



**Karimi v Nairobi City County (Environment & Land Case
874 of 2016) [2022] KEELC 13525 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 874 OF 2016
LC KOMINGOI, J
OCTOBER 6, 2022**

BETWEEN

JOSIAH KARIUKI KARIMI PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

RULING

1. This is the notice of motion dated 15th October 2021 brought under section 1A, 1B 3A 63(e) *Civil Procedure Act* Cap 21, Order 10 Rule 11, Order 51 Rule 1 of *Civil Procedure Rules* 2010 and all enabling provisions of law.
2. It seeks orders:-
 1. Spent.
 2. That the honourable court be pleased to stay the execution of the exparte judgment to Lady Komingoi J delivered on 29th April 2021 and all the consequential proceedings taken in this matter pending hearing and determination of the application interparties.
 3. That the honourable court be pleased to set aside the exparte judgment and all the consequential proceedings taken in this matter pending hearing and determination of the suit filed herein.
 4. That the honourable court be pleased to grant unconditional leave to the Defendant/Applicant to file its defence out of time or upon such conditions as are fair and just in the circumstances of this case.
 5. That the costs of this application be in the cause.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (k).



4. The application is supported by the affidavit of Mercy Kamau, advocate for the Defendant/Applicant sworn on the 15th October 2021.
5. The application is opposed. There is a replying affidavit sworn by Josiah Kariuki Karimi, the Plaintiff/ Respondent on the 10th November 2021.
6. On the 22nd March 2022, the court with the consent of parties directed that the notice of motion be canvassed by way of written submissions.

The Defendant's/Applicant's Submissions

7. They are dated 22nd May 2022. They raise four issues for determination.
 - (a) Whether the default judgment entered was a regular judgment.
 - (b) Whether the intended defence raises triable issues.
 - (c) Whether the defendant/applicant should be given leave to defend the plaintiff's suit.
 - (d) Whether this honourable court should set aside the Judgment entered on 29th April 2021.
8. The Defendant/Applicant confirms that it was in receipt of the summons to enter appearance as well as pleadings from the Plaintiff's advocate. It is further submitted that the default judgment entered on 29th April 2021 while regular, was obtained without the participation of the Defendant/Applicant in the proceedings in the main suit. This was attributed to the Defendant's/Applicant's advocates not being able to obtain full instructions on how to proceed with the matter.
9. It has put forward the case of *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR.
10. The Defendant/Applicant has attached a draft defence to the application. It has put forward the case of *Job Kilach v Nation Media Group Ltd & 2 Others* [2015] eKLR; *Philip Keipto Chemwolo & Another v Augustine Kubende* [1986] eKLR; *Tree Shade Motors Limited v DT Dobie & Company (K) Ltd & Another* Civil Appeal NO 38 of 1998.
11. It is further submitted that setting aside judgment is a matter of the discretion of the court. It has put forward the case of *John Mukuba Mburu v Charles Mwenga Mburu* [2019] eKLR. This application was filed without delay as the Defendant/Applicant was made aware of the judgment on 27th September 2021. This application was filed on 15th October 2021.
12. The Defendant/Applicant stands to suffer prejudice as the suit property may be lost while the Plaintiff/ Respondent stands to suffer no prejudice as he can be compensated by costs.
13. The Defendant/Applicant has shown a plausible reason why it failed to file a defence within the prescribed period and as such the court ought to exercise discretion in its favour. It prays that the application be allowed.

The Plaintiff's/Respondent's submissions

14. They are dated 27th June 2022. He submits that the Defendant/Applicant has not offered any explanation as to why it failed to appear in court on 14th October 2019 for pretrial and or on 14th October 2020 for hearing.



15. Judgement was delivered and the Defendant/Applicant was served with a copy vide a letter dated 24th June 2021 and received on 28th June 2021. Since then the Defendant/Applicant did not bother to apply to set aside the judgment but rushed to court with this application five months later after being served with a draft decree for approval. He has put forward the case of *Shah vs Mbogo* [1967] EA 166.
16. The Defendant/Applicant seeks to delay or deliberately obstruct the course of justice. He prays that the application be dismissed with costs.
17. I have considered the notice of motion, the affidavit in support and the response thereto. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- (i) Whether the Defendant's/Applicant's application is merited.
 - (ii) Who should bear costs of this application?
18. Order 10 rule 11 of the Civil Procedure Rules provides that:-
- “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.”
19. It is the Defendant's/Applicant's submissions that it were duly served with summons to enter appearance and other pleadings by the Plaintiff/Respondent. It admits that the Judgment herein was entered regularly. It is its case, that failure to participate in the proceedings was due to lack of instructions to the counsel on record.
20. The Plaintiff/Respondent on the other hand contends that the Defendant/Applicant has not offered any explanation as to why it did not participate in the hearing despite being served.
21. I have gone through the affidavit of Mercy Kamau, Advocate for the Defendant/Applicant. It confirms that they were aware of this suit. The issue of the transition of services between Nairobi City County and Nairobi Metropolitan Services could not have prevented the said advocate from attending court on the dates mentioned and seek more time. In the case of *Mbogo v Shah* [1967] EA 166 the Court of Appeal held thus:-
- “.....the principle governing the exercise of the Judicial discretion to set aside an *ex parte* judgment obtained in the absence of an appearance of defence by the defendant or failure by either party to attend the hearing is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”
- Similarly, in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 the court held that:-
- “Where there 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 or merits does not mean a defence that must succeed. It means a “triable issue” that is an issue which raises a *prima facie* defence which should go to trial for adjudication”.
22. I have gone through draft defence annexed to the application. In paragraph 4 it states:-
- “That the response to paragraph 3, 4, and 5, the defendant states that in respect to Plot Nos 438 (CCN 347) and 403 (CCN 281), the allocation for CCN 347 and CCN 281 as



indicated by the plaintiff are different from the ones in the defendant's records while with respect to Plot No 426 (CCN 92), does not exist at all, thus puts the plaintiff to strict proof".

In paragraph 5, it is stated:-

"The defendant also states that the allotment letter for Plot No 426A (CCN 92) is suspected. The plaintiff is put to strict proof."

23. I find that the Draft defence does not raise triable issues in view of the documents produced by the Plaintiff.
 24. Judgment was delivered on 29th April 2021 and the same was served on the Defendant/applicant on the 28th June 2021. I find that this application has been brought after an inordinate delay. No explanation has been given.
 25. In conclusion, I find that the Defendant/Applicant has failed to demonstrate that it deserves this court's discretion. The Plaintiff ought to be left to enjoy the fruits of his judgment.
 26. I find no merit in this application and the same is dismissed with cost to the Plaintiff/Respondent.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 6TH DAY OF OCTOBER 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendant

Mutisya - Court Assistant

