Kamau v Mwangi (Environment and Land Appeal 49 of 2018)
[2022] KEELC 15532 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15532 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL 49 OF 2018

LN GACHERU, J

DECEMBER 20, 2022

BETWEEN

MARGARET NJOKI KAMAU ..... PLAINTIFF

AND

REUBEN NDIVO MWANGI ..... DEFENDANT

RULING

1. There are two applications for determination herein. The first application dated 20th July 2022 brought under Section 19 of the *Environment and Land Court Act* which prays that this court grant the following four orders:

    i. That the Applicant be granted leave to withdraw their advocates M/s Mbiyu Kamau & Co. Advocates and appoint new advocates M/s Nganga Ngigi & Co. Advocates;

    ii. That this court stay the execution of the Orders of the Judgment of 17th June 2021;

    iii. That this court set aside the said judgment; and

    iv. That the Applicant be granted leave to file his Defence out of time.

2. The application was premised on the following grounds:

    i. That the Applicant's previous advocates failed to inform them of the hearing date and deliberately failed to file a Defence on their behalf;

    ii. That the dispute involves land parcel No. Kakuzi/Kimiriri Block 9/1557 (the suit property) and the Applicant may suffer irreparable loss and damage as he had been in actual possession of the suit property since 2003;

    iii. That it is fair for the suit to be heard afresh and the Defendant/Applicant be given a chance to defend himself; and

iv. That the Defence has a high chance of success.

3. The application was supported by affidavit of Reuben Ndivo Mwangi, the Applicant who averred that he attended to the Area Chief on 15th June 2022, on which day he way presented with the application dated 30th May 2022. He also found out that the suit had been heard in his absence, Judgment delivered in favour of the Plaintiff/Respondent who was seeking eviction orders against the Applicant.

4. The Applicant further averred that he enquired about this development when he visited his former advocates where he discovered that his former advocates had failed to file a defence, despite the court granting him leave to do so. This prompted the Applicant to seek new advocates and appointed the Law Firm of Nga'nga Ngigi & Co. Advocates to take care of the matter.

5. Lastly, the Defendant/Applicant averred that he has been in possession of the suit property since 2003, and that he stands to be evicted and suffer great loss should his application be denied. A draft Defence was attached therein.

6. The Plaintiff/Respondent opposed the application through the Replying Affidavit of Margaret Njoki Kamau dated 14th July 2022, in which she averred that the Applicant was granted leave to file his Defence within 7 days through a Ruling dated 24th June 2019, which he failed to do. The Plaintiff/Respondent states that the Applicant, who was represented by an advocate all the time, filed another application dated 8th September 2021, for leave to file his Defence out of time, which was again granted, with the Defendant/Applicant being ordered to pay costs, which he both failed to do.

7. The Plaintiff/Respondent further averred that the present application is a repetition of previous applications and therefore cannot stand. That the Defendant/Applicant has repeatedly given the reason of mistake of counsel for not filing his defence. She states that the Applicant has also failed to pay costs awarded to her.

8. In conclusion, the Plaintiff/Respondent averred that the Defendant/Applicant has failed to advance a good reason for the setting aside or staying the judgement of 17th July 2021 as the same is a regular judgement. She prays that the application be dismissed.

9. The second application for determination is one dated 30th May 2022, by the Plaintiff/Appplicant herein, made under Order 50 and Order 22 Rule 6 of the *Civil Procedure Rules*, seeking the execution of Eviction Orders against the Defendant/Respondent Reuben Mwangi, and that the OCPD Kaguku do enforce the eviction orders. The application was made on the grounds that judgement was delivered on 17th June 2021, in favour of the Plaintiff/Applicant and the Defendant/Respondent herein has refused to honour it and continued to remain on the suit property.

10. The application was supported by the affidavit of Margaret Njoki Kamau, in which she affirms that the matter was heard and decided on 17th June 2021, in her favour. That despite the judgment, the Defendant/Respondent has continued to reside on the suit property causing wastage and ought to be ordered to vacate the suit property. The Plaintiff/Applicant states that she is a pauper and therefore filing fees were waived.

11. The Defendant/Respondent herein opposed the application dated 30th May 2022, through his Replying Affidavit dated 20th June 2022, in which he avers that the matter was heard in his absence and a Judgment delivered on 17th June 2021. That he only heard of the Judgment following service of this application. He states that he intends to set aside the said Judgment of 17th July 2021, and prays that the court stay this application pending the hearing and determination of his intended application.

