



**Kariuki v Owino (Environment & Land Case 527 of 2013)  
[2024] KEELC 3382 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3382 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 527 OF 2013**

**LN MBUGUA, J**

**APRIL 24, 2024**

**BETWEEN**

**RICHMOND MACHARIA KARIUKI ..... PLAINTIFF**

**AND**

**ALEX ACHOLA OWINO ..... DEFENDANT**

**RULING**

1. Judgment was entered for the Plaintiff in this matter on 5.10. 2021. Subsequently, the Defendant filed the Notice of Motion application dated April 20, 2022 seeking to set aside the said judgement and an order for a retrial.
2. The application is premised on grounds on its face and on the Defendant's supporting affidavit sworn on April 20, 2022. He avers that he just found out that a judgment was issued against him and that he never knew of the progress of the case as his advocate never updated him on the progress and that when the judgement herein was read, he was not in court.
3. The application is opposed by the Plaintiff vide his preliminary objection dated September 26, 2023 on grounds that the issues canvassed in support of the instant application are *res judicata*, the same having been directly and substantially in issue between the same parties in the application dated October 13, 2022 which was determined on March 9, 2023.
4. The Defendant filed an affidavit sworn on December 4, 2023 in response to the Plaintiff's preliminary objection. He avers that the application dated October 13, 2022 concerned an injunction while the instant application is for setting aside judgment.
5. The issues that arise for determination are; whether the Defendant's Preliminary Objection dated September 26, 2023 is merited and whether the Applicant has met the threshold for setting aside the judgment.



6. On *res-judicata*, reference is hereby made to the provisions of Section 7 of the [Civil Procedure Act](#) which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

7. The court has looked at the application dated October 13, 2022 and discerns that it concerned a prayer for injunction to restrain the Plaintiff from interfering with the property known as Plot No. C4-164 Kayole, while the instant application is for setting aside the judgment. Therefore, the instant application is not *resjudicata* to the one dated October 13, 2022 thus the Plaintiff’s preliminary Objection has no merits.

8. On the 2<sup>nd</sup> issue, this court has discretion to set aside judgment. The court has considered that the Defendant was properly served with pleadings herein. He entered appearance, filed a statement of defense and largely participated in the suit through his counsel.

9. However, at the hearing of the matter on February 25, 2020, neither the Defendant nor his counsel were present and the matter proceeded without their participation as the court had satisfied itself that the Defendant was properly served.

10. The record indicates that counsel for the Defendant appeared in court on May 12, 2021 when the matter was mentioned to confirm filing of submissions but he did not request the court to set aside the proceedings of February 25, 2021. He even went further to file submissions which the court considered in its judgement in the matter.

11. The Defendant cannot claim that he was denied a chance to be heard. He had an Advocate and also a duty to follow up on his matter.

12. The Court is persuaded by the holding in [Anjeli Limited v Kenga Simba & 12 others; Chengo Omar & 19 others \(Intended Interested Parties\)](#) [2021] eKLR where it was held that;

“If a party is properly served and opts not to come to court, he can have nobody but himself to blame when judgment is entered against him. Nobody should shun a court proceeding thinking that they will automatically get an order for setting aside the judgment.”

13. In the end, I find that the application dated April 20, 2022 is not merited, the same is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Githui for Plaintiff

Defendant

Court assistant: Eddel

