



REPUBLIC OF KENYA



**Owidi v Ajore (Environment & Land Case 10 of 2021)
[2024] KEELC 3308 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 10 OF 2021
GMA ONGONDO, J
APRIL 8, 2024**

BETWEEN

PENINA AOKO OWIDI PLAINTIFF

AND

JARED ABUDO AJORE DEFENDANT

RULING

1. By a Notice of Motion application dated 23rd June 2023, the defendant/applicant, Penina Aoko Owidi through O.H Bunde and Company Advocates is seeking the following orders;
 - a. Moot
 - b. Moot
 - c. Moot.
 - d. That this Honourable Court be pleased to set aside the ex-parte Judgement entered against the Defendant and that the defendant be allowed to file defence out of time and defence the suit on merit.
 - e. That the costs of this application be provided for.
2. The application is premised upon the applicant’s affidavit of 18 paragraphs sworn on even date together with copies of documents marked as “PAO 1” to “PAO 3” and annexed thereto alongside grounds (a) to (j) set out on the face of it. Briefly, the applicant’s lamentation is that the ex-parte judgment was entered without requisite service and notice. That he has a good and arguable defence with triable issues hence the suit ought to be heard on merit.



3. The plaintiff/respondent through Bana and Company Advocates for Nchoe Jaoko and Company Advocates opposed the application by way of grounds of opposition dated 6th February 2024 which include;
 - a. The application is misconceived and without merit.
 - b. The application was filed after inordinate delay and the explanation given therefor.
 - c. The applicant failed to explain why she failed to file her defence after entering appearance.
4. Hearing of the application was by way of written submissions pursuant to orders of the court given on 23rd October 2023.
5. By the applicant's submissions dated 30th October 2023, reference is made to the orders sought in the application and that the memorandum of appearance was duly filed and served on the respondent. That the appellant was not served with any document by the respondent who intends to execute the matter. That he learnt of the decree dated 31st may 2023 and was not notified of entry of judgment. That the application has been brought without unreasonable delay and it is within the court's discretionary power that he be given a fair opportunity to defend the suit.
6. To buttress the submissions, learned counsel for the applicant relied upon Article 159 (2) (d) of *the Constitution* of Kenya 2010 and Order 10 Rule 11 of the Civil Procedure Rules, 2010. (The CPR herein) that the court may set aside default judgment as well as Order 22 Rule 6 of the Civil Procedure Rules on ten days' notice of entry of judgment before execution and Mbogo-vs-Shah (1968) 1 EA 93.
7. The respondent did not file any submissions in regard to the application.
8. I have duly considered the application, the grounds of opposition as well as the applicant's submissions. So, is the application merited?
9. The Ex parte judgment was rendered on 29th November 2022. Further to Order 10 Rule 11 (Supra), the court may set aside the judgment in default as sought in the application upon terms that are just.
10. It is trite that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system; see James Kanyiita Nderitu & another-vs-Marios Philotas Ghikas and another (2016) eKLR.
11. Article 48 of *the Constitution* of Kenya, 2010 stipulates the right of access to justice. The right to fair hearing cannot be limited pursuant to Articles 50 (1) and 25 (c) of the same Constitution. No doubt, the applicant is entitled to the said rights as regards her proposed defence in the present suit.
12. The judgement in issue is a technical one. In the case of Kanwal Sarjit Singh Dhiman-vs-Kashavji Jivraj Shah (2015) KLR, the Court of Appeal held;

“.....The courts exist for the purposes of dispensing justice and that the sword of justice cuts both ways. As a court we have to balance the two divergent interests. Further, it has been said time and again that a technical judgment is not the best judgment.”
13. Further, a fair opportunity to be heard (Audi alteram partem Rule) is a fundamental principle of justice; see Halsbury's Laws of England 5th Edition 2010 Volume 61 at paragraph 639.



14. Moreover, I subscribe to the decision in the case of Philip Keipto Chemwolo & Another-vs Augustine Kubende (1986) eKLR that the court has the discretion to grant the application to set aside judgment in default in the interest of justice; see also Mbogo case (supra).
15. Bearing in mind the length of delay to mount the application weighed against the facts of the case and the surrounding circumstances, the applicant should be let in to defend the suit to meet the ends of justice. Thus, the application is meritorious and the grounds of opposition fail.
16. Accordingly, the applicant be let to defend as the application is hereby allowed in terms of order number 4 for setting aside the ex-parte judgment with thrown away costs of Kshs 10,000/- to be borne by the applicant within 30 days and payable within the next thirty (30) days from this date.
17. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF APRIL 2024.

G.M.A ONG'ONDO

JUDGE

Present;

Mr. Jack Otieno instructed by O.H Bunde learned counsel for the plaintiff/respondent.

Fiona Mutiva, Court Assistant.

