



Omar & another v Luigi (Defending in the Capacity of Legal Representative of the Estate of Bontempi Luigi- Deceased) & 3 others; Mohamed (Proposed Interested Party) (Environment & Land Case 130 of 2015) [2024] KEELC 3291 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 130 OF 2015
FM NJOROGE, J
APRIL 23, 2024**

BETWEEN

SHARIFF MOHAMED A. OMAR 1ST PLAINTIFF

BOUGAINVILLAEA COTTAGES LIMITED 2ND PLAINTIFF

AND

ORNELLA BONTEMPI LUIGI (DEFENDING IN THE CAPACITY OF LEGAL REPRESENTATIVE OF THE ESTATE OF BONTEMPI LUIGI-DECEASED) 1ST DEFENDANT

RAKESH RAJPAL 2ND DEFENDANT

SAHALE ABDALLA SALIM 3RD DEFENDANT

REGISTRAR OF LANDS TITLES MOMBASA 4TH DEFENDANT

AND

MOHAMED ABDI MOHAMED PROPOSED INTERESTED PARTY

RULING

1. There are three applications pending determination. The first is dated 15th August 2023 and filed on 16th August 2023 by the Plaintiffs for the following orders: -
 1. Spent.
 2. That Mohamed Abdi be cited for contempt of this Honourable court’s orders of 12th July 2023.



3. That Mohamed Abdi be summoned to appear before this court and show cause why he should not be committed to civil jail or fine for disobeying the orders issued on 12th July 2023.
 4. That the Officer Commanding Police Division (OCPD) Malindi Police Station assist with the eviction of Mohamed Abdi his agents, servants and/or nominees residing on Plot Number 7861 Malindi.
 5. That Mohamed Abdi be personally held liable for the damages visited on the Plaintiffs/ applicants.
 6. That this honourable court may make such other orders as it deems necessary.
 7. That the costs of this application be provided for.
2. This application was premised on the grounds outlined on the face of it and supported by the affidavit sworn by the 1st Plaintiff on 15th August 2023.
 3. The second application is equally dated 15th August 2023 and was filed by the said Mohamed Abdi Mohamed as a proposed interested party on 16th August 2023 seeking the following orders: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. The judgment delivered on 1st March 2022, the decree issued on 9th May 2022 and the eviction orders issued on 27th July 2023 be and are hereby set aside *ex-debito justitiae* and the hearing of this matter commences de novo.
 5. The proposed interested party, Mohamed Abdi Mohamed be and is hereby joined in these proceedings as an interested party and granted leave to file his response to the Plaint herein.
 6. Costs of this application be provided for.
 4. In support of this application were the grounds enumerated on the face of the motion and the supporting affidavit sworn by the proposed interested party on 15th August 2023.
 5. The third application dated 5th September 2023 was filed by the 1st Defendant on 6th September 2023 for orders: -
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. Spent.
 6. Spent.
 7. That the honourable court be pleased to set aside the judgment delivered on 1st March 2022 and all consequential orders and grant leave to the 1st Defendant to file their defence out of time and allow this matter to commence de novo.



8. That the 1st proposed interested party Mohamed Abdi Mohamed and the 2nd Proposed Interested Party Khadija Sharif Mohamed be and is hereby joined in the proceedings as the 5th and 6th Defendants respectively.
9. That costs of this application be provided for in any event.
6. In support of this application was affidavit sworn by Claire Ornella Bontempi, said to be the 1st Defendant herein, on 5th September 2023.
7. There are thus two applications seeking to set aside judgment in this matter and one seeking inter alia an order Mohamed Abdi, the interested party, be cited for contempt of this court's orders of 12th July 2023.
8. In response to the first application for orders of committal, the proposed interested party filed a Replying Affidavit which he swore on 11th October 2023. He stated that he was not aware of these proceedings hence could not be cited for disobedience of this court's orders as alleged by the Plaintiffs. He added that he purchased the land in dispute herein on 22nd October 2019 and despite being in occupation since, he was never served with any pleadings in this matter until when the Plaintiffs attempted to evict him.
9. The Plaintiffs opposed the 1st Defendant's and the proposed interested party's notices of motion seeking orders of setting aside. They filed two Replying Affidavits both sworn by the 1st Plaintiff on 18th October 2023. In relation to the 1st Defendant's application, the 1st Plaintiff deposed that the former was at all material times aware of this suit as she was being represented by the firm of Katsoleh and Company Advocates. That upon judgment being issued, the court became functus officio . The 1st Plaintiff also gave a narration of the genesis of the dispute between the parties herein which I need not reproduce here. She contested that the 1st Defendant did not have any capacity to dispose the suit property Plot No. 7861 Malindi to the proposed interested party since she has never been the owner of the same. To the Plaintiffs, the 1st Defendant's application is scandalous and vexatious intended to delay the course of justice. She urged the court to dismiss it.
10. On whether the judgment should be set aside and the proposed interested party be allowed to join the suit for hearing of the same de novo , the 1st Plaintiff deposed that the Plaintiffs became aware of the proposed interested party's occupation on the suit property after judgment was delivered in their favour and during their attempt to sell the suit property to a third party. Consequently, the Plaintiffs engaged their advocates, police officers and the court to evict the occupants but such attempts were futile. If anything, so the 1st Plaintiff deposed, their eviction attempts were met with violence and death threats by the proposed interested party. For clarity, the 1st Plaintiff explained that the court's involvement was in their application dated 20th June 2023 for eviction orders. That application was allowed on 12th July 2023 by Odeny J. and warrants to give vacant possession signed on 27th July 2023.
11. The applications were heard simultaneously by way of written submissions.

