



**Wachira v Maina & another (Environment and Land Appeal  
E003 of 2022) [2024] KEELC 3701 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3701 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

**JG KEMEI, J**

**MAY 7, 2024**

**BETWEEN**

**PETER GICHIRI WACHIRA ..... APPELLANT**

**AND**

**LUCY MUTHONI MAINA ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR, THIKA ..... 2<sup>ND</sup> RESPONDENT**

*((Being an appeal against the Ruling and orders of the Hon C A  
Otieno SPM in ELC No. 124 of 2020, RUIRU delivered on 22/12/2021))*

**JUDGMENT**

1. The Appellant filed an appeal against the Ruling by Hon CA Otieno in SPMCC No 124 of 2020 delivered on the 22/12/2021 on the following grounds;
  - a. The Learned Magistrate erred in law and fact by arriving at the conclusion that a Court can enter ex-parte Judgment on a Counterclaim filed in response to a suit which is yet to be heard and determined on merit without the need for formal proof hearing and thus failing to set aside and/or discharge the ex-parte Judgment entered on 26<sup>th</sup> April 2021.
  - b. The Learned Magistrate erred in law and in fact in failing to give proper and/or sufficient consideration to the evidence and the submissions made by the Applicant.
  - c. The Learned Magistrate erred in law and fact by failing to appreciate that a Plaintiff's suit as filed is a sufficient defence to a counterclaim and that there is no law that permits entry of interlocutory Judgment with respect to none liquidated claims especially in land matters as was subject of determination before the trial Court.



- d. The Learned Magistrate erred in law and fact in failing to discharge, vary and/or set aside the injunction order granted on 26<sup>th</sup> March 2021 orders that were obtained without the Plaintiff's knowledge and/or instructions.
- e. The Learned Magistrate erred in law and in fact by allowing the Defendant to continue benefiting from injunctive orders obtained through falsification of material facts and failure to disclose to the Honourable Court the relevant information.
- f. The Learned Magistrate erred in law and fact in holding that the Defendant can continue to benefit from injunctive orders not consented to by the Plaintiff.
- g. The Learned Magistrate erred in law and fact in breaching the Appellants right to a fair trial and a fair hearing by entering default Judgment on the Counterclaim.
- h. The Learned Magistrate erred in law and fact in failing to consider the authorities of the Superior Courts cited by the Appellant in the submissions.
  - i. The Learned Magistrate erred in law and fact in Ruling against all the evidence on record and considering extraneous matters that were never pleaded and were never part of the record.
  - j. The Learned Magistrate misconstrued the law and its application to the facts of the case and ended up misdirecting herself by finding that an interlocutory Judgment in default of appearance can be entered in respect to a counterclaim when the main suit and dispute between the parties is pending hearing and determination by the same Court.
  - k. The Learned Magistrate took into consideration irrelevant issues and misguided herself in making the impugned decision and orders herein.
  - l. On the whole, the decision of the Honourable Magistrate is plainly erroneous and insupportable by the facts, evidence and the submissions and the law.
2. Consequently, the Appellant sought for the following orders;
  - a. The appeal be allowed.
  - b. The Ruling of the Learned Magistrate delivered on the 22/12/2021. and the orders thereto be set aside and in its place this Honourable Court do issue an order allowing the Plaintiffs application dated the 3/11/21 in terms of prayers b c d and e thereof.
  - c. Costs be provided for.
3. The appeal was canvassed by way of written submissions.
4. On whether the Court erred in entering an ex parte Judgment on a counterclaim filed in a land matter, the Appellant submitted that the power to set aside an interlocutory Judgment is provided for under Order 10 rule 11 of the Civil Procedure Rules 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.”



