



Ethics and Anti-Corruption Commission v Chepkole & 4 others (Environment & Land Case 242 of 2018) [2024] KEELC 1419 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1419 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 242 OF 2018
FM NJOROGE, J
MARCH 14, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

SALEH CHEPKOLE 1ST DEFENDANT

TITUS KIPKEMBOI 2ND DEFENDANT

PEMBENI LIMITED 3RD DEFENDANT

LIBERTY ASSURANCE COMPANY LIMITED 4TH DEFENDANT

WILSON GACHANJA 5TH DEFENDANT

RULING

1. This ruling is in respect of the 3rd defendant's Notice of Motion application dated 15/10/2023 which is expressed to be brought under Order 9 Rule 9, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Articles 20, 25(c), 48, 50, 159 and 259 of the Constitution of Kenya which sought the following orders;
 1. Spent
 2. That the firm of M/S Ndungu Ndiga Law Chambers be granted leave to come on record for the 3rd defendant/applicant in place of the firm of Mongeri & Co. Advocates.
 3. Spent
 4. Spent
 5. Spent



6. That this honorable court be pleased to set aside the ex parte judgement delivered on 22/9/2023 together with the ex parte proceedings thereto, the decree, and any other consequential orders arising therefrom and in its place order that the suit be heard de novo and on priority basis.
7. That costs of this application be provided for.
2. The application was supported by the affidavit of Byron Kipnetich Gawon Choge sworn on 15/10/2023. The grounds on the face of the application and the supporting affidavit were that Byron Kipnetich Gawon Choge was the authorized agent of the 3rd defendant; that the firm of M/S Ndungu Ndiga Law Chambers had been appointed to come on record on behalf of the 3rd defendant; that the suit property was registered in the name of the 4th defendant; that the 3rd defendant was a shareholder of the 4th defendant; that the 3rd defendant was never served with the pleadings in this matter but only became aware of the outcome after it was aired on Citizen TV on 2/10/2023 during the 7 O'clock bulletin; that it was upon perusal of the court record that the 3rd defendant came to learn that the firm of Sang & Langat Co. Advocates had entered appearance and later the firm of Mongeri & Co. Advocates filed a Notice of Change of advocates purporting to be appointed by the 3rd defendant; that the 3rd defendant had not engaged the said law firms to represent it in the present matter; that the said law firms did not therefore have instructions to act on behalf of the 3rd defendant; that the actions of the said firms were prejudicial to the interests of the 3rd defendant considering that it is now assumed by the court that the 3rd defendant failed to defend its interests by choice as they failed to participate in the proceedings even after entering appearance; that without a resolution and written instructions, the said firms cannot be said to represent the 3rd defendant in the suit; that it is therefore proper that the court finds that the 3rd defendant was not represented as it was never served in the first place; that the 3rd defendant has a strong case which has high chances of success; that the plaintiff will not suffer any prejudice if the orders sought are granted.
3. In response to the application, the plaintiff filed a replying affidavit sworn on 8/11/2023 on the same date. The affidavit is sworn by Brigid Maina counsel for the plaintiff. She deposed that sometime in 2018 the plaintiff received a report that public land that had been set aside for residential houses for civil servants had been irregularly acquired; that land parcel No. Nakuru Municipality Block 5/221 which was the suit property herein was part of the grabbed land; that on 13/07/2018 the plaintiff filed the present suit and judgement was delivered on 23/09/2023; that the 3rd defendant was served by way of substituted service through an advertisement placed in the Standard Newspaper on 26/11/2018 upon being granted leave by the court; that the plaintiff did a search at the Business Registration Service and the 3rd defendant did not appear in the database; that even though the 3rd defendant alleged that it did not instruct the firms of Sang & Langat Advocates and Mongeri & Co. Advocates, Noreen Shariff who was an administratrix of the Estate of Jim Choge and a co-administrator of the deponent in the present application, signed the replying affidavit filed on 26/11/2018 on behalf of the 3rd and 4th defendants; that even though the 3rd defendant alleged to be a director of the 4th defendant, no evidence was adduced of its own registration and/or existence; that the 3rd and 4th defendants are distinct legal entities; that on 16/09/2021 the court ruled that the firm of Sang & Langat Advocates could not represent the 4th defendant since it was in receivership and its affairs were overseen by a liquidator; that it is important to note that at the point of the 4th defendant's insolvency, the sole asset in its possession was the suit property which could not be liquidated because it was public land with government housing; that when the matter was coming up for hearing on 24/02/2021, the plaintiff served the 3rd defendant by way of substituted service on 9/02/2021 in the Daily Nation Newspaper; that it is clear that the 3rd defendant was duly notified of the present proceedings; that the 3rd defendant cannot now claim that



