



REPUBLIC OF KENYA



**Evans v Kiswii (Environment & Land Case 42 of 2016)  
[2024] KEELC 328 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 328 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 42 OF 2016  
A NYUKURI, J  
JANUARY 31, 2024**

**BETWEEN**

**MUNGAI MBUGUA EVANS ..... PLAINTIFF**

**AND**

**GEDION MAINGI KISWII ..... DEFENDANT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 31<sup>st</sup> August 2023 filed by the defendant seeking the following orders;
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to allow the firm of R. K. Mutua & Company Advocates to come on record for the defendant/judgment debtor in place of L. M. Wambua & Company Advocates.
  - d. Spent
  - e. That the Honourable Court be pleased to set aside the judgment entered on 4<sup>th</sup> May 2022 against the defendant/judgment debtor.
  - f. That costs of this application be provided for.
2. The application is premised on the affidavit sworn by Gedion Maingi Kiswii on 31<sup>st</sup> August 2023. The applicant's case is that the plaintiff intends to evict the defendants as decreed by court; that the judgment was obtained irregularly; that the defendant's advocate failed to attend court and to communicate to the defendant the position of this matter; that when the defendant visited his



advocates soon after lifting Covid-19 restrictions, in early 2022, he was met with hostility and the advocates failed to give him updates of his matter and told him that the advocate handling his matter no longer worked in that firm. Further, that the defendant proceeded to peruse the court file only to find that judgment had already been entered against him on 4<sup>th</sup> May 2022 while his advocate failed to attend court; and that his defence is merited and he should be heard.

3. He also stated that he received news that his clients were being evicted from the suit property. He attached a letter drawn by Mungai Mbugua & Company Advocates dated 25<sup>th</sup> August 2023 to all tenants on the suit property, a copy of the judgment and decree.
4. The application is opposed. Mungai Mbugua Evans, the plaintiff/decree holder herein swore a replying affidavit dated 14<sup>th</sup> September 2023 in opposition to the application. His case is that this court is functus officio and has no jurisdiction to hear the instant application; that on 23<sup>rd</sup> September 2020, the plaintiff's counsel invited the firm of L. M. Wambua & Company Advocates to take a hearing date for their application but they failed to attend.
5. Further, he stated that on 2<sup>nd</sup> March 2021, the court allowed their application and gave a mention date in their absentia and that they were served for mention on 10<sup>th</sup> June 2021 but they failed to attend court; that on 18<sup>th</sup> June 2021, the applicant's advocates were invited to take a hearing date but they failed to attend court; that on 2<sup>nd</sup> November 2021 when this matter was mentioned in court, the defendant was absent and a hearing date for 27<sup>th</sup> January 2022 was fixed but due to their absence, the matter proceeded exparte; that they also served their submissions which elicited no response from the defendant; that judgment was subsequently entered in the plaintiff's favour and that they sent a draft decree to the defendant for approval and as there was no objection, the court issued a decree on 20<sup>th</sup> July 2022.
6. The respondent asserted that they then served a bill of costs on 7<sup>th</sup> October 2022 for taxation on 22<sup>nd</sup> November 2022, without any appearance on the part of the defence. That the applicants have not sought review or appeal of judgment almost two years after delivery of the same. He stated that no reasons have been given why the defendants advocate refused to attend court since 10<sup>th</sup> June 2021.
7. He also stated that the firm of R. K. Mutua & Company Advocates had not complied with Order 9 Rule 9 of the Civil Procedure Rules and hence their application is untenable. He stated that the current advocate purporting to represent the defendant has no defined location of service which is questionable. That the attempt to blame the advocate is inexcusable and that blaming Covid-19 is merely cunning. He stated that all the service on the defence was done physically and therefore Covid-19 cannot be blamed.
8. He stated that equity aids the vigilant and not the indolent and that if it were true that the applicant's advocates did not represent him, he would have instituted disciplinary measures against his advocate. He stated further that the application is intended to mislead the court and the plaintiff should be allowed to enjoy the fruits of his successful litigation.
9. Parties were granted the liberty to file and serve submissions within set timelines but none complied.

### **Analysis and determination**

10. The court has carefully considered the application as well as the response thereto. It is clear that two issues arise for determination, namely;
  - a. Whether the firm of R. K. Mutua ought to be granted leave to come on record for the defendant in the place of L. M. Wambua & Company Advocates.
  - b. Whether the applicant has met the threshold for setting aside exparte judgment.



