



**Mutio v Muthoka (Civil Appeal E044 of 2022)
[2023] KEHC 17449 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E044 OF 2022**

RK LIMO, J

MAY 17, 2023

BETWEEN

JAMES M. MUTIO APPLICANT

AND

LAZARUS K.D. MUTHOKA RESPONDENT

*(An application dated 30/09/2022 seeking this Hon. Court for inter alia,
Orders for the suspension of the Orders for committal to civil jail, setting
aside of the proceedings and an Order for the subordinate Court Proceedings.)*

RULING

An application dated 30/09/2022 seeking this Hon. Court for inter alia, Orders for the suspension of the Orders for committal to civil jail, setting aside of the proceedings and an Order for the subordinate Court Proceedings.

1. Before this Court is an application by way of Notice of Motion dated 30th September, 2022 where James M. Mutio, the applicant herein, seeks the following orders/reliefs:
 - a. Spent
 - b. That there be suspension of the orders of the committal to civil jail and consequential orders of the Resident magistrate against the appellant pending the hearing of the application
 - c. That this honourable court do set aside the proceedings herein as the same are a nullity and violation of the applicant/appellant right to a fair hearing
 - d. That under the supervisory jurisdiction of the higher court over sub-ordinate courts, the proceedings, file and records of all the ruling in respect of CMCC No. E120 of 2022 be moved to this court to aid in the determination of the appeal



- e. That this honourable court be pleased to make such orders as it thinks just, fit and expedient to award in the circumstances
 - f. That the costs of this application be provided for.
2. This motion is supported by the following grounds as listed on the face of the application namely;
 - i. That the applicant has an arguable appeal and has high chances of success and that if he continues serving jail, the appeal will be rendered nugatory.
 - ii. That the applicant is presently serving civil jail and stands to suffer substantial loss unless stay is granted.
 - iii. That the applicant was condemned unheard in Kitui CMCC No. 120/22 and has appealed against it.
 - iv. That the trial court violated the applicant's constitutional rights as envisaged in Article 50 of Constitution of Kenya 2010.
 - v. That his committal to civil jail was un-procedural because the law was disregarded.
 - vi. That his job is at risk if he continues serving in jail.
 3. The applicant has supported his application with an affidavit sworn on 30th September, 2022 and a supplementary affidavit sworn on 21st October, 2022.
 4. The Applicant avers that he was never served with summons and plaint in the Lower Court and was gotten by surprise when he was confronted with execution proceedings.
 5. He contends that he instructed his Counsel to apply to have the interlocutory judgement set aside but the file reportedly got misplaced before the application was heard it resurfaced when the costs were assessed.
 6. He claims he was not served with Notice of judgement or bill of costs, decree and even the Notice to Show Cause.
 7. He claims that the amount in issue is colossal and he should have been accorded a chance to defend himself adding that what was borrowed was Kshs. 300,000 and does not understand how the amount jumped to Kshs. 600,000 in interests.
 8. He avers that the Respondent is extorting money from him which he contends is an illegality adding that he has a good defence.
 9. He avers that he never got a chance to ventilate issues on his application to set aside the exparte judgement because the court process in the lower court were un-procedural as the application to set aside judgement was placed before another court as the respondent allegedly pushed for the assessment of costs with a view to execution.
 10. He avers that his appeal is about the procedure and irregularities in the proceedings in the lower court.
 11. He submits that he never got the opportunity to file his defence and was condemned unheard. He prays that the proceedings in Kitui CMCC No. E120 of 2022 be stayed and further seeks that this court invokes its supervisory jurisdiction with a view to protecting his right to a fair trial which right he claims was violated. Towards that end, he asks this court to call for the proceedings from the Lower Court to ascertain its correctness and make appropriate orders.