5. The Appellant submitted that it is not proper to enter Judgment on a counterclaim and cited the case of Deacons E. A PLC Vs Techno Fitness Gym Limited & Another (2021) ECLR where the Court stated;
 

“There is no procedure for requesting for Judgment in default of a Reply to a counter claim and Order 10 Rule 3 is certainly inapplicable. I hold that, for a counter claim, unlike a Plaintiff, there is no procedure for requesting for Judgment in default of a defence. Where the Plaintiff fails to file a defence to counterclaim, the remedy is for the defendant to fix the matter for formal proof and not request for Judgment. Way back in 1979 Harris, J in Kahuru Bus Service v. Praful Patel [1979] KLR 213 took the same position and said “Neither Order VI nor Order IXA of the Civil Procedure Rules gives the Court jurisdiction to give Judgment on a counterclaim, in default of the filing of a defence to the counterclaim.”
6. The Court was further referred to the case of BOC Kenya Limited Vs. Chemgas Ltd (HCCC NO 935 of 1999) where the Court stated that the place of a counterclaim is anchored in the main suit and therefore the factor the Court should consider is whether the defence in place in the main suit raises triable issues. If so, then no interlocutory Judgment can be entered in the counterclaim before the main suit is heard and determined.
7. In addition, the Appellant faulted the trial Court for entering an interlocutory Judgment in a matter involving land which is in the nature of a non-liquidated claim. The case of Solomon Mwobobia Nkuraaru Vs. Jacon Mwiti (2015) eCLR was quoted in support of the above proposition. The Court was urged to find that the interlocutory Judgment entered was improper and has no basis in law.
8. Whether the Court erred in failing to vacate the injunction granted on the 26/4/21, the Appellant submitted that the application fell short of the grounds set out in law for grant of injunctions that is to say; prima facie case was not established; injunction granted based on misrepresented facts that the suit constitutes a matrimonial property yet the property was inherited by the Appellant; no irreparable loss was proven; Appellant never instructed the advocate to consent to the said injunction orders. For the forgoing reasons therefore the Court was urged to set aside the injunction orders granted in the trial Court.
9. The Respondent opposed the appeal vide the written submissions filed on the 8/4/2024.
10. Whether the Court erred in failing to discharge vary or set aside the injunction orders issued on the 26/3/2021 in respect to the suit land, the Respondent submitted that a consent order may be set aside on grounds similar to those applicable to a claim in fraud or collusion, the absence of consensus between the parties, public policy or for reasons as would be applicable to the setting aside or rescission of a contract. Citing the case of Sarovar Hotels Pvt Limited India Vs. Placid View Properties Limited, the Respondent contended that the Appellant has not provided sufficient reasons to warrant the setting aside of the consent order of the 26/4/21.
11. On the second issue as to whether the Court erred in failing to set aside the ex parte Judgment on the counterclaim, the Respondent submitted that the Appellant failed to file a reply to the counterclaim under Order 7 Rule 11 of the Civil Procedure Rules prompting the Respondent to seek for interlocutory Judgment for which it was entered on the 26/4/21.
12. Relying on the case of Susan Njuguna Vs. BK Terer & 2 Others (2005) eCLR the Respondent stated that the requirements of Order 7 rule 17 of the CPR are applicable to this case. That the said provisions are further buttressed in Order 10 rule 10 of the CPR which provides that the provisions of rule 4 to 9 inclusive shall apply with any necessary modification where the Defendant has failed to file a defence.



The Respondent contended that the Judgment entered in the trial Court was regular and the same was rightly entered against the Appellant.

13. On the principles for setting aside an *ex parte* Judgment the Court was referred to the decision in *James Wanyoike & 2 Others Vs CMC Motors Group Limited & 4 Others (2015) eKLR* where the Court stated as follows;

“... the principles and tests for setting aside an *ex parte* Judgment can be summarized as follows:-

