



Trustees for Kenya People’s Contractors Ltd v Attorney General & 4 others (Environment & Land Case E13 of 2020) [2022] KEELC 13689 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13689 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E13 OF 2020
TW MURIGI, J
OCTOBER 19, 2022**

BETWEEN

TRUSTEES FOR KENYA PEOPLE’S CONTRACTORS LTD PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

**CABINET SECRETARY MINISTRY OF INTERIOR AND COORDINATION
OF NATIONAL SECURITY 2ND DEFENDANT**

NATIONAL LAND COMMISSION 3RD DEFENDANT

COUNTY COMMISSIONER MAKUENI 4TH DEFENDANT

DIRECTOR OF PHYSICAL PLANNING MAKUENI 5TH DEFENDANT

RULING

1. By a Notice of Motion dated 25th of February, 2022 brought pursuant to the provisions of Order 45 Rules 1 and 2, Order 51 Rules (1) and (2) of the *Civil Procedure Rules 2010*, Sections 1A, 1B, 3A, 63(c) and Section 80 of the *Civil Procedure Act* and all other enabling provisions of the law the Applicants seek for the following orders:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this application, this Honourable Court be pleased to stay the execution of the judgment issued on November 19, 2021.
 4. That the Honourable Court be pleased to set aside and/or discharge in its entirety the Judgment dated November 10, 2021 and any consequential orders arising therefrom.



5. That the Court be pleased to set aside the interlocutory judgment entered herein on April 11, 2021 and the Defendants be granted unconditional leave to defend the suit.
 6. That the costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Benson Njagi sworn on the even date.

The applicants' case

3. It is the Applicants' case that the Ministry of Interior and Coordination of National Security is the owner and occupier of the suit property. The Applicants averred that the interlocutory judgment entered on 11th of April, 2021 was contrary to the provisions of Order 1 Rule 20 of the Civil Procedure Rules and Section 12 of the *Government Proceedings Act* Cap 40 Laws of Kenya. The Applicants argued that it is in the interest of justice to set aside the judgment so as to accord all the parties an opportunity of being heard on the issue of ownership of the suit property. The Applicants contend that the Respondent will not be prejudiced if the orders sought are granted.

The respondents' case

4. Opposing the application, the Respondent vide the replying affidavit of Samson Ndiku sworn on March 10, 2022 averred that the application was premature, misconceived, vexatious, frivolous and a blatant abuse of the Court process.
5. The Respondent averred that the Applicants were vide a demand letter dated April 1, 2020, notified that the Respondent would initiate legal proceedings against them. That upon institution of the present suit, the pleadings were served upon the Applicants on February 3, 2021. The Respondent went on to state that they requested the Court to enter judgment against the Applicants after they failed to enter appearance or file a defence. That interlocutory judgment was entered on April 11, 2021 and thereafter the matter proceeded for formal proof hearing and on November 10, 2021, the Court rendered its judgment in favour of the Respondent.
6. The Respondent argued that the application is intended to delay the execution of the judgment as the Applicants were at all material times aware of the existence of the suit. The Respondent contends that the Applicants have failed to demonstrate that they have triable issues since they have not attached a draft statement of Defence to demonstrate that they have triable issues. The Respondent argued that it will be prejudicial to re-open the case which it is at the execution stage.
7. The application was canvassed by way of written submissions.

Applicants' submissions

8. The Applicants' submissions were filed on June 23, 2022.
9. The Attorney General raised the following issues for the Court's determination: -
 - i. Whether the Defendant was served with an application to enter interlocutory judgment.
 - ii. Whether justice will be served by setting aside the judgment.
10. With regards to the issue whether the Defendants were served with the application to enter interlocutory judgment, the Attorney General submitted that an application for leave to enter interlocutory judgment was not obtained or served upon the Defendants as provided by Order 10 Rule 8 of the *Civil Procedure Rules*.



11. With regards to the second issue, the Honourable Attorney General submitted that to avoid driving the Defence away from the seat of justice, it will be in the interest of justice to set aside the default judgment and grant the Defendants leave to file their Defence.
12. To buttress its submissions, the Hon Attorney General relied on the following authorities: -
 1. [*First Community Bank v Ready Consultancy Limited & 3 Others*](#) (2021) eKLR.
 2. [*Gulf Fabricators v County Government of Siaya*](#) (2020) eKLR.
 3. [*Wachira Karani v Bildad Wachira*](#) (2016) eKLR.
 4. [*CMC Holdings Ltd v James Mumo Nzioki*](#) (2004) eKLR.
 5. [*Isaack Muturi Nyaki v Simon Nyaki & Another*](#) (2021) eKLR.

