



Unity Auto Garage (Nairobi) v Kenya Railways Corporation (Environment & Land Case E065 of 2024) [2025] KEELC 4194 (KLR) (21 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4194 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E065 OF 2024
JA MOGENI & AM COCKAR, JJ
MAY 21, 2025

BETWEEN

UNITY AUTO GARAGE (NAIROBI) PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

RULING

1. Before me are two (2) Applications; one dated 19/02/2024 by the Plaintiff/Applicant seeking that;
 1. Spent
 2. Spent
 3. Temporary injunctive order do issue restraining the Defendant/Respondent either by themselves, their employees, agents, servants, assigns and/or anybody else claiming under them from evicting the Plaintiff/Applicant and/or committing acts of illegal trespass and/or alienating the unsurveyed KR land siding off Enterprise Road between Changamwe Road & Dakar Road behind KCC within Nairobi Industrial Area measuring approximately 2.0 acres (as described in the offer for lease agreement dated 19th June, 2023 pending the hearing and determination of this suit
 4. That Officer Commanding Station (OCS), Railway Police Station be and is hereby directed to assist in the enforcement of these Orders.
2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of the Director of the Plaintiff, Mohamed Asjad Rashid who deponed that the Plaintiff operates three (3) garages that carry on the business of insurance repairs, trucks and private motor vehicle servicing within Nairobi and is desirous to consolidate all its operations into one facility for ease of management



as well as cutting down on operational costs and thus he engaged the Defendant in order to obtain a large facility.

3. He avers that he got an offer for lease and signed an agreement dated 19/06/2023 which was for the unsurveyed KR land siding off Enterprise Road between Changamwe Road & Dakar Road behind KCC which is approximately 2.0 acres for 9 years and it is within Industrial area.
4. On accepting the offer the Plaintiff paid the Defendant/Respondent Kesh 1,535,000.00 in respect of the subject property which he services to date. At the same time the Plaintiff spend about Kesh 30,000,000 to install and operate a garage which has employed several staff.
5. The Respondent has always made several requests and/or demands for rent payment which the Plaintiff has always fulfilled as shown vide annexure 4 which are text messages, correspondence and invoices demanding for clearance of rent. Infact the Defendant/Respondent delivered vacant possession of the suit property and the Plaintiff has obtained authority to run his business from Nairobi City County. In carrying out repairs and paint work for the premises the Plaintiff has spent about Kesh 30,000,000 as evidenced vide annexure 5 and annexure 6.
6. It is the Plaintiff's case that on 18/01/2024 the Defendant in breach of the existing Lease Agreement started the process of violently evicting the Plaintiff from the suit property as shown in the photographs annexed as MAR annexure 8 and that the Defendant has created a barricaded wall to the premises blocking the property entirely as can be seen in annexure MAR 9 yet there is no rent arrears.
7. There is real danger that the Plaintiff will be illegally evicted and absolutely divested from the suit property exposing the employees and clients to grave loss and damage. Yet the Plaintiff contends he has not been served any Court order for eviction or re-entry into the premises and no reasons has been given for the unlawful attempt at re-possession. Further that following violent eviction attempted on 18/01/2024, the Plaintiff made a formal criminal complaint against the Defendant and its agents claiming criminal trespass and malicious damage to property as seen vide the annexure MAR-11 which is a copy of OB.
8. It is the Plaintiff's contention that the orders sought will protect him from immeasurable injustice and there is no actual prejudice to be suffered by the Defendant.
9. That the purported eviction of the Plaintiff by the Defendant/Respondent is a blatant breach of the agreement and the law and it deprives the Plaintiff of quiet possession, use and enjoyment of the suit property.
10. Further that there is real danger that the Plaintiff will be illegally evicted and be divested from the suit property unjustifiably losing the suit property and exposing its employees and client to grave loss and damage, especially since there is no eviction order authorized by the Court.
11. It was the Plaintiff/Applicant's averment that it was ready and willing to deposit any security that the Court may direct to enable it secure the interim relief as sought in the Application. Further that there would be immeasurable injustice visited upon the Plaintiff if the Court does not intervene to forestall the unlawful eviction.
12. The second Application is the one dated 4/06/2024 filed by the Defendant/Applicant seeking the following:
 - i. Spent.
 - ii. That the default Judgment entered against the Defendant/Applicant on 3rd June, 2024, the Decree emanating therefrom and all consequential orders be set aside unconditionally.



