



**BAHO v ACAO (Civil Application 20 of 2014)  
[2024] KEHC 3736 (KLR) (Family) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3736 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
CIVIL APPLICATION 20 OF 2014  
MA ODERO, J  
APRIL 18, 2024**

**BETWEEN**

**BAHO ..... APPLICANT**

**AND**

**ACAO ..... RESPONDENT**

**RULING**

1. Before this court are two applications for determination as follows:-

“(1) Notice of Motion dated 3<sup>rd</sup> August, 2022 by which the Applicant BAH - O seeks for orders That:-

“(i) This Honourable Court be pleased to appoint Axis Real Estate Limited of Rahimtulla Tower No. 8, Upperhill Road, P.O Box xxxx – 00100, Nairobi, as Valuer for the purposes of ascertaining the value of the (Particulars Withheld) property and (Particulars Withheld) properties pursuant to Order Number 3 issued by this Honourable Court on 21<sup>st</sup> July, 2022.

ii. This Honourable Court be pleased to direct the Respondent to serve upon the Applicant, within seven (7) days of this order, a proper record of account of the rent that accrued from time to time on the (Particulars Withheld) Property to enable the Parties share these amounts equally, pursuant to Order Number 2 issued by this Honourable Court on 21<sup>st</sup> July, 2022.



- iii. Should the Respondent fail to comply with the order sought at prayer number (2) above, the Honourable Court be pleased to direct that the Valuer appointed further to prayer (1) above, determine the value of the rent that would have accrued on the (Particulars withheld) Property from 1<sup>st</sup> January, 2005 to 10<sup>th</sup> February, 2022.
  - iv. The Honourable Court be pleased to make such other orders and/or such directions as it considers appropriate for the proper, fair and effective determination of the matter before it.
  - v. Costs of this Application be borne by the Respondent.”
2. The application which was premised upon section 1A, 1B and 3A of the Civil Procedure Act, Order 5 Rule (7) and order 51 Rule 1 of the Civil Procedure Rules 2010 and any other enabling provisions of the law was supported by the Affidavit of even date sworn by the Applicant.
- (II) Notice of Motion dated 24<sup>th</sup> August, 2022 filed by the Respondent ACA seeking the following orders:-
- “(a) Spent
  - b. The Honourable Court be pleased to grant leave to the law firm of Messrs. Midenga & Company Advocates to act for the Respondent/Applicant herein in this matter in place of Ogwoka Ndege & Company Advocates.
  - b. Pending the hearing and determination of the application herein the Honourable Court be pleased to order a stay of execution and further proceedings and any consequential orders/decrees in the matter.
  - c. The Honourable Court be pleased to set aside the judgment Delivered on 10<sup>th</sup> February, 2022 by the Respondent/Applicant’s pleadings and he be accorded an opportunity to tender his testimony before judgment is rendered on the Applicant/Respondent’s Amended Originating Summons.
  - d. Costs of this application be provided for.
  - e. Any other, further or consequential relief that this court may deem fit and just to grant in the circumstances.”
3. The application was premised upon order 9 Rule 9 (a) of the Civil Procedure Rules Articles 25 (c), 50 (1) and 159 (2) (b) and (c) of the Constitution of Kenya 2010 and Sections 1A, 1B, 3, 3A and 80 of the Civil Procedure Act and was supported by the Affidavit of even date sworn by the Respondent.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated 25<sup>th</sup> April, 2023. The Respondent relied upon his written submissions dated 9<sup>th</sup> May, 2023 and Supplementary Submissions dated 3<sup>rd</sup> July, 2023.

## Background

5. This matter arose out of a suit filed by the Applicant seeking division of matrimonial property between herself and the Respondent. The properties in dispute between the parties are:-



