



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ahamed v Swaleh & another (Civil Appeal E208 of 2023)  
[2025] KEHC 4022 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 4022 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E208 OF 2023  
F WANGARI, J  
MARCH 13, 2025**

**BETWEEN**

**NASSIB BADI AHAMED ..... APPELLANT**

**AND**

**RAMA SWALEH ..... 1<sup>ST</sup> RESPONDENT**

**NURU ALI SALIM ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. Adika, Senior Principal Magistrate,  
delivered on the 26th July, 2023 in Mombasa Civil Suit No. 864 of 2029)*

**JUDGMENT**

1. The Appellant, who is the Plaintiff in the lower court matter filed a suit against the Defendants/ Respondents via a Plaint dated June 10, 2019. The Appellant bought a house located at Likoni, Mombasa from the Respondents at a consideration of Kshs. 2,600,000, where full purchase price was paid.
2. The house was later demolished by the Kenya Highway Authority (KeNHA) on the grounds that the house had been built on a road reserve. The Appellant averred that the Respondents failed to disclose the legal status of the suit property as there was a demolition notice that had been issued in year 2014 by the Government through KeNHA.
3. The Appellant issued demand notice for the refund of the full purchase price of the suit property as the Respondents had fraudulently misrepresented the true status of the property. After the Respondent failed to refund the amount, the Appellant filed the suit against them.
4. The Respondents filed their statement of Defence denying the allegations by the Appellant and the matter was set down for hearing. The matter was fixed for hearing severally but adjourned on account of the Defendant having not complied with the pre-trial directions. On 13/04/2021 when the matter



came up for hearing, Omburio advocate for the Defendants prayed for 14 days to file an application to cease from acting.

5. The application was allowed and given a hearing date for the said application fixed for 25/05/2021. On the said date, Oduor Advocate for the Defendant informed the court that he had issues with his clients concerning the supply of documents. He prayed for a further 21 days to comply with Order 11. The trial court granted the Defendants 30 days to comply. Hearing was fixed for 27/09/2021 when the matter did not proceed as both parties were absent. On the mention date, 25/11/2021, Omburo advocate for the Defendant sought for a hearing date and the matter was fixed for hearing on 12/04/2022.
6. On 12/04/2022, Oduor Advocate prayed for leave to file an application to cease from acting. The court stated that the counsel had been granted time to file the application, and matter was fixed for hearing at 12.30pm. When the matter was reached for hearing at 12:55pm, the Defendant was absent and the matter proceeded for hearing ex-parte.
7. Judgment was entered in favour of the Plaintiff against the Defendants where the Defendants were compelled to refund Kshs. 2,600,000 with interest at court rates from date of filing suit, with costs. The Plaintiff commenced execution proceedings and warrants of sale were issued in respect to the property Plot No. MS/1/263, said to belong to the Defendants.
8. Pursuant to the resulting advertisement for sale of the said property, One Salim Ali Salim Awadhi filed an objection via the Notice of Motion application dated 10/11/2022. He claimed he was the legitimate owner of the said property earmarked for sale, and the Defendants were his tenants who were paying monthly rent of Kshs. 15,000. He stated that he was not privy to the sale agreement between the Plaintiff and the Defendants.
9. Upon considering the application, replying affidavit and the submissions filed by the parties, the trial court in the Ruling dated 21/02/2023, dismissed the said application and found it to have been meant to hoodwink the court into discharging the property from attachment, and the Defendants who are true owners may dispose of it, rendering the lawful decree worthless.
10. On 06/03/2023, a Notice of Change of Advocates from the firm of Oduor Siminyu & Company Advocates to Mogaka Omwenga & Mabeya Advocates to act for the Defendants was filed. On the same date, the Defendants filed a Notice of Motion Application seeking for temporary stay orders in respect to the sale of the house standing in Plot No. MS/1/263 Likoni Shelly Beach which was scheduled to be sold by way of public auction on 09/03/2023.
11. They also prayed that the warrants of sale issued to the auctioneer be set aside, and the judgment entered on 26/07/2022 and the consequential orders be set aside unconditionally. The Defendants further prayed that they be allowed to defend the suit unconditionally.
12. The Defendants stated that they were not aware of the hearing dates and the ex-parte judgment until when execution process commenced. They stated that their advocate had lost their contact and hence unable to contact them to inform them of the hearing date. Their former advocate, Mathew Okumu Oduor swore an affidavit dated 06/03/2023 confirming that he had lost the Defendants contacts thus he could not notify them of the various hearing dates and other events in the matter.
13. The Defendants also faulted the execution process stating that the Decree stated was non-existent as it was dated 30/08/2022 yet the Judgment was entered on 26/07/2022. The auctioneer was also faulted for failing to give notice to the Defendants hence going against the provisions of the Auctioneer Rules.