- it did not instruct the advocates who entered appearance on its behalf as it had the option to enter appearance in person upon service; that the court in its judgement acknowledged that the 3rd defendant entered appearance but did not participate in the hearing; that the judgement was arrived at lawfully and all the parties were given opportunities to participate in the proceedings and the 3rd defendant's application should therefore be dismissed with costs.
4. The 3rd defendant filed a supplementary affidavit on 17/11/2023 sworn by Byron Kipngetich Gawon Choge. He deposed extensively on how the suit property was acquired and initially registered in the names of the 1st and 2nd defendant before it was transferred to the 3rd defendant. He also reiterated his averments in the supporting affidavit. He deposed that he was a co-administrator of the estate of Jim Choge representing one house while Noreen Shariff represented another household; that the existence of the two administrators was exclusive and that Noreen Shariff did not represent the interests of Pembeni Limited since Jim Choge was not a director; that it was improper to assume that since Noreen Shariff signed an affidavit on behalf of the 3rd defendant, she had the authority to do so; that Noreen Shariff was a director of the 4th defendant and could swear affidavits on its behalf; that even though the 3rd defendant was not able to acquire an updated copy of its CR12 from the Business Registration Services portal, it was still in existence and was a shareholder and director of the 4th defendant; that without personal service of the pleadings on the directors of the 3rd defendant, there was no way they would have known of the existence of the present proceedings; that the official receiver failed to prefer a solid defence and therefore the 3rd defendant should be given a chance to set out its defence and participate in the hearing.
 5. The application was canvassed by way of written submissions. The 3rd defendant filed its submissions dated 15/11/2023 on 17/11/2023 while the plaintiff filed its submissions dated 20/11/2023 on the same date.
 6. The 3rd defendant in its submissions identified the following issues for determination:
 - a. Whether the firm of M/S Ndungu Ndiga Law Chambers ought to be granted leave to come on record for the 3rd defendant.
 - b. Whether the applicant has made a case for grant of stay orders.
 - c. Whether the ex parte judgement ought to be set aside.
 - d. Who should bear the costs of this application.
 7. On the first issue, the 3rd defendant relied on Order 9 Rule 9 of the Civil procedure Rules and submitted that the 3rd defendant through a special resolution passed on 2/02/2023 appointed the firm of M/S Ndungu Ndiga Law Chambers to conduct legal proceedings on its behalf and it prayed that the same be allowed in place of the firm of Mongeri & Co. Advocates.
 8. On the second issue, the 3rd defendant submitted that it sought for stay of execution of judgement and decree pending the hearing and determination of the present application. The 3rd defendant further submitted that since the matter had already been slated for issuance of a ruling immediately after the filing of submissions, it wished to withdraw the said prayer and proceed with the prayer for setting aside judgement.
 9. With regard to the third issue, the 3rd defendant relied on the cases of James Kanyita Nderitu & another vs Marius Phillotas Chikas & another [2016], Shah vs Mbogo [1967] EA 166, Patel vs E.A Cargo Handling Services [1974] EA 75 among other cases and submitted that the court has the discretion to set aside an ex parte judgement. The 3rd defendant submitted that it did not see the advertisement



that was purportedly placed by the plaintiff as a mode of service of pleadings and therefore it was not properly served. The 3rd defendant argued that consequently the ex parte judgement was obtained irregularly and it should be set aside. It was the 3rd defendant's submissions that despite the two advocates filing pleadings on its behalf, it was unaware of their actions. The 3rd defendant relied on the cases of George Miyare t/a Miyare & Company Advocates v Nyando Power Techniques Limited [2017] eKLR, Lucy Bosire v Kehancha D.V Land Dispute Tribunal & 2 others (citation not given) and submitted that its draft defence raises triable issues and so its application ought to be allowed with costs.

