



**Muiruri v Mwangi & 2 others (Environment & Land Case
E002 of 2021) [2024] KEELC 223 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E002 OF 2021
LN GACHERU, J
JANUARY 25, 2024**

BETWEEN

JOHN NJARAMBA MUIRURI PLAINTIFF

AND

SAMUEL NDUNGU MWANGI ALIAS JOHN NJARAMBA 1ST DEFENDANT

STEPHEN IRUNGU NGUGI 2ND DEFENDANT

CATHERINE WANJIKU NDUNGU 3RD DEFENDANT

RULING

1. The 1st Defendant/Applicant herein Samuel Ndungu Mwangi, alias John Njaramba, filed this application dated 8th June 2023, premised to be brought under various provisions of law and sought for the following orders;
 - a. That the Honourable Court be pleased to stay or set aside the judgement delivered on 26th May 2023.
 - b. That this Honourable Court be pleased to enlarge time for the Applicant herein to file Defence out of time, to aid the court make full judgement with all facts of all parties.
 - c. That this Honourable Court be pleased to Re-open the case afresh in toto.
 - d. That costs of this application be provided for.
2. The application is premised on the following grounds;
 1. That the Applicant instructed the Law Firm of Chris Maina & Co. Advocates, to come on record for the 1st Defendant who filed Notice of Appointment on 15th July 2022.



2. That soon after the Applicant/1st Defendant was diagnosed with high Blood Pressure and was at home for a period of 6 months.
 3. That during the period, the Applicant was never informed of any interlocutory judgement or Formal proof hearing date.
 4. That the Applicant while attending court in Kigumo vide Criminal Case No. 790/2020 where the Applicant is charged with 2nd & 3rd Defendants, he was served with Judgement Notice, this happened on 4th May 2023.
 5. That the matter borders on land issues as captured in the 2nd & 3rd Defendant statements and its only fair that the proceedings be stayed and the 1st Defendant/Applicant be given chance to lay his case with facts.
 6. That the Court has inherent Powers to make orders as sought herein to ensure ends of justice are met and further on grounds raised in the affidavit of the applicant one Samuel Ndungu Mwangi.
 7. That in so allowing the Application herein, no prejudice will be occasioned to the parties as they too will have chance to interrogate the documents filed by 1st Defendant as well as cross-examine the 1st Defendant.
 8. That the fact that the 2nd & 3rd Defendants are charged with Criminal offence of forgery which fact was not adduced before this Court is substance enough to warrant the re-opening of this case.
 9. That the 2nd & 3rd Defendants cannot benefit from an act they are suspect of Criminal under deals thus the prayers hereof.
 10. That it is fair and just that the application be allowed as prayed.
3. The application is also supported by the Supporting Affidavit of Samuel Ndungu Mwangi, which reiterated the contents of the grounds in support of the Affidavit. He further averred that his appointed advocate, Chris Maina & Co. Advocates, failed to file a Defence to the Plaint and the Counter claim. That failure by his advocate was not his wish and that he has a good Defence as exhibited by the Draft Defence attached to the Application.
 4. He also averred that it is in the interest of justice that he seeks for a chance to prove to Court that the allegations in this case are false and he should be allowed to present evidence and witness. He urged the Court to allow his application.
 5. The application is opposed vide the Replying Affidavit of J. Mwangi Ben Advocate, who acted for the 2nd and 3rd Defendants and Plaintiffs to the counter-claim. He averred that all the parties herein were duly served in this matter, and they were all well aware of the proceedings herein.
 6. He also averred that Mr Chris Maina, Counsel for the 1st Defendant/Applicant attempted to file a Notice of Appointment dated 15th July 2022, but such notice was defective and inconsequential and may not have been served. Further that the 1st Defendant/Applicant did not file defence and the Court rightly proceeded with the matter.
 7. He also averred that the 1st Defendant/Applicant was only awoken by service of the Bill of costs served upon him by the 2nd and 3rd Defendants. It was his allegation that the Draft Defence is a sham, a smokescreen and is only meant to frustrate both the Plaintiff and the 2nd and 3rd Defendants. It was his



contention that there is no evidence of sickness or incapacitation of the 1st Defendant/Applicant and that the Applicant is hell bent on taking the Court for granted.

8. He also contended that for a fact, Judgement Notice was served upon the 1st Defendant/Applicant, on 4th May 2023. That the Applicant was also served with the Notice of Indemnity, notice of admission, statements and documents by the 2nd and 3rd Defendants on the 25th March 2022, as per the Affidavit of service marked JMB1.
9. Therefore, it was wrong for the 1st Defendant/Applicant to mislead the Court that he was never served and it was that service that prompted him to file the Notice of Appointment dated 14th July 2022. It was further contended that if the 1st Defendant wishes to contest the Judgement of the Court, he should deposit the decretal sum ordered. He further contended that the application is insincere, misconceived, frivolous and vexatious.
10. The Application was canvassed by way of written submissions. The 1st Defendant/Applicant filed his submissions, dated 4th September 2023, through the Law Firm of Chris Maina & Co. Advocates, and urged the Court to allow the instant application. The Applicant relied on Section 3A of the Civil Procedure Act which provides;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the end of justice or to prevent abuse of the process of the court’
11. He requested the Court to allow the instant application unconditionally.
12. The 2nd and 3rd Defendants /Respondents filed their submissions through the Law Firm of Kirubi Mwangi Ben & Co. Advocates and submitted that there are no plausible reasons advanced by the 1st Defendant/Applicant on why he did not bother to file his Defence or statement, having appeared on the matter on 14th July 2022. That the 1st Defendant/Applicant has not offered any evidence of sickness or incapacitation as alleged by him.
13. It was also submitted that the Draft Defence is a sham and discloses no triable issues. They urged the Court to dismiss the instant application.
14. The above being the pleadings and the rival written submissions, the Court finds that this being an application for setting aside an *ex parte* Judgement, the Court is called upon to exercise its discretion in favour of the 1st Defendant/Applicant and set aside the Judgement on record. In determining whether or not to exercise its discretion to set aside the said Judgements, the Court has to take into account the reasons that occasioned the default in appearance.
15. The 1st Defendant/Applicant was served with the Summons to enter appearance. He even appointed an advocate to appear for him, being Chris Maina & Co. Advocates. He however, failed to enter appearance, and matter proceeded for hearing in his absence. There was thus a regular judgment entered in default of filing a Defence and Appearance in court on the date of the hearing. The Court of Appeal in case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016]eKLR, summarized the criteria to be considered while the Court is exercising its discretionary powers as follows;