- iii. That the Applicant be granted leave to file its Defence and the Defence be deemed as duly filed and served on time
 - iv. Spent.
 - v. That pending the hearing and final determination of the instant Application, there be a stay of execution of the default Judgment and/or Decree herein.
 - vi. The Honorable Court be pleased to make such orders as it may deem fit in the interest of justice.
 - vii. That the cost of this Application be provided for.
13. The Application is based on the grounds stipulated on the body of the Application and the Supporting Affidavit by Stanley Gitari Acting General Manager Legal Services and the Corporation Secretary of the Defendant/Respondent.
 14. The Applicant deposes that the Plaintiff obtained Judgment in default of appearance on the basis of material concealment of facts. That the Plaintiff failed to disclose to the Court that their Notice of Motion Application dated 19/02/2024 had not been dispensed with and is what was coming up for directions.
 15. The Applicant has averred that the mention on 03/06/2024 was a mention for directions on the Plaintiff/Respondent's Notice of Motion Application dated 19/02/2024, and interlocutory Judgment could not be entered on a date for mention for directions on an Application where parties had complied and filed their responses.
 16. Further that he had not been indolent in the prosecution of this matter, and has timeously brought this Application to set aside the interlocutory Judgment. That for a party to be denied an opportunity to be heard on merits of its case this should be a last resort.
 17. He averred that the default Judgment entered was irregular and ought to be set aside *ex debito iustitiae*. Further that a party should not be condemned unheard and that the irregular Judgment should be set aside.
 18. The Defendant avers that he will be prejudiced should the matter proceed for formal proof hearing as scheduled on 06/06/2024. Further that the Applicant has a meritorious defence and that this Court has unfettered discretion to set aside the Judgment entered on 03/06/2024 and that the Orders sought be allowed.
 19. The Application is opposed vide a Replying Affidavit sworn by MOHAMED ASJAD RASHID, who deposes that he is a Director of the Plaintiff/Applicant and is duly authorized to swear Affidavit on its behalf.
 20. He contends that the Defendant/Applicant was served with Summons to enter appearance together with the Plaint and all pleadings and that he entered appearance through their Counsel on record on 1st March, 2024. Having entered appearance, the Defendant thereafter filed a Memorandum of Appearance dated 1/03/2024 signifying that they were fully aware of the proceedings in line with Order 7 Rule 1 of the Civil Procedure Rules, 2010.
 21. That despite entering appearance through its Counsel the Defendant/Applicant did not file their Defence and this is what prompted the request for default Judgment which was subsequently issued as against the Defendant.



22. It is the Plaintiff/Respondent's contention that the Defendant/Applicant has only availed the chronology of account of proceedings to Court but has not explained the course for delay for filing Defence out of time.
23. That this Honourable Court has requisite power to enter default Judgement and/or set down the matter for formal proof hearing for liquidated claims pursuant to the provisions under Order 10 R of the Civil Procedure Rules, 2010. That at the same time the Court has unfettered jurisdiction to set aside a default Judgement and that this discretion ought to be exercised judiciously.
24. The Respondent averred that there is no provision under the law that bars a party from filing a defence on grounds of a pending Application for interim orders. This being the case then the intention of the Defendant in failing to file the Statement of Defence for a period of roughly ninety-five (95) days from entering appearance was deliberate and aimed at delaying the final determination of the substantive suit.
25. Further the Respondent denied the allegation that there was material non-disclosure of any nature noting that the Application seeking interim injunction is and has been on record and the same can be accessible via Judiciary CTS portal and I believe that the Court was alive to the existence of this Application which, in any event, cannot act as a bar to granting of an interlocutory Judgement.
26. The Respondent also stated that he had also read the draft Statement of Defence annexed to the instant Application and that the same is littered with mere denials and does not contain any triable issues.
27. In his contention the Respondent averred that this Court wields power and the responsibility to protect the respect for the law and smooth and speedy dispensation of justice especially in instances of deliberate inaction aimed purely at creating inexcusable delays.
28. He also stated that the law has advanced to a level where an Advocate can be punished for laches where he fails to file a Defence on time and so the Application herein is undeserving.
29. Both Applications were canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.

