



REPUBLIC OF KENYA



KENYA LAW
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**Opot v Osoma & another (Environmental and Land Originating Summons
26 of 2021) [2022] KEELC 12745 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 26 OF 2021
AY KOROSS, J
SEPTEMBER 29, 2022
[ORIGINALLY KISUMU ELC NO. 55 OF 2018 (O.S)]**

BETWEEN

GEORGE OHALA OPOT PLAINTIFF

AND

JAMES AWIMBO OSOMA 1ST DEFENDANT

DANIEL OTIENO ATIENO 2ND DEFENDANT

RULING

Applicant's Case

1. The application for consideration is the defendants' notice of motion dated May 19, 2022 brought pursuant to the provisions of article 159 (2) (d) of the [Constitution](#), section 3A of the [Civil Procedure Act](#), order 22 rule 22 (1), order 9 rule 9, order 10 rule 11, order 51 of the [Civil Procedure Rules](#). They sought the following reliefs;
 - a. spent;
 - b. The honourable court do grant leave to the firm of CSA Advocates LLP to come on record on behalf of the defendants;
 - c. spent;
 - d. The honourable court be pleased to set aside the *ex parte* judgment entered in favour of the plaintiff on May 12, 2022 and direct the matter to be heard *de novo*; and
 - e. Costs of the application.



2. The motion is supported by grounds set out on its face and on the supporting affidavit of the 2nd defendant Daniel Otieno Atieno dated May 17, 2022.
3. In summary it was the defendants' case that they were not aware of the hearing date. They contended their counsel Mr Charles Liewa Madowo who was primarily in charge of the case left the partnership of HMS Advocates and in the process, the file was transferred to ELC Siaya. The firm of advocates who were previously on record failed to disclose to them of any notices or otherwise which culminated into the *ex parte* judgment. They asserted that the court record would bear witness that they had been keen to defend their case. They undertook to bear throw away costs and pleaded for the case to be heard *de novo*.
4. The 2nd defendant averred that he was an innocent purchaser for value and he had a valid defence and the court should grant them an opportunity to be heard. They asserted that the motion had been filed without delay and it would be in the best interests of justice if the orders sought were granted.

Respondent's Case

5. In opposition, the plaintiff filed a replying affidavit dated June 2, 2022. He averred that the court notified all parties that the suit had been transferred to Siaya ELC. Subsequent to the transfer, his counsel served several notices to the defendants' counsel HMS Advocates who did not heed the notices.
6. It was his position that the defendants and their counsel were indolent and were hell bent to delay the course of justice. They asserted that putting the blame on the previous counsel was not sufficient ground to unhinge the court's discretionary powers. He contended that the motion was an abuse of the court process and that the defence did not raise any triable issues and that he would be greatly prejudiced if the motion was allowed.

Defendants' Submissions

7. As directed by the court, the parties disposed of the motion by way of written submissions. By CSA Advocates, the defendants' filed written submissions dated May 22, 2022. Counsel identified two issues for determination: (i) whether the firm of CSA Advocates LLP should be granted leave to come on record on behalf of the defendants and (ii) whether the court should set aside the *ex parte* judgment and allow the matter to commence *de novo*.
8. On the 1st issue, they submitted that order 9 rule 9 of the [Civil Procedure Rules](#) called for leave of the court post judgment where there was a change of advocates or a party had decided to act person. They cited the case of [Ngitimbe Hudson Nyanumba v Thomas Ongondo](#) [2018] eKLR where the court stated that the mischief of this provision of law was to ensure that advocates are not denied their hard-earned fees. Counsel submitted that the plaintiff would not be prejudiced if his firm came on record.
9. On the 2nd issue, the defendants contended that it was settled law that this court had unfettered discretion to set aside *ex parte* judgment. They contended that the case of [David Kiptanui Yego & 134 others v Benjamin Rono & 3 others](#) [2021] eKLR outlined the well settled principles that guided courts in exercising their discretionary powers when setting aside an *ex parte* judgment which were; the defence raises triable issues, avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to obstruct and delay justice.

Respondent's Submissions

10. M/s Imbaya, counsel for the plaintiff filed written submissions dated June 2, 2022. Counsel identified a single issue for determination; whether the court should set aside the *ex parte* judgment.



11. Counsel contended in exercise of its discretionary powers, courts were guided by several principles. One, the court could not aid an undeserving party and on this, she relied on the case of *Shah v Mbogo* [1967] EA 116 and *Josephat Muthui Muli v Ezeteec Ltd* [2014] eKLR. Lastly, the court must be satisfied that the defendant was not properly served with summons, for sufficient reasons, or the defence had raised triable issues. On this counsel relied on the Supreme Court of Uganda decision of *Ongom v Owota* Civil Appeal Number 14 of 2001 and *Patel v East Africa Cargo Handling Services Limited* [1974] EA 75. I must hasten to add that the authorities relied upon by counsel were not proffered to this court.
12. Counsel submitted that the defence did not raise triable issues because the defendants had alluded that they were innocent purchasers for value without notice of any encumbrance whereas the plaintiff's claim was on an overriding interest. Consequently, counsel asserted that the motion was not merited.

