affidavit was sworn on May 30, 2022. It more or less repeated the contents of the grounds in support of the Application. He deponed that he was not aware of the suit as he was not served with summons to enter appearance. In his Affidavit, he does not state that he is swearing the Affidavit on behalf of the other defendants. At the same time he did not file any authority to show that he was acting in that behalf.
3. Be that as it may, Mr. Wamocha deponed further that the Plaintiffs had no claim against them since they (the Plaintiffs) were given their rightful parcel of land hence their allegations in the Plaint were untrue. He then contended that the Applicants had a good defence, a draft of which he annexed and marked as LW 1. He thus prayed that the judgment herein be set aside and the Defendants be given chance to Defend the suit. He deponed that the Applicants had extracted an eviction order and warrants of arrest against the Applicants. He prayed for the judgment herein to be set aside.
4. The Respondents opposed the Application by an Affidavit sworn on 9/06/2022 by one, Peter Elima Nyukuri. He stated that the Applicants lied about not being served yet in the year 2016, when the summons were served on the Defendants they visited the law firm of Ms. Risper Arunga & Company Advocates and called on the Plaintiffs for a meeting in that office but the Plaintiffs refused to attend. He deponed further that the Process Server was always accompanied by the area Chief, one Francis Murunga, who was ready to testify to that fact if called upon by the Court. He again deponed that the said learned counsel, Ms. Arunga, was the one who prepared for them the partnership Agreement the time the Applicants sold their parcels of land to other people and they were called to the office to solve the matter but they refused.
5. This Court directed that the parties file their written submissions on the Application. The Applicants did so but the Respondents did not. In their submissions the Applicants repeated the contents of the Affidavit in support of the Application that they were not aware of the proceedings until the time the 1<sup>st</sup> Defendant was arrested the by Police in execution of the warrants of arrest issued in the matter. They were therefore not served with the pleadings. They submitted further they had a good defence evidenced by the draft in which they denied all the allegations in the plaint. They relied on a decision of the Court of Appeal sitting in Mombasa in the case of *James Kanyita Nderitu & Another -vs- Marios Philota Ghikas & Another* [2013] eKLR. In it the learned judges distinguished between a regular and irregular judgment and gave the terms of setting aside such decisions. They also relied the High Court case of *African Banking Corporation Limited -vs- Generation Farmers & Co. Ltd & 2 Other* [2014] eKLR. They asked the Court to set aside the judgment.

### **Analysis, Issues and Determination**

6. After careful considered the application, the replying Affidavit, the Applicants' submissions, as well as the authorities and the law cited, I find the following issues determination:
  - a. Whether the prayer for setting aside the judgment delivered herein is merited.
  - b. Whether the Defendants should be granted leave to file their defence.
  - c. What orders to issue and who to bear costs?
7. I begin by analyzing the first issue. This is because the analysis of the second one depends on the outcome of the first one. If I were to find the first issue meritorious then it follows that a positive consideration of the second one is basically obvious. The consideration of Applications of this nature



is discretionary. Whether a judgment is regular or irregular, in determining whether or not to set it aside, the discretionary power of the Court very wide. However, where the judgment is irregular, in that it is found that a party was not served, the Courts have little discretion: they ought to set it aside *ex debito justitiae*, as will be discussed below. In essence the principles applicable in the two scenarios differ, even though the Court is called upon to exercise discretion. And even then, when exercising the discretion the Court should do so judiciously.

8. Therefore, the first question this Court considers is whether the judgment herein is a regular or irregular one. As stated above, in case I find that it was irregular, I have to set it aside *ex debito justitiae*. It means I set it aside as a matter of right. This is because to permit it to stand would amount to condemning a party unheard. That would run counter to the well-settled and revered principle of natural justice that one should not be condemned unheard. The principles of natural justice override the discretion of a Court.
9. Thus, in *Sangram Singh v. Election Tribunal*, Kotah, AIR 1955 SC 664, at 711 the Supreme Court of India emphasized on the importance of the right to be heard as follows:

“ [T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

10. The Applicants herein appear to raise the same issue. Thus, on the one hand, the Applicants contended that they were not served with summons to enter appearance. If their argument is to be taken to be true, then Defendants indirectly implore the Court to that the matter proceeded in their absence without giving them opportunity to be heard. Thus, they were condemned unheard. But their contention should be juxtaposed and compared with that of the Plaintiffs. Therefore, on the other hand, the Respondents contend that the Applicants were given opportunity to be heard but they squandered it. The Plaintiffs argue that the Defendants were served but they never chose to defend the case. Further, that when the suit papers were served on the Defendants, they even called on the Plaintiffs to go to the offices of the Defendants, the firm of Ms. Risper Arunga & Co. Advocates, for a discussion on the matter but the Plaintiffs refused to do so. As a consequence, they should not be given opportunity to be heard. These were better explained by the Court of Appeal in *James Kanyita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR. In it the Court stated as follows:-

“ 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....



