



**Gan Elma Limited & another v Joseph (Civil Case E003 of 2022)
[2024] KEHC 13714 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 13714 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE E003 OF 2022
SN MUTUKU, J
SEPTEMBER 18, 2024**

BETWEEN

GAN ELMA LIMITED 1ST PLAINTIFF

MARGARET WAITHERA SOY 2ND PLAINTIFF

AND

VICTORIA MWIKALI JOSEPH DEFENDANT

RULING

Background

1. The background of this matter is well captured in the Ruling of this Court delivered on 25th July 2022. In summary this court, after satisfying itself that the Defendant had been properly served with the Plaint, the Verifying Affidavit, Witness Statements, Summons to Enter Appearance and the Notice of Motion under Certificate of Urgency on 28th February 2022 and accepted service by appending her signature on the documents served on her, and that the Defendant had failed to enter Appearance, this Court entered judgment for the Plaintiffs in the liquidated sum of Kshs 23,740,199 with interest from 17th February 2022.
2. The Court further directed the Plaintiffs to set the suit down for hearing in the remainder of the other claim for general damages. It is that Ruling that has motivated the Defendant to move this court in the current application.

Notice of Motion

3. The Notice of Motion application is dated 27th January 2023. It is anchored on Article 50(1) and 159 of *the Constitution*, Order 10 Rule 11, Order 5 Rule 8, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and section 1A, 1B and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The Defendant seeks the following reliefs:



- a. Spent.
 - b. That, the judgment entered against the Defendant/Applicant on the 25th July 2022 and any consequential orders be set aside.
 - c. That, pending the hearing and determination of the Application inter partes, this Honourable Court be pleased to stay execution of the Judgment entered on 25th July 2022 against the Defendant/Applicant.
 - d. That, the Defendant/Applicant be allowed to file her Defence and defend the suit, further the annexed Draft Statement of Defence be deemed as duly filed and served upon payment of the requisite court filing fees.
 - e. That, costs of the Application be in the cause.
4. In support of the Application, the Defendant has stated that she instructed Mr. Njuguna from M/S Njuguna J.K & Company Advocates to represent her in this matter expecting him to enter appearance and file Defence on her behalf but this was not done; that Mr. Njuguna also failed to inform her that she was required to appear in court on 26th May 2022 to cross-examine the process server and that she has instructed another advocate Messrs. Igeria & Ngugi Advocates to represent her.
5. She further claims that Mr. Njuguna failed to inform the court that there is another suit on the same subject matter filed in the Chief Magistrate's Court at Kajiado being CMCC No. E080 of 2021 Gan Elma Limited v Michael Mulei and Victoria Mwikali Joseph and therefore this matter is sub judice. She claims that she is a victim of bad representation from an advocate and urged that this court allows her application in the interest of justice as the Plaintiffs will not be prejudiced.

Replying Affidavit

6. The Application is opposed through a Replying Affidavit sworn by the 1st Plaintiff and filed in court on 2nd May 2023. She has deposed that the Defendant has not advanced good reasons to warrant this court to exercise its discretion in her favour; that the deliberate delay and failure to enter appearance and file a defence is inexcusable and that it is not enough for the Defendant to blame her advocate, she is required to show tangible steps she took to follow up on the matter which she has failed to do.
7. It is further deposed that the Defendant has been indolent in following up the progress of her case with her advocate. She has deposed that it is not true as deposed by the Defendant that she has filed a similar suit in the Chief Magistrate's because in CMCC No. E080 of 2021 Gan Elma Limited v Michael Mulei & Victoria Mwikali Joseph was seeking an injunction restraining the Defendants from interfering with her quiet possession of the property and not a claim for malicious damage to property and damages for trespass and conversion and that she stands to suffer substantially and irreparably.
8. She has deposed further that the annexed draft defence raises no trial issues to warrant exercise of this court's discretion; that the application is an abuse of court process and that should the court be inclined to set aside the judgment, it should do so on condition that the Defendant deposits the full decretal amount as a condition for setting aside the default judgment.
9. The Defendant filed a supplementary affidavit on 9th October 2023 in response to the Replying Affidavit. I have read the contents of the same which contents reiterate the earlier averments.



Written Submissions

10. The application was canvassed through written submissions. The Defendant files submissions on 9th October 2023. She has reiterated the contents of her pleadings and submitted on whether this court should exercise its discretion in favour of the Applicant. She urges that the law allows for setting aside of default judgment on such terms as are just and cited International Air Transport Association & another v Roskar Travel Limited & 3 others [2022] KEHC 200 KLR and Patel v EA Cargo Handling Services Ltd (1974) EA 75.
11. She submitted that mistakes of counsel should not be visited upon an innocent litigant. On this she relied on Joseph Wekesa Tulula v Hilda Wanjiru Tulula Kitale ELC Case No 52 of 2013 and Belinda Muras & 6 others v Amos Wainaina [1978] KLR. She has submitted that her defence raises triable issues which ought to be determined by this Court on merit.
12. The Plaintiffs' submissions are dated 8th December 2023. They too have submitted on whether this Honourable Court should set aside the default judgment entered on 25th July 2022. They have submitted that this court should not set aside the default judgment and relied on James Kanyiika Nderity & another v Marios Philotas Ghikas & another [2016] eKLR and Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002, among other authorities.
13. They have submitted that a case belongs to the litigant; that it is not sufficient to blame counsel for failure to follow up on the matter without demonstrating tangible steps taken by the litigant to follow up the matter. They submitted that there was inordinate delay from the time the default judgment was entered on 25th July 2022 to 27th January 2023 when this application was filed and that on the date the Ruling was delivered, counsel for the Defendant was present in court but he did not file this application immediately thereafter.
14. They submitted that the draft defence does not raise any triable issues and that granting the orders sought will greatly prejudice the Plaintiffs.