12. The filed applications were canvassed further through written submissions. The Plaintiff /Applicant through the Law Firm of R.M. Kimani & Co. Advocates filed her submissions in support of the Application dated 30th May 2020, and also opposed the application dated 20th June 2022. She relied on the following authorities:

    a. On the application for Orders of Eviction against the Defendant from the suit property, the Plaintiff relied on the case of *Joseph Njugunah v. Peter Njugunah Gikkio & Another* (2021) eKLR where it was held

        > " Consequently, this court finds and holds that the Plaintiff is entitled to enjoy the fruits of his Judgment and therefore the prayer for eviction is merited. The Plaintiff has also sought the supervision and provision of security by the O.C.S Kihumbu-ini Police Station. While ordinarily the Court would be reluctant to bring in Police in civil matters, the Defendants even with the court ordering them to vacate have failed to do so and they have not denied that they are cultivating on the said land. The court finds the said prayer merited."

    b. Regarding the application by the Defendant dated 20th June 2022 for leave to file his Defence out of time, the Plaintiff relied on the case of *Jaber Mohsen Ali & Another v. Priscillah Boit & Another* (2014) eKLR where the Court held as follows:

        > " The applicant needs to demonstrate three elements. There must be demonstration that substantial loss will result if stay is not granted, secondly, the application must be made without unreasonable delay, and finally, there needs to be security for the due performance of the decree much has been said about the respective strength of the cases of the parties but that is not a consideration under Order 42 Rule 6. Apart from these elements, the essence of an application for stay pending appeal is aimed at preserving the subject matter litigation to avoid a situation where a successful appeal and only gets a paper judgement. The interests of both parties therefore need to be balanced as was stated in the Court of Appeal case or *Reliance Bank versus Norlake Investments Ltd* (2002) 1 EA 227.

13. Let me first start with the issue of delay. In the judgement of 31st July 2014, I give the defendants 30 days to vacate the suit land. When Judgment was delivered, there was no application to have the period of time extended. It follows that any occupation of the suit land that went beyond the period of 30 days is illegal. In my view, where a party has been given a particular timeframe within which he should comply with the judgment, then he ought to apply to stay that Judgment before that timeframe lapses. In my opinion, an application for stay coming after the stated days for compliance with the Judgment will constitute unreasonable delay, unless, a good explanation is offered, giving reasons why the application has come after the period given for compliance. In the instance of this case, the defendant has not stated why he did not apply for stay within the 30 days' timeframe given to him to vacate. It is my considered view that the defendant has applied for stay of execution pending appeal after unreasonable delay."

14. The Defendant through Nganga Ngigi & Co. Advocates filed his written submissions on 16th September, 2022, in support of the application dated 20th June 2022. He relied on the following authorities:

    a. On the issue of the appointment of advocates; the Plaintiff does not dispute this matter.

b. On the issue of orders for stay of execution of the Judgment of 17th July 2022, the Defendant relied on Order 22 Rule 22(1) of the *Civil Procedure Rules* which states:

> " The Court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgement-debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or execution thereof, for an order to stay the execution."
>
> The Defendant submits that the Plaintiff has instituted execution proceedings vide her application dated 30th May 2022, and thus stay of execution is warranted since he stands to be evicted.

c. On the issue of setting aside the said judgement, the Defendant relied on the case of *Kasama Kimani v. Jane Wangechi Kimani* (2020) eKLR where the court stated as follows:

> " Order 51 Rule 15 of the *Civil Procedure Rules* provides:- the court may set aside an order made ex parte. *In Wachira Karani v. Bildad Wachira* (2016) eKLR, in allowing an application to set aside an ex parte judgment, the court held that:- the rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits, and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing.

Further, in the case of *John Mburu versus Charles Mburu* (2019) eKLR the court held that it is trite that the test for the correct approach in an application to set aside the default judgement at firstly, whether there was a Defence on the merit, secondly, whether there would be any prejudice and thirdly, what is the explanation for the delay. This guide was set in the case of appeal suit of *Mohammed and Another versus Shocka* (1991) KLR 460. The court must interrogate whether the Defendant/Applicant is deserving of the orders sought of setting aside, the ex parte judgment"

The Defendant submitted that he has annexed a draft Defence that raises triable issues. That he legally acquired the suit property from the Plaintiff's deceased brother during his lifetime. He further relied on Article 50 and Article 159 of *the Constitution* of Kenya which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, and provides for the justice shall be done to all, irrespective of status.

d. On the issue for leave to file his Defence out of time, the Defendant relied Order 7 Rule 1 of the *Civil Procedure Rules*, which states that:

> " Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his Defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the Defence and file an affidavit of service."