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. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

11. In the instant Application, this suit proceeded for hearing by way of formal proof. The Court must have interrogated the circumstances of the absence of the Defendants in the pleadings and was satisfied as to the service of the summons to enter appearance. That is the fact that this Court is called upon to analyze and make a finding on. In essence, the Court is to be concerned more than anything else the fact of the allegation of the service of summons because in essence that is what the Defendants seem to fault.
12. The Applicants relied on Order 10 Rule 11 of the *Civil Procedure Rules* in making their Application. The Rule provide as follows:

“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.”
13. The operative term used in the provision is “may”, which imports the idea of permission and discretion. The discretion is wide but it has to be exercised judicially. Its purpose is to further the ends of justice. In *John Mukuba Mburu v Charles Mwenga Mburu* (2019) eKLR wherein the case of *Shah vs Mbogo* (1979) EA 116 was cited, it held that the discretion is very wide. The Court also stated thus:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”
14. In *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75, cited with approval in the case of *Stephen Wanyee Roki -vs- K-Rep Bank Limited & 2 Others* (2018) eKLR the Court held as follows:

“There are no limits or restrictions on the judge’s discretion 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 condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”



15. In the case of *Esther Wamaitba Njibia & 2 Others -vs- Safaricom Limited* [2014] eKLR, the learned Judge, citing the case of *Stephen Ndicbu vs. Monty's Wines and Spirits Ltd* [2006] eKLR, held as follows:

“The principles governing the exercise of judicial discretion to set aside ex-parte Judgments are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See *Patel vs. E.A. Cargo Handling Services Ltd* [1974] E.A 75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, 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 cause of justice (See *Shah vs. Mbogo* [1969] E.A 116). The nature of the action should be considered, the Defence if any should also be considered; and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration vs. Gasyali* [1968] E. Way. 300). It also goes without saying that the reason for failure to attend should be considered.”

16. In *Wachira Karani v Bildad Wachira* [2016] eKLR Justice Mativo, cited the case *Ongom vs. Owota* where the Court opined that for one to succeed in setting aside of an ex-parte judgment, the court must be satisfied with two things namely:

- (i) Either that the Defendant was not properly served with summons; or
- (ii) That the Defendant failed to appear in court at the hearing due to sufficient cause.

17. The above analysis then leads this Court to consider how the Plaintiffs satisfied the Court that the Defendants had been served with summons to enter appearance. I have looked at the Affidavit of service that was sworn by one Patrick Simiyu the Process Server, on 21/12/2017, and filed in Court the same day, together with a Request for Judgment. I find it very clear and very detailed in the manner in which service was effected on each and every Defendant on 08/12/2022. Thus, the judgment in this suit was regular.

18. Even though this Court has found above that the judgment was regular, it still obliges the Court to consider whether or not the intended Defence raises triable issues. Triable issues do not necessarily imply that the Defence be one that must succeed. However, it must show that the Applicants have a Defence case which raises questions which would make the Court pause to say, “this issue calls for further investigation.” Thus in the case of *Job Kwach -vs- Nation Media Group Ltd* it was held as follows:-

“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”[own emphasis]

19. A defence that raises triable issues is, in my view, at the extreme opposite side of a defence that consists of mere denial. On mere denial defence, it has been held that it is not a sufficient defence. Thus, in the



Ragbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996, the Court of Appeal held:

“If a general traverse...were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as *Magunga General Stores vs. Pepco Distributors Limited* [1988-92] 2 KAR 89. The position of the law...is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to constitute an admission of the issues raised in the Plaint.”

20. Therefore, in *Magunga General Stores vs. Pepco Distributors Ltd.* [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334 the same Court held:

“Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given.”

21. I have looked at the draft defence annexed to the Affidavit in support of the instant Application and marked as LW 1. It is the classic example of a mere denial. Apart from the descriptive formal paragraphs of the document and those that admit the jurisdiction of the Court and the non-existence of a suit or previous proceedings, all others are mere and bare denials. In my view the said draft defence is not one that is worth going for trial. Thus, it is not one that can form the basis for disturbing the Judgment herein.

22. The upshot is that the Application dated June 30, 2022 is wholly unmerited. It was an afterthought action that was designed to delay the fruits of justice, brought too late in the day, soon after execution has commenced. Once more, I notice also from the documents that were filed with the Plaint, it is clear, as was deponed by the Respondent that the law firm now representing the Defendants herein had indeed done the Partnership Agreement between the parties. How it turns out that she could represent by one of the parties, it a matter of unprofessional conduct. The Application is hereby dismissed with costs to the Respondents.

Orders Accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE ORALLY AND VIA ELECTRONIC MAIL ON THIS 21<sup>ST</sup> DAY OF JULY, 2022.**

**DR.FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