10. The plaintiff in its submissions set out the background of the matter and submitted on the following issues it perceives to be arising for determination:
 - a. Whether the firm of M/S Ndiga Law Chambers ought to be granted leave to come on record for the 3rd defendant.
 - b. Whether the applicant has made out a case for grant of stay orders.
 - c. Whether the ex parte judgement ought to be set aside.
 - d. Who should bear the costs of this application.
11. On the first issue, the plaintiff relied on the case of Stephen Mwangi Kimote vs Murata Sacco Society [2018] eKLR and submitted that the 3rd defendant did not serve all the parties involved as stipulated in the Civil Procedure Rules and therefore the court should decline audience to the 3rd defendant's counsel and strike out the present application.
12. On the second issue, the plaintiff submitted that the 3rd defendant had abandoned its prayer of stay of execution and that the plaintiff had already sought implementation of the said judgement.
13. With regard to the third issue, the plaintiff relied on the case of Shah vs Mbogo [1967] EA 166 and submitted that the summons and pleadings in the present matter were served upon the 3rd defendant by way of substituted service. It was the plaintiff's submissions that on 15/11/2018 this court authorized substituted service upon the 3rd defendant and reiterated that the court in its judgement acknowledged that the 3rd defendant had been served but chose not to participate in the proceedings. Counsel relied on the case of Mwala vs Kenya Bureau of Standards E.A LR [2001] 1 E.A 148 and submitted that the judgement is final and not open to setting aside.
14. The plaintiff relied on the case of Gideon Mose Onchwati v Kenya Oil Co. Ltd & another [2017] eKLR and submitted that a mistake by an advocate or party does not automatically justify setting aside an ex parte judgement. The plaintiff submitted that the 3rd defendant's arguments that it did not instruct any of the advocates on record was misconceived and lacked credibility. It was the plaintiff's submissions that even though the 3rd defendant claimed that it learnt of the judgement in this matter on 2/10/2023 during the 7 O'clock news on Citizen TV, the resolution attached to its application showed that a meeting was held on the same day at 2.00 pm where the applicant was appointed as an agent and the law firm appointed to act on behalf of the 3rd defendant in the present matter. The plaintiff also relied on the cases of Mwaro & another v Charo & 5 Others (Environment & Land Case 27 of 2018) [2022] KEELC 15473 (KLR) (21ST December 2022), Letambul v County Government of Samburu & another (Cause E038 of 2022) [2023] KEELRC 2127 (KLR) (22 September 2023) among other cases and submitted that even though the 3rd defendant argued that it had not instructed the advocates who entered appearance on its behalf, no evidence has been attached to show that they complained to the Advocates Complaints Commission or the Law Society of Kenya.



15. The plaintiff relied on the case of Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR and submitted that a company is not obliged to file a resolution to file a law suit or authorize an affidavit or legal representation. The plaintiff also submitted that the 3rd defendant had not brought any evidence to confirm who the company directors were; that the 3rd defendant does not have a valid defence and since the judgement was entered regularly, the conditions for setting aside judgement regularly entered have not been fulfilled. The plaintiff then sought that the 3rd defendant's application be dismissed with costs.

Analysis and determination

16. After considering the 3rd defendant's application, the response thereto and the submissions, the only issues that arise for determination are whether the firm of M/S Ndungu Ndiga Law Chambers should come on record for the 3rd defendant in place of the firm of Mongeri & Co. Advocates and whether the court should set aside its judgement delivered on 22/09/2023.

a. Whether the firm of M/S Ndungu Ndiga Law Chambers should come on record for the 3rd defendant in place of the firm of Mongeri & Co. Advocates.