The Defendant submits that despite instruction to act, his advocates from the Law Firm of Mbiyu Kamau & Co. Advocates failed to file a Defence and that he was unaware until he perused the court record.

e. On the issue of mistakes of the Applicant's counsel not being visited upon him, the Defendant relied on the case of *Patriotic Guards Ltd v. James Kipchirchir Sambu* (2018) eKLR, in which the court held that

> "The appellant has also argued that mistakes of counsel should not be visited on an innocent litigant. In the Tana case (supra) the Court observed as follows, from past decisions that courts will readily excuse a misstate of counsel if it affords justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

f. Lastly, on the issue of costs, the Defendant relied on Section 27(1) of the *Civil Procedure Act* which provides as follows:

> "Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

15. As analysed above there are two applications – one filed by the Plaintiff and the other by the Defendant. The Plaintiff's application seeks execution of the judgement delivered on 17th June 2021. The Defendant on the other hand seeks leave to withdraw his advocates M/s Mbiyu Kamau & Co. Advocates for deliberately failure to file a Defence on his behalf and appoint new advocates M/s Nganga Ngigi & Co. Advocates. He further prays for stay the execution of the orders of the Judgment of 17th June 2021; or that this court set aside the said judgment. Lastly, that the Defendant be granted leave to file his Defence out of time.

16. The Defendant's application dated 20th July 2022, will be considered first. On his prayer to appoint new advocates, this matter is not disputed.

17. On the issue for orders to set aside the Judgement of 17th June 2021, the Defendant/Applicant referred to the case of *Kasama Kimani v. Jane Wangechi Kimani* (2020) eKLR wherein the application was made under Order 55 Rule 15 of the *Civil Procedure Rules*. This Court will refer to the setting aside of a Judgment pursuant to Order 10 Rule 10 and Order 10 Rule 11 of the Rules which states:

Order 10 Rule 10 - Default of Defence

The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.

Order 10 Rule 11 - Setting aside Judgment

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.

18. This Court is guided by the provisions of Article 159(2)(d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The focus being on substantive justice, rather than procedural technicalities, and the just, efficient, and expeditious disposal of cases.

19. As stated above, Order 10 Rule 10 of the Rules, provides that in cases where a Defendant has failed to file a defence, Rules 4 to 9 shall apply with any necessary modification. While Rule 11 empowers the court to set a side or vary a Judgment that has been entered under Order 10.

20. Courts have the discretionary power to set aside ex parte Judgment, with the main aim being that justice should prevail. The Courts are not required to consider the merits of a Defence in an application of this nature, although the Defendant has a draft Defence to the Plaint which it should be allowed to be heard on merit. Therefore, courts ought to look at the draft Defence and accompanying documents before proceeding to give its ruling as to whether the Defendant's Defence raises triable issues. In *Patel -v- E.A. Handling Services Ltd* (1974) EZ 75, *Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd* CA 38 of 1998 and *Mania -v-Muriuki* (1984) KLR 407, the Courts held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error.

21. The general principle is that an applicant should not suffer due to a mistake of his Counsel. This was the position in *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & Another*, Civil Application No. Nair 236 of 2009 where it was held that:

> "It is widely accepted principle of law that a litigant should not suffer because of his Advocate's oversight."

22. In the case *Winnie Wambui Kibinge & 2 Others -v- Match Electricals Limited* Civil Case No. 222 of 2010, the Court held that:

> "It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit."

23. Further, in the case *Mohamed & Another -v- Shoka* (1990) KLR 463, the Court set out the tenets a court should consider in setting aside an interlocutory Judgment to include:

    i. Whether there is a regular judgment;

    ii. Whether there is a Defence on merit;

    iii. Whether there is a reasonable explanation for any delay;

    iv. Whether there would be any prejudice.

24. The issue of regular Judgment was addressed in the case *Mwala -v- Kenya Bureau of Standards EA LR* (2001) 1 EA 148, where the court stated;

> "To all that I should add my own views that a distinction is to be drawn between a regular and irregular ex-parte judgment. Where the Judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand, the Judgment sought to be set aside is an irregular one, for instance, one obtained either where there is no proper service, or any service at all of the summons to enter appearance or when there is a memorandum of appearance or Defence on record but the same was in inadvertently overlooked the same ought to be set

aside not as a matter of discretion, but ex debit justiciae for a court should never countenance an irregular Judgment on its record."

25. In the cases of Patel -v- E.A. Handling Services Ltd (1974) EZ 75 and Tree Shade Motor Ltd -v- D.T. Dobie Co. Ltd CA 38 of 1998 and Thayu Kamau Mukigi -v- Francis Kibaru Karanja (2013) eKLR, the Court stated as follows:

> " On the second prayer of the defendant that he be granted leave to file his Defence and counter claim, I will be guided by the principles elucidated in the case of Tree Shade Limited -v- DT Dobie Co. Ltd. CA 38/98 where the court held that when an ex-parte Judgment was lawfully entered the court should look at the draft Defence to see if it contained a valid or reasonable defence."