- i. L.R. No. xx/x/xxx and L.R Number xx/x/xx in Nairobi (Particulars withheld) Estate (hereinafter referred to as the (Particulars withheld) Property’)
  - ii. Property (House) in (Particulars Withheld) Sub-location, East Ugenya location, Siaya County (hereinafter referred to as ‘the (Particulars Withheld) Property’)
6. The genesis of the two applications is the judgment which was delivered by Hon. Lady Justice Ali – Aroni (as she then was) on 10<sup>th</sup> February, 2022. In the said judgment which was delivered in the absence of the Respondent the High Court made the following orders:-
- “(a) A declaration that (Particulars Withheld) property and (Particulars Withheld) Property are jointly and equally owned by the Applicant and the Respondent.
  - (b) The rent that has accrued from time to time be calculated and shared equally between the parties.
  - (c) Both properties be valued to ascertain the value of each by a valuer to be jointly appointed and remunerated by the parties.
  - (d) One party may make an agreement with the other to buy off the others shares if the parties fail to agree to this arrangement both properties to be sold at market value and the proceeds shared equally.
  - (e) Rent as ordered in (b) above may be recovered from the Respondent’s share.
  - (f) Cost to the Applicant.”
7. In her application dated 3<sup>rd</sup> August, 2022 the Applicant seeks to have the above judgment/orders implemented. She seeks to have a valuer Axis Real Estate Limited engaged to conduct the valuation of the (Particulars Withheld) Property.
8. The Applicant avers that the Respondent has been unco-operative, that he had denied her access to the (Particulars Withheld) property and that the Respondent has been benefitting from all the rental income collected from that property to her exclusion.
9. The Respondent however prays for orders to have the case re-opened to enable him give his defence. He alleges that the Applicant has failed to engage him to agree on a valuer to conduct the valuation exercise.
10. The Respondent avers that that the hearing of 6<sup>th</sup> February, 2020 was conducted in his absence as his advocate failed inform him of the hearing date. That he only became aware of the judgment when the valuer was sent to him. He accuses the valuer of, overvaluing the (Particulars withheld) property.
11. Regarding the (Particulars Withheld) property the Respondent states that this is not his matrimonial home but is ancestral property acquired through inheritance which is not open to division.
12. The Respondent goes on to allege that the Applicant in her evidence failed to disclose to the trial court the fact that the couple own other joint properties in Westlands Kenya, in Colorado USA and in Bonn Germany where the Appellant currently resides. The respondent denies that the parties agreed to dispose the (Particulars Withheld) Property where he lives with his family and claims that he spent a sum of about Kshs. 80 million in renovating the said property after it was burnt down.
12. The Applicant retorts that the hearing date of 10<sup>th</sup> February, 2022 was taken by consent in court and that all correspondence relating to the matter was forwarded by her advocate to the Respondents



Advocate via email in line with the directions given by the Hon. Chief Justice following the declaration of the Global Covid-19 Pandemic which led to the scaling down of court activities.

### **Analysis And Determination**

13. The Respondent has sought leave for the firm of Messrs Midenga & Company Advocates to come on record for him after judgment. This prayer is allowed.
14. I will proceed to first consider the application dated 24<sup>th</sup> August, 2022 filed by the Respondent.
15. I have carefully perused the record of the proceedings as before the trial judge. I note that at all material times the Respondent was represented by counsel in the matter. On 17<sup>th</sup> October, 2019 in the presence of both counsel the hearing of the main suit was set down for 6<sup>th</sup> February, 2020.
16. On that day and despite the date having been taken by consent there was no representation for the Respondent. Neither the Respondent nor his Advocate attended court. The court proceeded to hear the Applicants evidence and upon closure of the Applicants case the court gave directions for filing of written submissions.
17. The Respondent did not put in any written submissions and on 1<sup>st</sup> October, 2020 the court gave directions of highlighting of the submissions.
18. Following the directions on highlighting of submissions the Hon. trial judge was transferred. The matter came before me on 3<sup>rd</sup> June, 2021 when I directed that the file be forwarded to the Hon. trial judge to enable her prepare the judgment. I further directed that the judgments would be delivered 'on notice.'
19. The file was then forwarded to the trial judge and on 10<sup>th</sup> February, 2022 the judgment was delivered. On that date there was no representation for the Respondent. However the trial judge noted that notices had been sent to both parties and proceeded to deliver the judgment.
20. The Respondent complains that he was not given an opportunity to present his defence. However on 3<sup>rd</sup> June, 2021 the court was notified that the Respondent had not participated in the trial at all.
21. The court notes that in the Initial stages of the trial Mr. Ojwang Agina Advocate acted for the Respondent. The parties attempted a settlement which attempt was not successful. Finally on 17<sup>th</sup> October, 2019 the court set a hearing date of 6<sup>th</sup> February, 2020. On the date when the hearing date was given both parties were represented in court. Therefore the Respondent through his Advocate was fully aware of the date when the suit was to be heard. Notwithstanding the fact that the hearing date was taken by consent neither the Respondent nor his Advocate attended court. The hearing then proceeded in the absence of the Respondent.
22. The Respondent now complains that he was let down by his advocate who failed to inform him of the hearing date. He claims that is why he failed to attend court and also failed to give his defence to the suit. The Respondent states that he was unaware of the date scheduled for delivery of the judgment because his Advocate did not inform him of the date for judgment.
23. I note that the judgment in this matter was delivered on 10<sup>th</sup> February, 2022. It was not until August, 2022, Six (6) months later that the Respondent filed this application seeking to re-open the case.
24. The Applicant has prayed that the judgment and orders issued by the High Court on 10<sup>th</sup> February 2022 be set aside and that he be accorded an opportunity to tender his evidence before judgment is rendered on the Amended Originating Summons.



