



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gituma v Lintari & another (Civil Appeal E099 of 2023)  
[2023] KEHC 23289 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23289 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E099 OF 2023  
TW CHERERE, J  
OCTOBER 5, 2023**

**BETWEEN**

**GEORGE MUGAMBI GITUMA ..... APPLICANT**

**AND**

**MUTWIRI JACOB LINTARI ..... 1<sup>ST</sup> RESPONDENT**

**FAITH NTARARA MUKETHA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

1. The parties in this matter concur that applicant did not defend Meru CMCC 60 of 2019 and that the judgment dated February 23, 2022 in favour of respondents was an *ex parte* judgment.
2. By application dated April 6, 2023, applicant sought the setting aside of the *ex parte* judgment and leave to defend the suit on grounds that he had not been served with the court processes.
3. By a ruling dated June 14, 2023, the said application was dismissed and applicant was ordered to liquate the decretal sum in instalments grounds that:
  1. Applicant had become aware of the judgment on November 28, 2022 when he was arraigned under a warrant of arrest
  2. Applicant had on November 28, 2022 filed an application to pay the decretal sum in instalments and did not file application to set aside the *ex parte* judgment
  3. The application to set aside the *ex parte* judgment was filed with inordinate delay of 13 months
  4. By notice of motion dated June 22, 2023 filed on June 29, 2023, applicant seeks stay of the ruling dated June 14, 2023 on the grounds that respondents are threatening to execute



the exparte judgment and his appeal will be rendered nugatory. Annexed to the application is applicant's affidavit sworn on June 22, 2023 to which is annexed a memorandum of appeal.

5. Respondents opposed the application by way of a replying affidavit sworn by the 1<sup>st</sup> respondent on July 24, 2023 in which he gives a chronology of the proceedings before the trial court. He urges that in the event the application is allowed, the applicant be directed to deposit half of the decretal sum.
6. I have considered the application in the light of the affidavits on record and annexures thereto.
7. The crux of the matter really is whether applicant ought to have been given an opportunity to defend himself against the respondents' claim.
8. The rules of natural justice "audi alteram partem", hear the other party, require that no man/woman may be condemned unheard. (See *Msagha v Chief Justice & 7 others* Nairobi HCMCA No 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553).
9. Consequently, when applicant herein claims that that right to be heard has been denied, his appeal cannot be said to be frivolous especially in view of the fact that there are in force orders directing him to settle the decree arising out of the exparte judgment.
10. From the foregoing, I find that the notice of motion dated June 22, 2023 and filed on June 29, 2023 has merit and it is allowed in the following terms:
  1. The ruling dated June 14, 2023 issued in Meru CMCC 60 of 2019 is stayed pending the hearing and determination of this appeal
  2. Applicant is directed to file and serve the record of appeal within 30 days from today's date
  3. Mention for directions on November 23, 2023 to confirm compliance with these orders and for further directions
  4. Costs of this application shall abide the costs of the appeal

**DATED AT MERU THIS 05<sup>TH</sup> DAY OF OCTOBER 2023**

**WAMAE.T. CHERERE**

**JUDGE**

**Appearances**

Court Assistants - Kinoti/Munene

For Appellant/Applicant - Ms. Gumato for Kiogora Mugambi & Co. Advocates

For Respondents - Mr. Nyantika for J.Okerosi Ochako & Co Advocates