12. The application is opposed by the Respondent vide his Replying Affidavit sworn on 11th October 2022. He contends that there is no appeal filed by the applicant, that the applicant's application dated 29th July, 2022 remains unprosecuted and that the court's directions to have the application served and heard were not complied with.
13. The Respondent disputes the Applicant's claim that there was no service of summons and avers that the Applicant was indeed served with the same which resulted with the applicant's counsel entering appearance on his behalf but after the interlocutory judgment was entered. The memorandum of appearance is exhibited as KDM-2. The Respondent avers that this application is vexatious and has annexed an alleged admission of liability of the money owed as exhibit LKDM-3.
14. The Respondent in his written submissions through Counsel, reiterates that there is no appeal on record.
15. He insists that the applicant's application to set aside interlocutory judgement was not served or prosecuted despite the directions issued by the trial court. It is the Respondent's case that the applicant is not entitled to the orders sought in this application.
16. He also contends that the application before court offends Section 65 of the Civil Procedure Act as well as Order 42 Rule 1 & 2 of the Civil Procedure Rules on the form of the Appeal submitting that there is no judgement or ruling from the trial court to warrant an appeal because the applicant did not participate in the proceedings on the lower court.
17. This court has considered this application and the response made. The applicant is challenging the regularity of the proceedings in the Lower Court and seeks suspension of his committal to civil jail as well setting aside of the proceedings in the lower court.
18. From the onset, I must observe that the applicant appears a bit convoluted because on one hand, he holds that he has appealed against the Order of Hon. Asiago delivered on 27th September, 2022 and that basis, his committal to civil jail should be lifted/suspended pending the hearing and determination of that appeal. On the other hand, he insists that the proceedings leading to his committal were irregularity and that his right to a fair trial was violated. On that basis, he seeks the intervention of this court through its supervisory jurisdiction.

In other words, the applicant has invoked both the appellate and the supervisory jurisdiction of this court and from the pleadings placed before me, he appears uncertain as which route to follow or pursue.

The applicant in his prayers also appears cloudy and the drafting of the application could have served the purpose better with some clarity.
19. However, having said that, this Court is minded to serve the ends of justice by administering fairness and justice as stipulated under Article 159(2) (d) of the Constitution of Kenya 2010 and specifically in line with prayer (e) of this application.
20. In Order to do that an overview of the proceeding in the Lower Court going by the record before me is necessary.
21. This Court has called for the Lower Court file and has perused through it.
22. The record shows that the suit in the Subordinate Court was filed through a plaint on 21st April, 2022
The Plaint and Summons to enter appearance were served upon the Defendant (the applicant herein) on 25th April 2022 as evidenced by the Defendant's signature inscribed at the back of the summons



document. There is an Affidavit of Service filed on 10th May 2022 by Process Server Boniface M Kyenza confirming service of Plaintiff and Summons to enter appearance on the Defendant.

23. As per Order 6 rule 1 and Order 7 Rule 1 of Civil Procedure Rules, the Defendant had 15 days to enter appearance from 25th April 2022 and then thereafter another 14 days to file and serve Statement of Defense.

24. Order 6 Rule 1 of the Civil Procedure Rules provides as follows;

“Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.”

25. The applicant had 15 days from 25th April 2022 to enter appearance which means he was to file his memorandum of appearance by 10th May, 2022 or hereabout and then file his defence by 24th May, 2022. Order 7 Rule 1 of the Civil Procedure Rule provides;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

The Respondent appears to have moved fast because on the 10th May, 2022 which was the last day the Applicant was required by law to enter appearance, he requested for interlocutory judgement vide a request for judgement dated 10th May, 2022.

26. In that request for judgment dated 10th May 2022, the Plaintiff/Respondent requested for judgment against the Defendant/Applicant which indicated “who having been duly served with the summons to enter appearance together with a copy of the Plaintiff, has failed to enter appearance and/or file a defence within the prescribed time.” The Plaintiff/Respondent prayed “a final judgment for Kshs 900,000/- together with costs and interest of this suit from 7/2/2020 till payment in full”. That request was made under Order 10 Rule 5 of the Civil Procedure Rules which provides that: -

“Where the plaintiff makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff’s right to proceed with the action against such as have appeared.”

27. This Court finds that request of judgement was flawed in two aspects namely: -

a. The request was made rather prematurely because it was required as per the summons to enter appearance “within 15 days” from 25th April, 2022. Going by the calendar, 15 days were to expire on the midnight of 10th May, 2022. Time had not therefore lapsed.

b. The request for judgement was based on a liquidated demand and so even if there was a default to enter appearance and defence the applicant ought to have made his request for judgement in default pursuant to Order 10 Rule 4(1) of the Civil Procedure Rules which provides as follows: -

“Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together



with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.”