26. This Court has noted that the Defendant's advocate has not come on record to explain the failure to file a Defence was on their part, while the Defendant has on multiple occasion applied for leave to file his Defence and failed to do so. The Court has reviewed its prior two rulings granting the Defendant leave to file his Defence and indeed the pattern is explicit.

27. It is a general law that Advocate's failure to execute his client's instructions amounts to professional negligence. This was the position in Water Painters International -v- Benjamin Ko'goo t/a Group of Women in Agriculture Kochieng (Gwako) Ministries (2014) eKLR, where the Court stated that;

> " ...in the words of justice Ringera in Omwoyo vs African Highlands & Produce Co. Ltd (2002 J) KLR, time has come for the legal Practitioners to shoulder the consequences of their negligent acts of omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of negligence of the defendant's Advocates. This is a proper case where the Defendant's remedy is against its Advocate, while suing advocates for professional negligence and not setting aside the judgment."

28. The Court's power to set aside a Judgment is exercised with a view of doing justice between the parties. Reliance is placed on the case of, Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd -v- Augustine Kubede (1982-1988) KAR, where the Court held:

> " The Court has unlimited discretion to set aside or vary a Judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties"

29. In the case of Kimani -v- MC Conmell (1966) EA 545, the Court held that where a regular Judgment has been entered, the court will not usually set aside the Judgment unless it is satisfied that the Draft Defence raises triable issues. Further in Jomo Kenyatta University of Agriculture and Technology -v- Musa Ezekiel Oebal (2014) e KLR, the Court stated that the purpose of clothing the court with discretion to set aside ex-parte Judgment is:

> " To avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice..."

30. In the case of Patel -v- EA Cargo Handling Services Ltd (1974) EA, the Court stated that the main concern of the court is to do justice tothe parties, and it will not impose conditions on itself to fetter the wide discretion given to it by the Rules.

31. Further, the Court in Habo Agencies Limited -v- Wilfred Odhiambo Musingo (2015) eKLR, stated that it is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of litigation. This was the same position held in the case Ruga Distributors Limited -v- Nairobi Bottlers Limited HCCC 534 of 2011, where court stated that it is not enough for a party to blame their advocates but to show the tangible steps taken by him in following up his matter. (See the High Court case David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR)

32. In the present Application the Defendant/Applicant failed to file his Defence on multiple occasions, despite leave to do so, for reasons that his advocates failed to act. The failure he imparts on his advocates amounts to professional negligence on their part. The Defendant/Applicant has shown no evidence of action taken against his advocates against the purported negligence.

33. However, Order 10, Rule 11 of the Civil Procedure Rules, provides that ex-parte interlocutory Judgment in default of appearance or Defence may be set aside, it reads 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."

34. From the reading of this provisions, a Court has the discretion to set aside a default judgment. In the case of, Patel -v- EA Cargo Handling Services Ltd (1974) EA 75, the Court held that:

> " 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."

35. The discretion of a court to set aside or vary ex-parte Judgment entered in default of Appearance or Defence is a free one and is intended to be exercised to avoid injustice or hardship, but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice. This was the position in *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR.

36. In the exercise of this discretion the Court will consider inter alia if:

    i. The defendant has a real prospect of successfully defending the claim; or

    ii. It appears to the court that there is some other good reason;

    iii. The Judgment should be set aside or varied; or

    iv. The defendant should be allowed to defend the claim

37. In the instant case, there is no dispute that the Defendant was granted leave to file his defence, and that at the time the Judgement was entered, the Defendant had not filed a Defence thereto. Therefore, the Judgement entered on 17th June 2021, in favour of the Plaintiff is valid and regular.

38. Furthermore, this court has had the benefit of reviewing the Defendant's annexed Defence in which he states that he acquired the suit property legally. However, no supporting documents are attached as evidence of the Plaintiff's deceased brother transferring the suit property legally to the Defendant. In such an instance the Defendant has no real prospect of successfully defending the claim.

39. In order to achieve this expediency and in the interest of justice and the parties, it is my considered opinion that the Court's Judgment delivered on 17th June 2021, stands and the application dated 20th July 2022 is dismissed.

40. In regard to the Plaintiff's application dated 30th May, 2022, the Court finds that the same is for execution Order. The Plaintiff has a Judgment in her favour. It has not been set aside. No reasons why execution should not issue. The Plaintiff application dated 30th May 2022, is allowed entirely in terms of Prayers No. 1, 2, and 3.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Absent – Plaintiff/Respondent

Absent - Defendant/ Applicant

Joel Njonjo – Court Assistant.

L. GACHERU

JUDGE