



**Wanjiku v Fourteen Falls Limited & another (Environment & Land
Case 24 of 2014) [2023] KEELC 17285 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 24 OF 2014**

NA MATHEKA, J

MAY 10, 2023

BETWEEN

BETH WANJIKU PLAINTIFF

AND

FOURTEEN FALLS LIMITED 1ST DEFENDANT

REGISTRAR OF TITLES 2ND DEFENDANT

RULING

1. The application is dated December 19, 2022 and is brought under Sections 1A, IB, 3A of the [Civil Procedure Act](#) and Order 10 Rules 8 & 11, Order 40 Rule 1 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#) seeking the following orders;
 1. That this Application be certified as urgent and service thereof be dispensed with at the first instance.
 2. That pending the interparte hearing of this Application this court be pleased to stay the execution of the judgement dated December 3, 2019 and all consequential orders.
 3. That this Court be pleased to set aside the order issued on the April 22, 2014 by Honourable Justice S Mukunya granting the Plaintiff leave to serve by way of newspaper advertisement.
 4. That pending the hearing and the final determination of this application this Court be pleased to grant a stay of execution of the judgement delivered on the December 3, 2019 by Honourable Justice C K Yano and all consequential orders.
 5. That this Court be pleased to set aside and/or vary its judgement delivered on the December 3, 2019 by Honourable Justice C K Yano and all consequential orders.



6. That the Court be pleased to grant the Defendants herein leave to file its defence and defend the suit as per the draft defence annexed to this application
 7. That the costs of this application be provided for.
2. It is based on the grounds that the Honourable CK Yano delivered judgement in this matter on the December 3, 2019 *ex parte* without the 1st Defendant being invited or ever being served. That summons to enter appearance were never served upon the 1st Defendant/Applicant. That the Plaintiff/Respondent proceeded to obtain an irregular order for substituted service without having filed any return of service indicating the attempts she had made to serve the 1st Defendant/Applicant. That the Plaintiff/Respondent all along knew that the 1st Defendants/Applicants had instructed the firm of Kariuki Muigai and Co Advocates to deal with any issues concerning the suit property and they had had various correspondences with the Plaintiff's Advocates. That they are triable issues in this matter and the Applicant should be given a chance to defend the suit. The 1st Defendant/Applicant learnt about the matter through their Counsel Waweru Kihara and Co Advocates who came across the listing in the Kenya Law Website. The said firm of Advocates filed a notice of appointment dated November 26, 2019 six days before the judgement. That thereafter the file could not be traced and filed an application to set aside on the July 2, 2020.
 3. This court has considered the application and submissions 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."
 4. The principles for setting aside a default judgment are set out in the case of *Patel vs 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."
 5. The Court of Appeal in the case of *James Kanyiiita 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 EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986] KLR 492 and *CMC Holdings v Nzioki* [2004] 1 KLR 173).

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."

6. This court has perused the court record and find that, this suit was filed 2014. 1st Defendant/Applicant maintains that summons to enter appearance were never served upon them. That the Plaintiff/Respondent proceeded to obtain an irregular order for substituted service without having filed any return of service indicating the attempts she had made to serve the 1st Defendant/Applicant. That the Plaintiff/Respondent all along knew that the 1st Defendants/Applicants had instructed the firm of Kariuki Muigai and Co Advocates to deal with any issues concerning the suit property and they had had various correspondences with the Plaintiff's Advocates. The Plaintiff/Respondent confirms that she had corresponded with the Applicant before filing this suit. PW1 testified that she bought a plot but later realised that she had settled on the wrong plot. She found out that the registered owner was the 1st Defendant/Applicant and she sent a demand note to them which she produced in court. One wonders them why she was not able to serve them the same way and had to go through a newspaper advertisement. I find that it is possible that the Applicant did not see the advertisement and also that the Plaintiff/Respondent knew of their where about. I find that the application dated March 9, 2022 is merited and I grant the following orders;

1. That the judgement dated December 9, 2019 is set aside and all consequential orders.
2. That the Applicant is to file and serve their defence within the next 14 days from the date of this ruling.
3. Costs of this application to be in the cause.

It is so ordered.

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

N.A. MATHEKA

JUDGE