1. That the Court has unfettered, unlimited and unrestricted jurisdiction to set aside an *ex parte* Judgment.
2. That the tests for setting aside an *ex parte* Judgment are:-
  - a. Whether there is a defence on merits?
  - b. Whether there would be any prejudice to the Plaintiff?
  - c. What is the explanation for any delay?”
14. The Respondent further contended that the Appellant failed to file a defense or annex a draft defence to the counterclaim to inform the Court on the merit of his defence to the said counterclaim.
15. On the question of prejudice, the Respondent contended that she stands to suffer prejudice because the progress of the case is being impeded by delays created by the Appellant and that as the saying goes justice delayed is justice denied.
16. In conclusion the Respondent submitted that there is no evidence to show that the trial Court misdirected itself in law nor misrepresented facts or considered facts which ought not to have been considered or were plainly wrong.
17. Having considered the appeal, the issues for determination are; whether the *ex parte* Judgment on the counterclaim was properly entered; whether the orders of injunction arrived at through the consent of the parties should be set aside or vacated; costs of the appeal.
18. In the trial Court the Appellant filed an application dated the 3/11/2021 seeking for orders *inter alia* that the *ex parte* Judgment entered on the 26/4/21 be set aside ; the injunction orders be set aside discharged and or varied; the Appellant be granted leave to amend the Plaintiff.
19. Vide a Ruling delivered on the 22/12/2021 the trial Court dismissed the application save for prayer No 3 allowing the amendment of the Plaintiff. It is this decision that has aggrieved the Appellant triggering the appeal under consideration.

### **Ex parte Judgement on Counterclaim**

20. In the trial Court the Appellant filed suit against the Respondent seeking a declaration that the suit land is owned by the Appellant absolutely and that an order be issued directing the Land Registrar to remove a caution lodged by the Respondent on the Register. The Respondent filed a defense and counterclaim against the claim of the Appellant. It is commonly agreed that the Appellant failed to file a reply to the counterclaim.
21. In law a counterclaim is filed as part of the Defendant’s answer to a Plaintiff. It is an independent cause of action asserted by the Defendant against the Plaintiff’s claim essentially raising issues that the defense would have raised had he the first chance to go to Court. The Court has to pronounce Judgment on



both the Plaintiff and the counterclaim as both contain the claims of the Plaintiff and the Defendant. The rules relating to a defence by a Defendant apply to a defence in answer to a counterclaim so that the Plaintiff must respond likewise to a Defendant just like claim in the Plaintiff.

22. The Court concurs with the Respondent that the provisions of Order 7 rule 11 of the Civil Procedure Rules apply to the case at hand. It states as follows;

“Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the Court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.”

23. The Court finds that the Appellant failed to file and serve his reply to the counterclaim as provided for in the procedural law set out above.

24. That said, I have reflected on the nature of the prayers sought in the Plaintiff and I find that the claim is in the nature of a non-liquidated claim. The Provisions of Order 10 rule 6 of the Civil Procedure Rules provide as follows;

“Where the Plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the Court shall, on request in Form No. 13 of Appendix A, enter interlocutory Judgment against such defendant, and the Plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be.”

25. Applying the above provisions to the case at hand, the Court concurs with the Appellant that the claim having been of the nature of a non-liquidated claim, even in the absence of a reply to the counterclaim, the right position is that the claim had to be proven by way of evidence but not to enter an interlocutory Judgment which is summary in nature.

26. On the question of vacation of the orders of injunction issued in the trial Court, a perusal of the record shows that the 26/3/2021 counsels for both parties compromised the application by allowing prayer no 3 of the said application. It has been argued by the Appellant that the advocate who acted for him had no instructions to so act and that the said orders ought to be vacated. It is trite that the principles applicable to the setting aside a consent are the ones applicable to setting aside a contract.

27. In the case of *The Board of Trustees National Social Security Fund Vs Michela Mwalo (2015)* where the Court stated as follows;

“The Judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent Judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent Judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent Judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

28. Similarly in the case of *Brooke Bond Liehig Ltd Vs Mallya (1975) EA 266* the Court stated as follows;

“A Court cannot interfere with a consent Judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”



29. The case of Flora N Wasike Vs. Destimo Wamboko (1988) eKLR is more apt to the facts of the instant appeal, the Court stated as follows;

“It is now settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio Vs. Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983. In Purcell v F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

30. The Court finds that the Appellant has not demonstrated that the orders in this suit were obtained through fraud misrepresentation to warrant the Court to disturb them. The Court concurs with the decision of the trial Court entirely.

31. In the end the appeal partially succeeds in terms of the prayer with respect to the exparte Judgement which is hereby overturned.

32. I order each party to meet the costs of the appeal.

33. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 7<sup>TH</sup> DAY OF MAY, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kamande for the Appellant

Wahome for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Court Assistants – Phyllis & Oliver

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