14. Upon considering the application, supporting affidavit, replying affidavit and the written submissions by the parties, via the Ruling dated 26/07/2023 by Hon. Adika, the application was found to have merits. The decree was found to be invalid, and the judgment irregular as the Defendants were not aware of the proceedings, hence setting them aside. The Defendants were allowed to defend the suit and directed to have complied with Order 11 of the Civil Procedure Rules within 30 days from the date of the ruling.
15. Dissatisfied with the said ruling, the Plaintiff filed this appeal via the Memorandum of Appeal dated 04/08/2023 based on the following grounds in summary;
  - a. The trial magistrate sat on appeal from a court of equal jurisdiction
  - b. Finding that the Defendants previous counsel had no instructions yet no application to cease from acting had been filed, prosecuted or allowed.
  - c. Trial magistrate failing to rule on the preliminary issue on the current advocates for the Defendants having come on record after judgment without consent or formal application.
  - d. The magistrate erred in law and in misinterpreting and disregarding settled state decisis.
16. The Plaintiff/ Appellant sought to have the ruling of Hon. Adika, Senior Principal Magistrate in respect to the Notice of Motion dated 06/03/2023 be varied and, or set aside.
17. The appeal was canvassed by way of written submissions, and both parties complied in filing their rival submissions.

### **Analysis**

18. I have considered the pleadings herein and the submissions filed on appeal. The issues for determination are;
  - a. Whether the status of legal representation for the Defendants both in the lower court and in the appeal
  - b. Whether the lower court had jurisdiction to hear and determine the application dated March 6, 2023
  - c. Whether the lower court ruling ought to be set aside
19. On the first issue, in the ruling subject to this appeal, if was found that the counsel for the Defendants in the lower court had no instructions to proceed as the counsel had lost contacts with his clients. From the record, the counsel had indicated to the court that he was to file an application to cease from acting. O the date when the said application was to be heard, the counsel had not filed the application as intended, but he prayed for a hearing date instead and asked to be granted time to comply with Order 11, and matter fixed for hearing for 12/04/2022.
20. On the scheduled date for hearing, the defence counsel asked for time to file an application to cease from acting. The court stated that the counsel had been granted opportunities to do so, but failed to file the application. The court directed that the matter do proceed for hearing.
21. The defence counsel nor the Defendants did not show up for the hearing and the matter proceeded for hearing ex-parte. The counsel having failed to file and prosecute the intended application to cease from acting, nor the Defendants withdrawing their instructions, the counsel is deemed to have been on record for the Defendants with instructions to proceed. Order 9, rule 12 of the Civil Procedure Rules is therefore not applicable.



22. In respect to the current firm of advocates on record, they filed the Notice of Change of Advocates dated 06/03/2023 after judgment of the lower court had already been entered. From the records, no leave was sought to have the said advocates come on record for the Defendants. However, upon perusing the Defendants/ Respondents submissions on appeal, the counsel submitted that there was a consent on record which was filed, and which was between the former advocates on record and the current firm of advocates.
23. I have perused through the Record of Appeal and no such consent is on record. I however put into consideration that the former advocate swore an affidavit in support of the application dated 06/03/2023 deponing that the contacts between him and the Defendants had been lost, hence he could not inform them of the hearing date.
24. The essence of Order 9 rule 9 of the Civil Procedure Rules is as observed in the case of S.K Tawadi v Veronica Muehlmann (2019) eKLR as hereunder;