Analysis and Determination

30. The issues that I find are key in determining the two Applications are:-
 - i. Whether the Applicant's Application is merited.
 - ii. Whether the Respondent's Application is merited.
 - iii. Who pays the costs of both Applications?
31. The principles that guide the Court in whether or not to grant an interlocutory injunction are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction Application, the Applicant has to satisfy the triple requirements to;(a)establish his case only at a prima facie level,(b)demonstrate irreparable injury if a temporary injunction is not granted, and(c)ally any doubts as to (b) by showing that the balance of convenience is in his favour.”



32. I will now proceed to determine if the Plaintiff has met the above requirements.

Whether the Plaintiff has established a prima facie case

33. The Plaintiff's case is that he entered into a Lease Agreement with the Respondent on or about 19/06/2023 for a period of 9 years commencing 1/07/2023 and has paid up quarterly rent of Kshs 1, 535,000 and was consequently granted vacant possession of unsurveyed KR land siding off Enterprise Road between Changamwe Road and Dakar Road measuring approximately 2.0 acres.
34. That the Respondent attempted to violently evict the Plaintiff/Applicant from the suit property on 18/01/2024. That he began the process of erecting a barricade on the suit property to restrict access which was unlawful conduct and in material breach of express agreement entered into.
35. The Applicant avers to have made considerable investments and developments in renovating the suit property to be fit for use and procuring licenses from Nairobi City County. The Applicant remains apprehensive that they would be greatly prejudiced in the event no injunctive orders were issued.
36. On the other hand, the Defendant contends that it is the registered owner of the suit property and that it is immaterial that the Plaintiff paid some money to the Defendant since it did not comply with all the terms stipulated in Letter of Offer.
37. That one should not be allowed to benefit from their own wrong like the Plaintiff's case where it failed to obtain a pegging certificate which is a key requirement in such kinds of arrangement.
38. Further that the Plaintiff encroached and fenced off the operational area for KCC who alerted the Defendant who then took action against the Plaintiff demanding compliance including the laid down procedures for environmental compliance and presentation of the report of the environment to the Defendant.
39. Therefore there is no prejudice to be suffered by the Plaintiff/Applicant but the Defendant stands to suffer if the Plaintiff is allowed to take over the suit property. The Application should be dismissed.
40. At this preliminary stage all that the Plaintiff is required to demonstrate is that he has a right which has been infringed and which is capable of being protected. The Court of Appeal in *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR observed as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case.”

43. The Plaintiff's assertion that there is a valid Lease Agreement to which he has paid some remittance in line with Clause 15 of the offer for lease. Receipt of which is acknowledged and the Defendant even issued a receipt in respect of the payment. At this interlocutory stage the Court is more concerned with preserving the subject matter of the suit. It is therefore my finding that the Plaintiff has established a prima facie case.