The respondent's submissions

13. The Respondent's submissions were filed on 11th of May, 2022.
14. Counsel for the Respondent submitted that the principles in considering whether or not to set aside interlocutory judgment were set out in the case of [*Mwaila v Kenya Bureau of Standards*](#) (2001) eKLR and [*Patel v EA Cargo Handling Services*](#) (1974) EA 75.
15. Counsel submitted that the Applicants were duly served with the pleadings and summons to enter appearance but failed to enter appearance or defence within the stipulated time. Counsel argued that the Applicants have not given any valid reason explaining their failure to file their pleadings within the stipulated time.
16. Counsel went on to submit that the Court should not exercise its discretion to set aside the judgment since the Applicants have not annexed a draft defence to demonstrate that it raises triable issues. Counsel cited the following cases to buttress his submissions on this point: -
 1. [*Kimani v MC Connell*](#) (1966) EA 545.
 2. [*Tree Shade Motor Limited v DT Dobie Co Ltd*](#) CA 38/89.

Analysis and determination

17. Having considered the application, the affidavits, and the rival submissions, I find that the main issue for determination is whether the Plaintiffs obtained leave to enter interlocutory judgment against the Defendants.
18. Order 10 Rule 11 of the [*Civil Procedure Rules*](#) provides that ex parte interlocutory judgments in default of appearance or defence may be set aside. It stipulates as follows;

“where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or upon such terms as are just.”



19. Courts have the discretionary power to set aside ex parte judgment with a view of doing justice to the parties. The discretion should be exercised to avoid injustice. In the case of *Philip Keipto Chemwoto and Anor v Augustine Kubende* (1986) eKLR, the Court of Appeal held that;
- “the Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties.”
20. The well established principles of setting aside interlocutory judgment were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where the Court held that;
- “There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment, 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.”
21. In the present case, the Plaintiffs vide a Plaint dated December 4, 2020 and filed on the even date, sought for the following orders against the Defendants: -
- a. An order of permanent injunction restraining the Defendants from encroaching or in any other manner interfering with the Plaintiff’s land parcel number Nzai/Kikumini/201.
 - b. An order of eviction against the Defendants compelling them to remove the offending structures that have encroached into the Plaintiffs parcel of land parcel number Nzai/Kikumini/201.
 - c. Alternatively, the Plaintiff prays for full compensation as entitled to them under the parameters set for the lawful compulsory acquisition set under Article 40 of the *Constitution* and the *Land Acquisition Act* Cap 295 Laws of Kenya.
22. The Court record shows that, the Plaintiff requested for judgment to be entered against the Defendants on the grounds that that the Defendants although duly served with summons to enter appearance, had failed to enter appearance or file their Defence within the stipulated time. Interlocutory judgment was entered against the Defendants on April 11, 2021. The matter proceeded to formal proof hearing on September 22, 2021 and on November 10, 2021, the Court rendered its judgment in favour of the Respondents.
23. The Applicants stated that the Respondent did not file an application for leave to enter interlocutory judgment against the Applicants and that even if they did, the same was not served upon the Applicants as required by the law.
24. Order 10 Rule 8 of the *Civil Procedure Rules* provides as follows: -
- No judgment in default of appearance or pleading may be entered against the Government without the leave of the Court and any application for leave shall be served not less than seven days before the return day.
25. It is clear from the above provisions that a party requesting for interlocutory judgment against the Government must file an application for leave to enter judgment and then effect service of the same upon the Attorney General. In the present case, it is clear from the Court record that the Respondent vide a letter dated May 17, 2021 requested for Judgment to be entered against the Defendants. The Court record bears no application seeking the leave of the Court to enter judgment as provided by the



law. It is evident from the proceedings that leave to enter judgment against the Defendants was not obtained and served upon the Respondent which is contrary to the provisions of the law. The entry of the judgment against the Defendants was therefore irregular and it must be set aside.

26. This Court finds and holds that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of defending his case. Article 50 of the Constitution entitles every person to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard. Halsbury Laws of England, 5th edition 2010 vl 61 at para 639 states that;

“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice.”

27. It is clear that the right to fair hearing is a fundamental human right. This Court finds and holds that no prejudice will be occasioned to the Plaintiff/Respondent if the matter is heard and determined on merit.

28. The upshot of the foregoing is that the application dated February 25, 2022 is allowed in the following terms: -

- a. The interlocutory judgment entered on April 11, 2021 be and is hereby set aside.
- b. The ex parte judgment entered on November 10, 2021 and all the consequential orders be and is hereby set aside.
- c. The Applicant is granted leave to file and serve its Defence within 21 days from the date of this ruling.
- d. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Ms Kyalo for the Plaintiff/Respondent.

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