28. Nonetheless, pursuant to that request, the court entered ex-parte judgment as prayed for in the plaint on 12th May 2022 on the basis that the Defendant/ Applicant having been served, had failed to enter appearance or file a defence within the stipulated period of time.
29. Though the trial court entered exparte judgement on 12.05.2022 after the statutory period for entering appearance by the applicant had expired, it is clear that the court was moved prematurely. As I have observed above, the applicant upon service, on 25th April, 2022 had until the midnight of 10th may, 2022 to enter appearance and until 20/5/2022 to enter defence. The Applicant through Counsel belatedly filed a Notice of appointment on 24th June, 2022 after expiry of the statutory period.
30. I have considered the frantic claims by the applicant that he was not served but the same in my view is unfounded because the affidavit of service clearly shows he was served and he clearly appended his signature at the back of the summons on 25th April, 2022.
31. The applicant has in fact not disclosed how he learnt of the case and instructed his Counsel to file Notice of Appointment on 24th June, 2022.
32. Following issuance of the ex-parte judgment on 12th May 2022, counsel for the Plaintiff/Respondent sought supply of the decree and certificate of costs vide letter dated 1st July 2022. The decree was extracted on 8th August 2022. Thereafter execution of the decree ensued.

33. Order 22 Rule 6 of the [Civil Procedure Rules](#) provides;

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days’ notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution” (emphasis added).

34. This Court has perused through the record of the Lower Court file which is fairly small. There is no record on the file indicating that a notice prescribed under Order 10 Rule 6 of the [Civil Procedure Rule](#) as stipulated above was ever served on the applicant or his Counsel.
35. This Court also finds that there is another anomaly which is not clearly explained. There is an application dated 29th July, 2022 filed under certificate on 2nd August 2022 by the applicant asking for inter-alia setting aside of the ex-parte judgement as well as leave to file defence out of time. That application was placed before Court on 3rd August, 2022 and the court certified the matter urgent and scheduled inter- partes hearing for 10th August, 2022. Before the application was canvassed, the record shows that the Respondent/decree holder moved the court for assessment of costs on 8th August, 2022 which was done same day and the decree issued also the same day. The Respondent then applied for execution and the applicant was committed to civil jail on 27th September, 2022 upon which he moved this Court vide the application now before court.



36. The applicant avers that there was foul play in Lower Court which frustrated his efforts to prosecute his application dated 29th July, 2022.

This court has not found any evidence of expression of frustrations in terms of a letter or any document indicating that the applicant's counsel turned up in court on 10th August, 2022 as directed. Nonetheless, this court finds that the trial court did not bring up the matter on 10th August, 2022 if it was scheduled to be in court that day. That omission by the trial court indicates that either the matter was not listed or the file was misplaced as advanced by the applicant. Either way, it is apparent that the application to set aside the *ex parte* judgement never saw the light of the day and the applicants right to be heard was therefore breached. That right to be heard is one of the fundamental rights well enunciated under Article 25 of the *Constitution* of Kenya and as such it must be protected by this Court.

37. This court finds that in the interest of justice, it is fair and expedient to invoke the supervisory jurisdiction of this court which I hereby do by setting aside the order issued on 27.09.2022 by the trial court.

38. This Court has already found as observed above that the request for judgement in default of appearance and defence was filed prematurely that is some hours before statutory period expired. I find that it would be merely academic to direct the parties to go and canvass the Notice of Motion dated 29th July, 2022. For purposes of expediency, this court marks both that application dated 29th July, 2022 together with the appeal herein as spent with no order as to costs.

39. The interlocutory judgement entered on 12th May, 2022 is hereby set aside. The applicant is given 7 days from the date of this ruling to enter appearance and defence. Cost of this application shall be in cause in the lower court.

DATED, SIGNED AND DELIVERED AT KITUI THIS 17TH DAY OF MAY, 2023.

HON. JUSTICE R. K. LIMO

JUDGE