44. The second issue is whether the Plaintiff is likely to suffer irreparable loss which cannot be compensated by damages if the injunction is not granted. It is the Plaintiff's contention that the Defendant on or about 18/01/2024 attempted to violently evict the Plaintiff from the suit property and even erected a barricade to restrict access and now terms the Plaintiff as a trespasser.
45. On his part, the Defendant's Counsel has submitted that there is no property that the Plaintiff has been divested off and that they will suffer no harm. That instead it is the Defendant who will suffer if the Plaintiff is allowed to take up the property.
46. In considering the question of irreparable loss with regard to land the Court in the case of *Panari Enterprises Ltd -vs- Lijoodi & 2 Others* (2014) eKLR held as follows:
- “Land is unique and no one parcel can be equated in value to another though the value of the suit property can be ascertained, it would be right to say that the Plaintiff can be compensated in damages. I hold that the damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach.”
43. Similarly, in the instant case although the rental payment can be ascertained, ultimately this case is about land and the use of land I would hesitate to hold that it can easily be compensated in damages.
44. Regarding the balance of convenience, there is no doubt that the Plaintiff has been in possession of the suit land and he would be prejudiced if he is evicted before his case is heard and determined. The balance of convenience therefore tilts in his favour.
45. On the issue of setting aside the *ex parte* Judgment, I am persuaded that if there are good reasons that support the Application to set aside an *ex parte* Judgment then they should be considered.
46. Order 12 rule 7 of the Civil Procedure Rules, 2010 as read with rule 2 provide that where Judgment has been entered the Court may set aside or vary the Judgment or order upon such terms as may be just. In the case of *Kimani Kigano and Company Advocates v Jimba Credit Corporation Limited Justice Bosire* (as he then was) summarized the powers of the Court to set aside *ex-parte* orders as follows:
- “ 1) The power to set aside is discretionary;
- 2) The discretion is unlimited provided it is properly exercised;
- 3) It being a judicial discretion must be exercised on the basis of evidence and sound legal principles;
- 4) The Court has power under order 14A rule 10 of the Civil Procedure Rules to set aside on terms as are just;
- 5) The Court is obliged to look at the defense the Applicant Defendant may be having to the claim;
- 6) If a party establishes that he has a reasonable defense and which appears on the face of the pleadings to contain considerable merit, the Court ought to be inclined towards setting aside.”
43. Another factor that the Court ought to consider is that the Applicant is not guilty of obstructing the course of justice. In the Applicants/Defendant's submissions, it is contended that there was no service and further that the day when the *ex parte* order was issued the Court was supposed to mention the matter and hear it.



44. The Respondent/Plaintiff on the other hand states that there was proper service and has referred to the Affidavits of Service filed in Court. According to precedents, where there is no service the Court has no discretion but to set aside the Judgment. This was the decision of the Court in Nairobi HCCC No. 171 of 2001; Remco Ltd v. Mistry Javda Parbat & Co. Ltd & 2 Others where it was stated as follows:

“First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment is an irregular one which the Court must set aside *ex debito Justitiae* (as a matter of right) on Application by the Defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of judicial process itself. Secondly, if the default judgement is a regular one, the Court has unfettered discretion to set aside such Judgment and any consequential decree order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the Court is to do justice between the parties.”

43. However, where there is proper service the Court has to inquire about the reasons for failure to attend Court and also look at the Defense to ascertain whether or not there are triable issues raised in the Defense. Setting aside of *Ex parte* Judgment is discretionary and the discretion is intended so as to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. (See *Shah v Mbogo & Another* [19671] EA 116). In this case the grounds upon which the Application to set aside the Judgment was made were on the basis of lack of service of the mention, hearing and Judgment date.

44. I have perused the file and I am persuaded that the Applicant is deserving of the said orders.

45. By allowing both parties to fully present their case, the Court can reach a more just and equitable decision based on all available evidence and arguments. In essence, setting aside an *ex parte* Judgment is a mechanism to ensure a fair and just legal process, protecting the rights of all parties involved.

46. In the final analysis, it is my finding that the Notice of Motion dated 19/02/2024 is merited and so is the Notice of Motion Application dated 04/06/2024. I therefore grant the two Applications and make the following orders:-

- a. Temporary injunctive order is hereby issued restraining the Defendant/Respondent either by themselves, their employees, agents, servants, assigns and/or anybody else claiming under them from evicting the Plaintiff/Applicant and/or committing acts of illegal trespass and/or alienating the unsurveyed KR land siding off Enterprise Road between Changamwe Road & Dakar Road behind KCC within Nairobi Industrial Area measuring approximately 2.0 acres (as described in the Offer for Lease Agreement dated 19th June, 2023 pending the hearing and determination of this suit.
- b. That Officer Commanding Station (OCS), Railway Police Station be and is hereby directed to assist in the enforcement of these Orders.
- c. The interlocutory Judgment entered on 03/06/2024 is hereby set aside.
- d. The Plaintiff is hereby awarded throw away costs of Kshs. 100,000/= within 30 days from the date hereof.
- e. In default thereof the interlocutory Judgment shall stand reinstated.



f. Mention shall be on 18/06/2025 for Directions.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 21ST DAY OF MAY 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

In the presence of:

Mr. Kihang'a for the Plaintiff

Mr. Kipkorir holding brief for Mr. Kiplang'at for the Defendant

Mr. Melita – Court Assistant

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MOGENI J

JUDGE