Analysis and Determination

15. The power to set aside default judgment is discretionary. Order 10 Rule 11 provides that:

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.
16. I have considered the Application under determination. I have read and understood the application, the Replying Affidavit, the Supplementary Affidavit and the submissions of parties. I have also read the court record. The record shows that after this court declined to certify the Notice of Motion dated 17th February 2022 and directed that it be served, Mr. Njuguna for the Defendant and Ms Agwata for the Plaintiff attended court on 30th March 2022. Service of the Plaintiff was contested by Mr. Njuguna. I directed that the process server should attend open court session for cross-examination on 26th May 2022.
17. On that date, Mr. Njuguna did not attend court. He was represented by Ms Wambura. During call over of the cause list Ms Agwata informed the court that the process server was present for cross-examination. Ms Wambura did not mention to the Court that she was not present in Kajiado but was addressing the Court virtually. She was aware that the court was to proceed to open court for cross examination. During open court session, it was not possible to cross examine the process server due to non-attendance of the counsel for the Defendant. Ms Agwata proceeded to address the court on the pending application. I set the date for Ruling on 23rd June 2023 but before that ruling could be



delivered, the Defendant filed an application on 15th June 2022 to arrest the ruling. It was argued by Ms Wambura and Ms Agwata on 4th July 2022. I prepared the Ruling and delivered it on 25th July 2022 in the presence of Ms Wambura for the Defendant and Ms Agwata for the Plaintiff.

18. The matter was set down for formal proof on 13th December 2022 on which date Ms Wambura for Mr. Njuguna for the Defendant informed the court that Mr. Njuguna had filed an application dated 9th November 2022 to cease from acting for the Defendant. The reasons advanced were that counsel was not able to obtain instructions from the Defendant to proceed with the matter and that she was unreachable.
19. I directed that the Defendant be served to attend court and adjourned the matter to 21st December 2022 to allow the Defendant to be served to attend court. On that date, Ms Wambura informed the court that the Defendant had been served and was present in court. Indeed the Defendant was present and she informed the court that she was not opposed to the application to cease from acting on her behalf. Ms Agwata did not oppose the application. It was allowed.
20. The Defendant asked for time to engage another advocate. I granted her more time until 18th January 2023 on which date a Mr. Mwangi appeared for the Defendant. His Notice of Appointment was not available on record and I allowed him more time until 19th January 2023 to place it on record. On 19th January 2023, Mr. Mwangi sought more time to get full instructions from the Defendant. I adjourned the matter to 31st January 2023. On 31st January 2023, the Defendant brought another advocate, Mr. Mbaji. By this date, the Defendant had already filed the current application.
21. I have gone to this great length of quoting the record of the court to show how events unfolded in this matter. The issue that requires my attention is whether the Defendant has demonstrated that she deserves the orders she is seeking. Put differently, has the Defendant placed sufficient material before the court to persuade this court to exercise its discretion in her favour?
22. In *James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another* [2016] eKLR, the Court expressed itself thus:

“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...”
23. The factors that I have to take into account in determining whether to allow this application or not are clearly specified in the above case. What are the reasons for the failure of the Defendant to file memorandum of appearance or defence? The Defendant blames her counsel at the time. But as submitted, the case belongs to her. She had to remain vigilant and make constant follow-up efforts. The record shows that she was not always available to instruct her advocate. This court, as record shows, did all within its power to give the Defendant more time to sort out her issues without her taking the cue to do so. It forced her counsel on record at the time, Mr. Njuguna to seek orders to cease from acting for her for the very reason that she was not giving him the required instructions to proceed with the matter.



24. Secondly, it is clear that the Defendant was having trouble with the lawyers she was instructing. This is evidenced by the changes of advocates for the Defendant. Could it be that they were all having trouble getting instructions? It is not lost to this court that the Defendant has not placed any material before the court to show any tangible steps she took to follow up the matter with her lawyers.
25. Secondly, there is an inordinate delay. The Defendant was represented when the default judgment was entered on 25th July 2022. From that date, the Defendant took time until 27th January 2023 after changing legal counsel three times. That is almost 6 months after the order of default judgment. From the record and as stated in the ruling of 25th July 2022, the Defendant was properly served and she accepted served by appending her signature to the documents which included Plaintiff and Summons to Enter Appearance. The Summons to Enter Appearance clearly specified that the Defendant was required to enter appearance within 15 days from the date of service.
26. In addressing the issue that mistakes of counsel should not be visited on an innocent litigant, I am persuaded by *Savings and Loans Limited v Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002*, where the Judge expressed himself as follows:
- “whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates’ failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such Advocate’s failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progress of her case. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.
27. While I am alive to the fact that no case is similar to another and that each case should be determined on its own peculiar circumstance, I blame the Defendant for being indolent and in delaying taking action in this matter. As stated above, this court went to great lengths to accommodate the Defendant to be present in court. There is no evidence of any effort on her part to ensure that appropriate action was taken on her part to avoid delay in filing this application.
28. I further find that the Plaintiffs will be greatly prejudiced by the orders sought if this court were to grant them. Consequently, it is my finding, and I so hold, that the Defendant has failed to persuade this court that she deserves the orders she is seeking. Her conduct as shown in this ruling portrays an indolent party who is not willing to facilitate the court to expeditiously resolve this dispute.
29. The Notice of Motion dated 27th January 2023 is hereby dismissed with costs to the Plaintiffs. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 18TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