Analysis And Determination

13. I have carefully considered the motion, affidavits and the parties' rival written submissions and the issues falling for determination are (i) whether the firm of CSA Advocates LLP should be granted leave to come on record and (ii) whether the court should set aside the *ex parte* judgment and allow the matter to commence *de novo*. I will deal with them in a sequential manner.

I. Whether The Firm of CSA Advocates LLP Should Be Granted Leave To Come On Record

14. On the first issue, order 9 rule 9 of the [Civil Procedure Rules](#) provides that:

“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”.
15. Within the provisions of order 9 rule 10, the prayers for leave to come on record post judgment may be combined with other prayers provided the question of change of advocate or party intending to act in person is determined first. A reading of the plaintiff's replying affidavit does not demonstrate that he was in opposition to the firm of CSA Advocates LLP coming record and his counsel never submitted on this issue. The prayer is grounded on legal provisions and I see no reason why they should be denied this relief.

II. Whether The Court Should Set Aside The Ex Parte Judgment And Allow The Matter To Commence De Novo.

16. This 2nd issue is the crux of the matter. On February 22, 2022, this court satisfied itself that the previous counsel for the defendants HMS Advocates were duly served with a hearing notice and pursuant to the provisions of order 12 rule 2(a) of the [Civil Procedure Rules](#), it proceeded with the plaintiff's case *ex parte*. This court rendered judgment in the plaintiff's favour on May 12, 2022. Shortly thereafter, the defendants filed the instant motion.



17. Pursuant to the provisions of order 12 rule 7 of the Civil Procedure Rules, this court has unfettered discretionary powers to set aside or vary such a judgment. This provision reads as follows;

“Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just”

18. The decision of Azangalala J (as he then was) in Stephen Ndiru v Monty's Wines and Spirits Limited [2006] eKLR stated that the principles that guide a judge in exercising her discretionary powers were well settled. The decision stated as thus;

‘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 v EA Cargo Handling services Ltd (1974] EA75). 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 v Mbogo [1969] EA116). 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 v Gasyali [1968] EA 300). It also goes without saying that the reason for failure to attend should be considered.’ emphasis added]

19. In applying these principles to the facts of this case, have the defendants satisfied the criteria upon which this court should exercise its discretionary powers and set aside the *ex parte* judgment?

20. The defendants have admitted that their previous advocates were duly served with a hearing notice. However, the counsel who was in personal conduct of the matter had left the partnership of the previous firm hence, the said firm neither notified them that the suit had been transferred nor informed them that the suit had been slated for hearing. On the other hand, the plaintiff argued that his counsel duly served the said previous advocates and the excuse given by the defendants was not plausible. The defendants asserted that their current advocates’ court assistant stumbled across the judgment at the court registry and swiftly filed the instant motion.

21. This motion was filed on May 19, 2022 which was just about a week apart from when this court rendered its judgment; there was no inordinate delay. Bearing in mind the reasons given by the defendants, their previous conduct in prosecuting the suit is paramount in establishing the veracity of their claims.

22. This court has interrogated the record and indeed counsel Mr Madowo had on several occasions previously attended court in this suit and the defendants had duly filed their pleadings. These previous conduct does not demonstrate that they ever intended to obstruct the course of justice. In my considered view, I have no reason to doubt the defendant’s assertions as to why they failed to attend court. The mistake is excusable. I have had an opportunity to interrogate the replying affidavit dated February 15, 2019 and it raises triable issues. Justice will be better served if both parties are accorded an opportunity to be heard on merits to enable each one them ventilate their case.

23. In the premises, and for the foregoing reasons, I am satisfied that the motion is merited and it is hereby allowed. Ultimately, I issue the following disposal orders;

a. The firm of CSA are granted leave to come on record on behalf of the defendants.



- b. The *ex parte* judgment entered on May 12, 2022 together with any ensuing consequential orders are hereby set aside.
- c. The defendants shall pay the plaintiff throw away costs of Ksh 20,000/- within 14 days from the date of this ruling and in default, the order setting aside the *ex parte* judgment shall stand vacated.
- d. The suit shall be heard *de novo* in open court on November 22, 2022.

DELIVERED AND DATED AT SIAYA THIS 29TH DAY OF SEPTEMBER 2022.

HON. A. Y. KOROSS

JUDGE

29/9/2022

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Odeny for the plaintiff

Ms. Akumu h/b for Mr. Madowo for the defendants

Court assistant: Ishmael Orwa