11. Order 9 Rule 9 of the *Civil Procedure Rules* 2010 grants the court the power to grant leave for a party to change their advocates after judgment. The same provides as follows;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -

- a. Upon an application with notice to all the parties; or
  - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
12. Legal representation and the liberty for a party to choose or change an advocate is a Constitutional right encompassed within the right to a fair hearing and a party is free to change their advocates as they deem fit. In the instant matter, the firm of L. M. Wambua has been on record for the defendant since 2016 to date. Judgment herein was entered on 4<sup>th</sup> May 2022 when the firm of L. M. Wambua was on record. As the defendant intends to appoint the firm of R. K. Mutua to represent him, the law requires that the change of advocates after judgment be effected by an order of the court. Having considered the averments made by the applicant, I am satisfied that the has a right to change advocates and have properly invoked the provisions of Order 9 Rule 9 of the *Civil Procedure Act* and therefore deserve leave for the firm of R. K. Mutua to represent him. I therefore allow that prayer.
13. Regarding setting aside *ex parte* judgment, the jurisdiction of the court to set aside *ex parte* judgment is provided for in Order 12 Rule 7 of the *Civil Procedure Rules* as follows;

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.

14. Principles for setting aside *ex parte* judgment are well settled. In considering such application, the court ought to consider the reasons for non attendance and whether the defence raises triable issues, so as to exercise its discretion in allowing or dismissing the application.
15. In the case of *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubende* [1982-1988] KAR page 1036, the court held as follows;

The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MC Connell* [1966] EA 545 where a regular judgment had been entered the court will not usually set aside the judgment unless it was satisfied that there is triable issue.

16. Similarly, in the case of *Sebei District Administration v Gasyali & Others* [1968] EA the court stated as follows;

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.

17. In the instant matter, it is not disputed that the defence counsel was served for hearing on 27<sup>th</sup> January 2022. The applicant blames his advocate and states that it is the advocate who was hostile and refused to inform him of the progress of the suit. The plaintiff has demonstrated without any challenge



from the defendant, that he served the defence counsel on four different occasions for mentions and hearing before the matter was heard on 27<sup>th</sup> January 2022, without appearance by the defence, and subsequent to the hearing, he served the defendant again with submissions, mention notice, taxation notice, judgment notice, and draft decree but there was no appearance on the part of the defendant. Indeed the record shows that from 29<sup>th</sup> September 2020 to 4<sup>th</sup> September 2023, when the matter came up in court about ten times, there was no appearance on the part of the defendant. Therefore for three years the defendant did not bother to know the progress of his case and hence blaming his former advocate is merely a feeble excuse as the case was his and did not belong to the advocate. I therefore reject his excuse for non appearance as being unjustified. Thus the judgment on record is a regular judgment.

18. Having found that the judgment herein is regular, the next issue to consider is whether there is a triable defence on record. I have perused the defence and the same states that the defendant purchased the suit property from Mavoko Land Development Company Limited and paid the full purchase price. Noting that the vendor mentioned by the defendant is the same vendor who sold the suit property to the plaintiff, it is my view that the defence raises a triable issue on the ownership of the suit property; the question being who between the plaintiff and the defendant was sold the suit property by Mavoko Land Development Company Limited.
19. The totality of the above is that there is inordinate delay on the part of the plaintiff who filed application herein one year and four months after judgment. However as the defence raises a triable issue, I am inclined to grant him opportunity to be heard. However as his conduct of losing interest in this matter for three years and failing to follow up on its progress for those three years, forcing the plaintiff to incur attendance, service and drawing costs, he must bear the thrown away costs borne for three years by the plaintiff as well the attendant delay. In the premises, I set aside the judgment entered herein on 4<sup>th</sup> May 2022 on condition that the defendants pays the plaintiff within 30 days thrown away costs of Kshs. 150,000/-. In default, the judgment on record dated 4<sup>th</sup> May 2022 shall revert. The costs of this application are assessed at Kshs. 10,000/- shall be borne by the defendant to be paid within the same period of 30 days from today. As this matter has been in court now for about 8 years, the same to be heard expeditiously on priority basis.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31<sup>ST</sup> DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

Mr. Mwenda for plaintiff/decree holder

No appearance for defendant

Josephine - Court Assistant

