



REPUBLIC OF KENYA



**Mwaro & another v Charo & 5 others (Environment & Land Case
27 of 2018) [2022] KEELC 15473 (KLR) (21 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 27 OF 2018**

**MAO ODENY, J
DECEMBER 21, 2022**

BETWEEN

**JOHN CHARO MWARO 1ST PLAINTIFF
DICKSON KAZUNGU YAA (SUING ON BEHALF OF THE ESTATE OF SIMON
KAFADZI MWARO) 2ND PLAINTIFF**

AND

**EMMANUEL KATANA CHARO 1ST DEFENDANT
DANIEL KASENA CHARO 2ND DEFENDANT
ONESMUS RIZIKI KAHINDI 3RD DEFENDANT
BLANDINA GAMAGHANA MALIMU 4TH DEFENDANT
STANLEY M TSUMA 5TH DEFENDANT
MRIMA KITI 6TH DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated November 12, 2021 by the defendant/applicants seeking the following orders:
 - a) Spent.
 - b) That there be stay of execution of the judgment and decree of this court made on August 31m 2021 pending hearing and determination of this application to set aside the said judgment and decree.



- c) That the judgment and Decree made on August 31, 2021 and all consequential orders be set aside and the defendants be granted unconditional leave to file their defence to the plaintiff's case.
 - d) That the costs of this application be in the cause.
2. The application was supported by the affidavit of Onesmus Riziki Kahindi sworn on November 12, 2021 whereby he deponed that upon being served with summons in this matter, they sought legal advice from the firm of Walter Mayaka & Company Advocates who was to represent their interests in the matter.
 3. The applicant stated that on October 23, 2021, they were served with a copy of the judgment and decree against them dated August 31, 2021. It was the applicant's case that they were not able to reach their advocate which necessitated instructing the present advocate to peruse the court file of which he found out that the advocate neither entered appearance nor filed a defence on their behalf.
 4. It is the applicant's case that they have a reasonable defence against the plaintiff's claim but they were condemned unheard contrary to the rules of natural justice and urged the court to allow the application as prayed.
 5. The plaintiffs opposed the application vide a replying affidavit sworn by John Charo Mwaro the 1st plaintiff/ respondent who deponed that the defendants admit that they were duly served with the summons to enter appearance but failed to comply within the stipulated period hence the matter proceeded for formal proof.
 6. The plaintiff further deponed that the issue service of application of revocation of grant can only be dealt with by the court that issued such grant and therefore not an issue before this court.

Defendants' submissions

7. Counsel relied on order 12 rule 7 of the *Civil Procedure Rules* and submitted that the court has wide and unfettered discretion to set aside Judgment upon such terms as may be just as the principles set out in *Shah v Mbogo & Another* [1967] EA 116.
8. Mr Shujaa further submitted that the factors to be considered in an application of this nature were set out in the case of *James Kanyitta Nderitu & Another vs Marios Philotas Ghikas & Another Civil Appeal no 6 of 2015*. It was counsel's submission that the applicants were let down by their appointed advocate who failed to file the appearance or defence despite being instructed by the Defendants.
9. Counsel stated that it is not disputed that the defendants had a duty to follow up with their advocate on the position of their case and that the defendants in the circumstances exercised the diligence that was expected of them.
10. Counsel therefore urged the court to exercise its discretion in favour of the applicants as they have given sufficient explanation as to why they did not enter appearance and file defence within the stipulated period.

Plaintiffs' submissions

11. Counsel identified two issues for determination as, whether judgment and decree should be set aside and defendants granted leave to file their defence and whether orders for stay of execution should be issued.



12. Counsel submitted that the jurisdiction of courts to set aside *ex-parte* judgment is provided for under order 10 rule 11 of the [Civil Procedure Rules](#) and that this power is discretionary and in exercising that discretion, courts have to ascertain that the reasons given by the Defendant are convincing enough to have it exercise discretion in its favour. Counsel relied on the case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR.
13. Mr Nyongesa submitted that the explanation given by the applicant is not sufficient and blaming counsel is not a good reason for the delay in entering appearance and filing defence. He stated that litigants are supposed to be proactive in ensuring that they follow up on their cases and that the indolence of one litigant should not be visited upon another successful litigant who is set to enjoy the fruits of the judgment and relied on the case of *Tana & Athi Rivers Development Authority v Jeremiah Kimogho Mwakio & 3 Others* [2015] eKLR it was held:

“As stated in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR that “it is not enough for a party in litigation to simply blame the advocates on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.”
14. Counsel further submitted that if the defendants really wanted to defend the suit, they would have made every effort to become aware of what was happening in their case, and that the draft defence attached to the application does not raise any triable issues but mere denials.
15. On whether the orders for stay of execution should be issued, counsel submitted the applicants have not met the conditions of stay of execution as provided for under Order 42 rule 6 of the [Civil Procedure Rules](#) and urged the court to dismiss the application with costs.

Analysis and determination.

16. This is an application for setting aside judgment and stay of execution. The plaintiffs instituted this suit way of Plaint dated February 2, 2018, the defendants have admitted that they were duly served with summons to enter appearance but neither filed appearance nor filed a defence within the stipulated period. This matter therefore proceeded by way of formal proof and a judgment delivered on August 31, 2021.
17. The principles for the setting aside of *ex parte* judgment were considered in the case of East Africa in *Mbogo v Shah* [1968] EA 93, 95 referred to in Pithon Waweru, as follows:

“Two questions arise on this appeal. The first is the circumstances which would justify a judge granting an application made under O 9, r 10, to set aside a judgment entered *ex parte*; the second is the circumstances in which this court, as a Court of Appeal, would interfere with the exercise of the discretion of a judge made on any such application.”
18. Setting aside a judgment is discretionary and the court must exercise such discretion judiciously to ensure that justice is done for both parties. The Court of Appeal in [Butt v Rent Restriction Tribunal](#) [1982] KLR 417 provides guidance on how a court should exercise discretion and held that: -
 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of proceedings.
 4. The court in exercising its discretion whether to grant(or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount or rent in dispute and the appellants had an undoubted right of appeal.
 5. The court in exercising its powers under order XLI rule 4 (2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse'.
19. The applicants blame their former advocate for neither entering appearance nor filing a defence. They have not stated what steps they took to show their interest in defending the case. A case belongs to parties who should take keen interest in how the matter is being handled by counsel. Not just giving papers to counsel and expect magic. If the applicants were not satisfied with their counsel, they should have engaged the services of an alternative counsel or even go as far as finding out what was going on from the court registry. Blaming counsel is not enough reason for setting aside judgment. Litigants should be vigilant on how their cases are being handled by counsel and take keen interest on the way forward.
 20. I am not satisfied by the reason given by the applicant for not filing defence within the stipulated period hence the court cannot exercise its discretion in the applicant's favour.
 21. On whether this court is satisfied that the applicants will suffer substantial loss in the event that stay of execution is not granted, the applicants have not demonstrated any way they will suffer substantial loss. Rather, they have stated at length they have an arguable case but have not elaborated to this court what loss they will suffer if the orders sought are not granted.
 22. On whether the application has been made without unreasonable delay, the judgment which is the subject of this application was delivered on August 31, 2021 and the instant application was filed on November 12, 2021, this can pass though the delay in filing the application has not been explained. Similarly, the applicant has not the threshold for orders of stay of execution.
 23. The upshot is that the application dated November 12, 2021 is hereby dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF DECEMBER, 2022.

M A ODENY

JUDGE