In regular default Judgement, the Defendant will have been duly served with summons to enter appearance or to file a Defence, resulting in default Judgement. Such a Defendant is entitled to Order 10 Rules 11, of the Civil Procedure Rules to move to Court to set aside the default Judgement 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 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 lapsed 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 others.”

16. Further in the case of *Shah vs Mbogo*(1967) EA 166, the Court of Appeal established the guiding principles that courts need to consider on an application to set aside judgment. The court held as follows;

This discretion to set aside as *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it’s not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. “29”. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique facts and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”

17. The Court of Appeal further reiterated the above principles in the case of *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75, and courts have continued to apply the above principles time and again.
18. In present case, the 1st Defendant/Applicant has averred that though he was served with summons to enter appearance and he appointed an advocate, he fell sick thereafter and did not file his Defence. That even though an interlocutory judgment had been entered, he was not served with notice of the said entry of judgement. That he was only informed of the Judgement of the Court while at Kigumo Law Courts on 4th May 2023, by the 2nd and 3rd Defendants.
19. Further that the 2nd and 3rd Defendants did not inform the Court that they have been charged with a Criminal offence of forgery over the suit property, and they cannot benefit from an act they are suspect in. The 1st Defendant/Applicant further alleged that in allowing this application, it will not prejudice any of the parties herein.
20. Though the 1st Defendant/Applicant alleges that he was sick of High Blood Pressure, there was no evidence annexed of such sickness. He had an Advocate who even after filing Notice of Appointment, did not bother with finding out what happened to the case.
21. Further the 1st Defendant alleges that he was served with Judgement Notice on 4th May 2023, at Kigumo Law Courts. The Judgment was entered on 26th May 2023. The 1st Defendant/Applicant therefore was not incapacitated from 14th July 2022, when he entered appearance upto the time of filing the instant application, as it is evident that on 4th May 2023, he found time to attend Kigumo Courts, but could not find time to attend to this court. Indeed, it is clear the 1st Defendant/Applicant took this court for granted. He only filed this application after he was served with the Bill of Costs.
22. This Court will concur with the submissions by the 2nd & 3rd Defendants that failure to by the 1st Defendant/Applicant to file his Defence was inordinate, and he cannot lament that he was not served with Interlocutory Judgement. He filed the Notice of Appointment after the Interlocutory Judgement has been entered, and he should at least have taken interest to find out what transpired in Court.



23. The principles applicable in consideration for an application to set aside a Judgement or now are well laid down in several cases. In the case of Toshika Construction Company Ltd vs Harambee Co-operative Savings & Another (2019) eKRL, the Court of Appeal held as follows; -
- a. Firstly, there are no limits or restrictions on the Judge's discretion except that if he does vary the Judgement, he does so on such terms..... The main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given to it by the rules(See Patel vs E.A. Cargo Handling Services Ltd(Supra).
 - b. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. See Shah vs Mbogo (1967) EA 116.
 - c. Thirdly, the Court of appeal shall not interfere with the exercise of the discretion of a Judge, unless it is satisfied that the Judge in exercise of his discretion has misdirected himself in some matter and as a result, has arrived at a wrong decision.....
24. From the above decisions and provisions of law, there is no doubt that the Court has power to set aside an exparte Judgement. However, such leave is not granted as a matter of course. The Court must be satisfied that a good explanation has been offered for it to set aside such a Judgement, and upon such terms that would fit the circumstances, for the reason that such action would take the Plaintiff back in time causing delay in the conclusion of the matter proceeded for hearing and a Judgement was given.
25. It is trite that Court should not assist a party who deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice as was held in the case of Shah vs Mbogo (Supra).
26. This Court has noted that the 1st Defendant/Applicant did not offer tangible evidence or explanation that he was unwell and thus the reasons for failure to file his Defence and attend Court. He chose to attend the Criminal Court and not this Court to defend the suit. He only woke up after he was served with Bill of Costs. This Court finds that the 1st Defendant/Applicant is deliberately seeking to delay the cause of justice on this matter.
27. For the above reasons, the Court finds that the 1st Defendant/Applicant is not deserving of the orders sought where the Court is called upon to exercise its discretion.
28. Consequently, this court finds the Notice of Motion Application dated 8th June 2023, is not merited and the same is dismissed entirely with costs to the 2nd and 3rd Defendants/ Respondents.
29. It so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF JANUARY, 2024

L. GACHERU

JUDGE

Delivered online in the presence of

Mr Irungu Mwangi for the Plaintiff

1st Defendant/Applicant – Absent

2nd Defendant – Absent



3rd Defendant – Absent

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

25/1/2024

TABLE

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