17. The 3rd defendant sought for leave for the firm of M/S Ndungu Ndiga Law Chambers to come on record in place of the firm of Mongeri & Co. Advocates.
18. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:

- “9. 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 by 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.”

19. The court in the case of Loise Wambui Karigu & another vs. Joel Gatungo Kiragu & Another [2016] eKLR held as follows:

“It is important to note that the provisions of Order 9 rule 9 were put in place to cover some mischief by a party who after being represented by an advocate in the entire trial decides to abandon the same advocate after judgment without addressing the issue of legal fees earned to that date. It was also intended to ensure that the advocates or parties on the other side are kept informed about the change of address for service of any further court process. The intention of the drafters of this rule was noble and aimed at having some order in civil practice.”

20. It is my view that in the present matter, the firm of M/S Ndungu Ndiga Law Chambers should be granted leave to come on record in place of the firm of Mongeri & Co. Advocates and I therefore issue that order on a preliminary basis prior to proceeding to the determination of the next issue.



b. Whether the court should set aside its judgement delivered on 22/09/2023.

21. The 3rd defendant sought for the court to set aside its judgement delivered on 22/09/2023 on the ground that it was not served with the pleadings in this matter. The 3rd defendant alleged that it became aware of the present proceedings upon hearing the determination on the news on Citizen Tv and upon perusal of the court record found out that the firm of Sang & Langat Advocates had entered appearance on its behalf. Later the firm of Mongeri & Co. Advocates filed a change of advocates but did not participate in the proceedings. The 3rd defendant denied instructing the said firms of advocates and on that ground sought that the judgement in the matter be placed aside.
22. The plaintiff opposed the setting aside of the judgment delivered on 22/09/2023 and argued that it had served the 3rd defendant through substituted service on 26/11/2018 upon being granted leave to do so by the court. The plaintiff annexed a copy of an order given on 12/09/2018 where leave was granted to the plaintiff to serve the 2nd and 3rd defendants through advertisement in the local daily newspaper. The plaintiff also annexed a copy of the Standard Newspaper of 26/11/2018 which showed that the 3rd defendant was served by way of substituted service. Even though the 3rd defendant alleged that it was not aware of the present proceedings, it is quite evident that there was proper service.
23. The other ground upon which the applicant sought to set aside the judgement was that it did not instruct the firms of M/S Sang & Langat Advocates and Mongeri and Company Advocates to represent it. It is not disputed that initially the firm of M/S Sang & Langat Advocates entered appearance on behalf of the 3rd defendant. It is further not disputed that on 5/02/2021 the firm of Mongeri and Co. Advocates filed a Notice of Change of Advocates but did not file any other pleadings.
24. The court in *Esther Wamaitha Njihia & 2 others v Safaricom Limited* [2014] eKLR cited with approval the case of *Stephen Ndichu v Monty's Wines and Spirits* [2006] eKLR where it was held as follows;

“The principles governing the exercise of judicial discretion to set aside ex-parte judgements are well settled. The discretion is free and the main concern of the court is to do justice to the parties before it (See *Patel –vs- E. A. Cargo Handling Services Ltd* (1974) E. A. 75). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see *Shah –vs- Mbogo* (1969) E. A. 116). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See *Sebei District Administration –vs- Gasyali* (1968) E. Way. 300). It also goes without saying that the reason for failure to attend should be considered.”
25. It is important to note that the judgement delivered in this matter was not an ex parte judgement. As aforementioned in the preceding paragraphs, it is clear that the 3rd defendant was served with the pleadings in the present matter. The issue of whether or not it instructed the firms of Sang & Langat Advocates and Mongeri Advocates to represent it is irrelevant to the present application. As it stands, counsel entered appearance on behalf of the 3rd defendant but did not participate in the proceedings.
26. It is my view therefore that the 3rd defendant has not demonstrated sufficient reason to set aside the judgement of the court delivered on 22/09/2023. Consequently, save for prayer no 2 which I have granted as indicated herein above, no other substantive prayer in the 3rd defendant's application



dated 15/10/2023 has any merit and they are all disallowed. The applicant shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 14TH DAY OF MARCH, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