25. In this case as stated earlier the hearing date had been taken by consent. However on the hearing date neither the Respondent nor his Advocate were in court. The learned trial Judge decided to proceed to hear the case notwithstanding their absence.
26. This Ex parte judgment was delivered by Hon. Lady Justice Ali Aroni who has now been elevated to the court of Appeal. Order 45 Rule 2 of the Civil Procedure Rules, 2010 provides as follows:-
- (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important evidence as is referred to in Rule (1), or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who pressed the decree or made the order sought to be reviewed.
  - (2) If the Judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing.
27. Therefore on the basis of order 42 Rule 2 (21) this court has the jurisdiction to hear and determine this application.
28. The grounds upon which a judgment may be reviewed and/or set aside were set out in the case of Shah -vs- Mbogo & Another [1967] E.A where the court of Appeal held that:-
- “This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accidents 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”
29. The law responding the setting aside of an Ex parte judgement is found in order 12 Rule 7 of the Civil Procedure Rules which provides that:-
- “Where under this order judgment has been entered or the suit has been dismissed, the court, on application may set aside or vary the judgment or order upon such terms as may be just”
30. The law makes a distinction between a default judgment that was regularly entered and an Ex parte judgment entered irregularly. [see James Kanyiita Nderitu & Another -VS- [2016] eKLR]
31. In this case the Ex Parte judgment was entered regularly as the Respondent had been served, had proper notice of the proceedings and the hearing date and indeed the Respondent had all along fully participated in the proceedings through his Advocate.
32. In the James Kanyiita Nderitu Case [supra] the court of Appeal stated that
- “In a regular judgment the defendant will have been duly served with summons 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.”
33. In such a situation the court will in exercising this discretion consider the reason why the defendant failed to defend the suit and will also consider whether the defendant has a triable defence.
34. In this case the Respondent has explained that the Advocate handling his matter left the firm of Ogwoka Ndege & Co. Advocates. This is not denied by the Applicant. I have seen in the file text messages between the Respondent and his Advocate where the Respondent chastises his Advocate for



failing to alert him of the hearing date for the case. The Advocate responds that he had left the law firm which was handling the matter in 2019 and therefore had no authority to call and/or communicate with his former clients. [See Annexures 'ACA02 and 3a' to the Notice to cross examine dated 15<sup>th</sup> February, 2023].

35. The Advocate further confirms that he did receive information relating to the Respondents case but states that he merely alerted his former boss of the same. He did not alert the Respondent personally.
36. As stated earlier the Respondent had participated fully in the proceedings upto the point of hearing. He had filed a reply to the summons and had filed a detailed witness statement. It is clear that the Respondent fully intended to defend the suit.
37. The Respondent cannot be blamed for the confusion which arose when the Advocate who was handling the matter left the law firm on record. It was this exit from the law firm which led to the failure to inform the Respondent of the date for hearing.
38. I have perused the Replying Affidavit dated 9<sup>th</sup> May, 2023 as well as the Further Affidavit of even date both sworn by the Respondent. I am persuaded that they raise pertinent issues which the Respondent ought to be granted an opportunity to ventilate in a court of law.
39. It is an underlying principle of an hearing that no man should be condemned unheard. Indeed Article 50 (1) of *the Constitution* of Kenya 2010 upholds this right to a fair hearing which of necessity involves the right and opportunity to present a defence.
40. I am satisfied that sufficient cause has been advanced to have the judgment of 10<sup>th</sup> February, 2022 set aside.
41. The Respondent deserves an opportunity to present his defence and to have the case decided on merit.
42. In the circumstances I find that the failure of the Defendant to attend court on the hearing date was excusable. It was not an omission borne out of laxity or indifference. The omission was inadvertent and arose due to the failure of the law firm on record to put their house in order when the Advocate handling the Respondent case left the firm. As such. The respondent was not informed of the hearing date. I therefore find merit in the application to set aside the judgment to allow the Respondent an opportunity to present his defence.
43. Having found as above, I will not consider the Application dated 3<sup>rd</sup> August, 2022 seeking to enforce the judgment of 10<sup>th</sup> February, 2022.
44. Finally this court makes the following orders
  - (1) The law firm of Messrs Midenga & Company Advocates is granted leave to act for the Respondent/Applicant in place of the firm of Ogwoka Ndege & Company Advocates.
  - (2) The Respondent is granted an opportunity to present his defence/evidence to the Amended Originating Summons dated 10<sup>th</sup> April, 2014.
  - (3) The matter to be set down for hearing within forty (40) days of the date of this judgment.
  - (4) The Notice of Motion dated 3<sup>rd</sup> August, 2022 is dismissed in its entirety.
  - (5) Each party to meet their own costs.

**DATED IN NYERI THIS 18<sup>TH</sup> DAY OF APRIL, 2024**

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**MAUREEN A. ODERO**  
**JUDGE**

