



**Hamisi v Kutembela (Environment & Land Case 168 of 2017)
[2023] KEELC 17305 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 168 OF 2017
NA MATHEKA, J
MAY 10, 2023**

BETWEEN

RAMA HAMISI PLAINTIFF

AND

HASSAN KUTEMBELA DEFENDANT

RULING

1. The application is dated January 17, 2023 and is brought under Order 10 Rule 11 of the [Civil Procedure Rules, 2010](#) and Sections 1A, IB, 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. That this Application be certified as urgent and service thereof be dispensed with at the first instance.
 2. That this Court be pleased to order a stay of execution of the default/*ex parte* judgement and decree herein and arrest of Salim Hassan Kutembela pending hearing and determination of this application.
 3. That pending the hearing and determination of this application, the Court be pleased to stay all other proceedings in this matter.
 4. That the default *ex parte* judgement against the Defendant be set aside and the process server be called for cross examination on mode of service.
 5. That the Applicant herein be granted leave to file his defence.
 6. That the costs of this application be provided for.
2. It is based on the grounds that the Applicant was arrested and taken into the Police station on allegations and charges of forcible detainer and he spent the whole night at the police cells and on the following day was released on a cash bail. That the Defendant herein is his father who passed on more



than 20 years ago and therefore service of pleadings herein is disputed. That the Applicant was not aware of these proceedings nor the judgement as they were never served. That unless stay of execution is granted, the Applicant will be prejudiced and will suffer substantial loss since the suit property is ancestral land having been brought up there. That the Applicant has a good and meritorious defence against the Plaintiff's claim.

3. The Plaintiff/Respondent filed grounds of opposition and raised a preliminary point of law that the said Salim Hassan Kutembea lacks locus standi as he is not one of the parties in this suit. That he has not sought to be enjoined in this suit. That the allegation that the Defendant passed away has not been substantiated and not factually proved by evidence. That even if this was true the Applicant lacks the requisite authority under the law to institute the motion on behalf of the Defendant.
4. This court has considered the application and the grounds of opposition therein. This court has unfettered discretion to set aside a judgment entered in default of appearance in Order 10 Rule 11, which provides;
 11. 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 principles for setting aside a default judgment are set out in the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 where the court held that;

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."
6. The Court of Appeal in the case of *James Kanyita Nderitu & Another vs Marios Philotas Ghikas & another* Civil Appeal No 6 of 2015 (2016) eKLR held that;

"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v Shah (*supra*), *Patel v E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).
7. In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not



even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion.

8. Be that as it may, the Plaintiff/Respondent has raised a preliminary issue of whether or not the Applicant one Salim Hassan Kutembela has *locus standi* to file this application. The locus standi of parties before court goes to the root of the court to hear and determine the matter. In *Mavoko Land Development Company Limited vs Mlolongo Catholic Church & 2 others* (2022) eKLR, it was held that the presence of proper parties before the court is paramount to the court's jurisdiction. It was held that;

"It is trite that the presence of proper parties before the court is sine quo non to the exercise of jurisdiction of the court. This position was reiterated by the court in Apex Finance International Limited & another vs Kenya Anti-Corruption Commission [2012] eKLR citing with approval the Nigerian Supreme Court case of Goodwill & Trust Investment Ltd & Anor vs Will & Bush Ltd where the court held as follows:

"it is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed. The parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned."

9. The Plaintiff/Respondents have submitted that the Applicant Salim Hassan Kutembela has no Locus Standi or capacity to institute this suit. That due to the lack of the said capacity, the suit is incompetent and should be struck out. In the case of *Law Society of Kenya v Commissioner of Lands & Others*, Nakuru High Court Civil Case No464 of 2000, the Court held that;

Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and others v City Council of Nairobi (1982) KAR 229, the Court also held that;-

"the term *locus standi* means a right to appear in Court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings".

10. It is therefore clear that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means a place of standing. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the Applicant has no locus standi, then the Applicant cannot be heard and that point alone may dispose of the suit. In the case of *Quick Enterprises Ltd vs Kenya Railways Corporation*, Kisumu High Court Civil Case No22 of 1999, the Court held that;

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone".

11. The Applicant Salim Hassan Kutembela stated that the Defendant herein is his father who passed on more than 20 years ago and therefore service of pleadings herein is disputed. That the Applicant was not aware of these proceedings nor the judgement as they were never served. He has not applied to be enjoined in this suit and is not the administrator of his father's estate. The Plaintiff/Respondent



submits that the Applicant has filed this application without having being issued with a grant of letter of Administration. I find that the Applicant is not a party to this suit and has no *locus standi*. I find that the application dated January 17, 2023 is unmerited and I strike is out with costs.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

