



**Ngaara v Njaaga (Environment and Land Case E337 of 2023)  
[2024] KEMC 180 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEMC 180 (KLR)

**REPUBLIC OF KENYA  
IN THE CHIEF MAGISTRATE'S COURT (MILIMANI LAW COURTS)  
ENVIRONMENT AND LAND CASE E337 OF 2023  
P ACHIENG, CM  
NOVEMBER 21, 2024**

**BETWEEN**

**PETRONILLA NJERI NGAARA ..... PLAINTIFF**

**AND**

**ANNE WANDIA NJAAGA ..... DEFENDANT**

**RULING**

1. The Defendant filed the application dated 19th July 2024 seeking the following orders;
  1. Spent
  2. Spent
  3. Spent
  4. The ex-parte Judgment entered on 4/4/2024 and the subsequent decree issued herein against the Defendant be set aside and the Defendant be allowed to file her Defence within 14 days from the date of the Ruling resulting from this application.
  5. Costs of the application be in the cause.
2. The application is premised on grounds on its face and is supported by an Affidavit sworn by the Defendant/Applicant. The Plaintiff/Respondent filed a Replying Affidavit in response to the application. The application was canvassed by way of written submissions.
3. I have considered the application, the Replying Affidavit filed and the written submissions. The Defendant/Applicant basically states that on 27<sup>th</sup> October 2023, she was served with Summons to Enter Appearance and Plaint. While at Makadara Law Courts around that time, she met a person by the name of Juma who misrepresented to her that he was an advocate, and she engaged him to handle the matter. She was surprised when she was recently served with a Notice of Entry of Judgment. She



made persistent calls to the said Juma but the calls were not going through as the number appears to have been disconnected.

4. In reply to the application, the Plaintiff/Respondent states inter alia that the Defendant/Respondent has not produced any evidence of having instructed an advocate. The Defendant further states that a law suit belongs to a party and not an advocate and there is no reason that has been advanced as to why the applicant could not follow up on the progress of the case after purportedly giving instructions to file defence.
5. Order 10 rule 11 of the Civil Procedure Rules provides that an interlocutory judgment in default of appearance or defence may be set aside. It states as follows:

"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."

6. It is within the Court's discretion to set aside an interlocutory Judgment. Courts are guided by the provisions of Article 159(2)(d) of the Constitution and Section 1A and 1B of the Civil Procedure Act in administering justice, the focus being on substantive justice, rather than procedural technicalities, and the just, efficient and expeditious disposal of cases. In the case of Times U Savings and Credit Co-Operative Society Limited v Njuki & another (Civil Appeal E033 of 2021) [2022] KEHC 3012 (KLR) (12 May 2022) (Judgment), the Court held as follows;

".....the court has power to set aside the interlocutory judgment and allow the appellant herein to file a suitable defence. However, such leave is not to be granted as a matter of course. The court must satisfy itself that there is a good explanation that has been offered to set aside such judgment and upon such terms that it would deem fit in the circumstances for the reason that such action would definitely be taking a plaintiff back in time causing delay in the conclusion of her case especially where the matter had proceeded to formal proof and a judgment given.

7. In the instant case, the defendant states that she engaged a person who she believed was an advocate to represent her in the suit, but the person did not take any action in the matter. It appears however that she was not keen to follow up the matter with the said person to ensure that action has been taken in defending the suit. That is not however to say that the doors of justice are not open to her. It will be against the rules of natural justice to deny her a hearing on that basis. In the case of Winnie Wambui Kibinge & 2 Others v Match Electricals Limited Civil Case No. 222 of 2010 the Court held that:

"It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit."

8. In the case of, Sebei District Administration v Gasyali & others (1968) EA 300 Sheridan J. observed that:

"The nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court"



9. In the case of *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR the Court held that:

"If the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away."

10. In the case of *Patel v East Africa Cargo Handling Services Ltd* (1974) EA 75 Sir Duffus stated as follows:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed. It means as Sheridan J put it "a triable issue" that is, an issue which raises a prima facie defence and which should go to trial for adjudication"

11. Having considered the present application in totality and being guided by the above decisions, and in furthering the overriding objective under Order 1A of the *Civil Procedure Act*, the Court will exercise its discretion in favour of granting the Defendant/Applicant an opportunity to be heard in the suit. The present application is therefore allowed as follows;

- a. The default Judgment entered against the Defendant/Applicant on 4<sup>th</sup> April 2024 and all other consequential orders made thereto are hereby set aside.
- b. The Defendant/Applicant is ordered to file and serve her Statement of Defence within 14 days from the date of this ruling failure to which the order setting aside the interlocutory Judgment shall stand vacated.
- c. The Defendant/Applicant is condemned to pay throw away costs of Ksh. 15,000/= to the Plaintiff/Respondent within 21 days from the date of this ruling failure to which the order setting aside the interlocutory Judgment shall stand vacated.
- d. Costs of the application shall be in the cause.

**DATED DELIVERED AND SIGNED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER 2024**

In the Presence of:

Mr. Kairu for Plaintiff/Respondent

Mr. Magara for Defendant/Applicant

Court Assistant - Newton

**HON. P. ACHIENG**

**CHIEF MAGISTRATE**