‘....in my view, the essence of Order 9 Rule 9 of the CPR was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace them’.
25. In this case, there is no such risk as the former advocates are well aware of the proceedings after the judgment. If his interests had not been protected, he would have raised an objection in having the current advocates being on record. Despite there being no consent on record, I find that the current advocates on record are properly on record as representing the Defendants/ Respondents.
26. On the second issue, it was argued by the Appellant that the trial court in entertaining the application dated 06/03/2023 was sitting on appeal of a court of equal jurisdiction. The Appellant submitted that the Defendants could only move the court for review of the judgment delivered on 26/07/2022 or appeal against the said judgment.
27. It is not in dispute that the matter proceeded ex-parte on the date of hearing for non-attendance on the part of the Defendants and their counsel. As stated above, the hearing of the matter had been postponed severally at the instance of the Defendants, until when the court directed that the matter do proceed in their absence. Judgment was thereafter entered in favour of the Plaintiff as the evidence went undefended.
28. Order 12 Rule 7 of the Civil Procedure Rules provides as follows:

“Where under this order judgment has been entered or a suit dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
29. Order 51 Rule 15 of the Civil Procedure Rules provides as follows;

“The court may set aside an order made ex-parte”
30. From the above provisions of the law, the trial court was well within the law to entertain the application to set aside the ex-parte judgment.
31. On the third issue, the setting aside of the judgment under Order 12 Rule 7 of the Civil Procedure Rules is typically a matter of discretion. The Applicant has to demonstrate that the trial court fettered its discretion and acted contrary to justice. This discretion has to be exercised judiciously, as was stated



the case of *Shah vs Mbogo* (1979) EA 116 quoted with approval in the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR:

“.....this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designated to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.”

32. The wording of Order 12 Rule 17, the exercise of the discretion should not be designated to assist in obstruction or delay the cause of justice. From the chronological order of events in the matter, it is doubtful that the Defendants had the intentions of having the matter be heard and to its logical conclusion.
33. To start with, the defence is a mere denial of averments by the Plaintiff in his Complaint. Further, the various opportunities the Defendants were granted to comply with Order 11 of Civil Procedure Rules causing the hearing to be adjourned is an indicator that they were bound to have the matter delayed.
34. Upon execution proceedings being commenced, the Applicant/ Objector in the application dated 10/11/2022, the Objector, one Mr. Ali Salim Awadhi stated that he was the legal owner of the property that was up for auction, and the Defendants were his tenants. He denied that they were the owners of the house but rent paying tenants.
35. It is after the said application was dismissed that the Defendants filed the application dated 06/03/2023. This time, the Defendants stated that they were the legal owners of the said house and sought to have the auction stopped. I find that the proceedings by the Objector and the filing of the application dated 06/03/2023 were meant to obstruct/ delay justice and deny the Plaintiff from enjoying the fruits of his judgment.
36. Lastly, the Defendants stated that the advocate had lost their contact and that is why he could not inform them of the hearing date. This was confirmed by the advocate in his Supporting Affidavit dated 06/03/2023. In the case of *Duale Mary Ann Gurre v Amina Mohamed Mahamood & Another* [2014] eKLR, it was held as follows: -

‘An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his Advocate to ensure the Advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate.’

37. The Defendants had the primary obligation to follow up on the matter. It was not submitted that the whereabouts of their advocate was unknown. I find that they were indolent in following up their matter and only woke up from their slumber when their home was advertised for auction.
38. For the reasons stated above, I find that the exercise of the discretion by the trial court ought to have been in favour of the Plaintiff and not the Defendants. I note that the execution process was faulted, I hereby direct that fresh execution proceedings be carried out in compliance with the law.

### **Determination**

39. Following the foregoing discourse, the upshot is that the following orders do hereby issue: -



- a. The appeal has merits
- b. The Ruling dated July 26, 2023 is hereby set aside, and substituted it with an order dismissing the Notice of Motion dated March 6, 2023
- c. The Appellant is at liberty to execute afresh and in compliance with the relevant provisions of the law.
- d. Costs awarded to the Appellant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 13<sup>TH</sup> DAY OF MARCH, 2025**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Applicant

N/A by the Respondent

M/S Salwa, Court Assistant

NB: File released to the registry. The Parties be notified and judgment be published in the e-filing platform.