Plaintiffs' Submissions Dated 30th January 2024

12. Counsel relied on the definition of contempt given in the *Blacks' Law Dictionary* and in the case of *DKG v EG* [2021] eKLR. In the said case, the conditions set out in order to succeed in civil contempt proceedings were first, the terms of the order and whether the Respondent had knowledge of the said terms, and, lastly failure of the respondent to comply with the terms of the order. These conditions, counsel submitted, amount to the standard of proof in such cases as were similarly quoted in the book "*Contempt in Modern New Zealand*" and in the case of *Charles Langat v Mukesh Kumar Kathilal*



Patel [2021] eKLR. To counsel, the proposed interested party was informed of the court orders by the auctioneer sent to evict him, but blatantly failed to comply.

13. In relation to the prayer for joinder by the proposed interested party, counsel cited to me the decision of Francis Kariuki Muruatetu & another v Republic & 5 others Petition 15 (as consolidated with petition 16 of 2013) [2016] eKLR where the Supreme Court set out the three guiding principles in an application for joinder. Firstly, that the proposed interested party ought to establish an identifiable stake. To counsel, the sale agreement allegedly between Claire Bontempi and the proposed interested party did not amount to an identifiable stake for reasons that the said Claire was not a party to this suit and that she has never owned the suit property; that during the pendency of this suit, the suit property was at all times registered in favour of the 2nd Defendant.
14. On whether the judgment herein should be set aside, counsel argued that it was not possible to do so since the proposed interested party is not a party to this suit having failed to establish that an order for his joinder is warranted. He added that the 1st Defendant was at all material times aware of the suit and proceedings as he was represented by his then advocate Mr. Obaga working under Katsoleh and Company Advocates until judgment was delivered.

1st Defendant's Submissions Dated 14th November 2023

15. Counsel submitted on their application dated 5th September 2023. He argued that the substitution of the 1st Defendant upon the demise of Bontempi Luigi was fraudulently done behind his back and that the 1st Defendant never participated in any succession proceedings; that the 1st Defendant having also denied instructing the firm of Katsoleh & Co. Advocates, then there was no service upon the Applicant of the proceedings herein.
16. Counsel added that the lack of service upon the 1st Defendant infringed upon her rights to a fair hearing as espoused under Article 50 (i) of the Constitution. Counsel relied on the case of Mureithi Charles & another v Jacob Atina Nyagesuka [2022] eKLR.
17. Further, it was counsel's submission that the lack of service rendered the judgment irregular as such it ought to be set aside as a matter of right and the matter be heard de novo . To buttress this point counsel relied on the case of Yoosbin Engineering Corporation v Aia Architects Limited (Civil Appeal E074 of 2022) [2023] KECA 872 (KLR).

Proposed Interested Party's Submissions Dated 30th January 2024 And 14th November 2023

18. In relation to the contempt issue, counsel argued that the application filed by the Plaintiffs did not meet the threshold set out in the case of DKG v EG [supra] and the standard of proof stated in the case of Mutitika v Baharini Farm, civil application no. 24 of 1985 NBI where the standard of proof in contempt cases was said to be higher than that of balance of probabilities but lower than beyond reasonable doubt.
19. Counsel further submitted that this court is clothed with the requisite jurisdiction to entertain the proposed interested party's application in line with Order 1 rule 10 (2) of the Civil Procedure Rules and as stipulated in the case of Sammy Kanyi Kareithi v Barclays Bank of Kenya & 2 others; Ross Xavier Whithey (applicant) [2021] eKLR. He added that by virtue of the proposed interested party being on the suit property, he has an overriding interest capable of protection under common law.
20. Counsel relied on the definition of an "interested party" stated under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and in the case of Trusted Society of Human Rights Alliance v Mumo Matemu [2014] eKLR.



21. Having outlined and considered the applications, supporting affidavits, replying affidavits, submissions and authorities cited by the parties herein, I shall analyze the following issues for determination: -
- i. Whether the proposed intended party is in contempt of this court's orders issued on 12th July 2023;
 - ii. Whether the judgment delivered on 1st March 2022, the decree issued on 9th May 2022 and the eviction orders issued on 27th July 2023 be set aside;
 - iii. Whether the proposed interested party should be joined to these proceedings and the matter heard de novo.

Analysis And Determination

Issue (i)

22. As properly submitted by parties, contempt of court is that willful conduct or action that defies or disrespects authority of a court. The reason why courts punish for contempt was stated in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] KLR 828, by Ibrahim, J. (as he then was) as follows: -

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

23. I also agree with the submission by counsel for the proposed interested party that contempt of Court is in the nature of criminal proceedings and, therefore, proof of a case against a contemnor is higher than that of balance of probability. Therefore, due to the gravity of consequences that ordinarily flow from contempt proceedings, it is significant that in order to succeed in civil contempt proceedings, an Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.
24. In the present case, the existence of the orders issued on 12th July 2023 is not in dispute. I have perused the said orders which state that the 2nd Defendant/respondent, his agent, servants and/or nominees residing on Plot number 7861 Malindi to give vacant possession of Plot No. 7861 Malindi to the Plaintiffs/applicant and/or their nominees, and that they be evicted with the assistance of the OCS Malindi. It is evident that the proposed interested party was not a party in the main and eviction proceedings. Further, it is clear to me that the proposed interested party's claim streams from the 1st Defendant, therefore it cannot be inferred that he falls under the cluster of the 2nd Defendant's agent, servant or nominee as stated in the impugned orders.
25. In the circumstances, since it has not been demonstrated that he was a party to the proceedings therein or an agent, servant or nominee of the 2nd Defendant, I am unable to find that the proposed interested party is in contempt of the orders issued on 12th July 2023



Issue (ii)

26. The grant of orders for setting aside of a judgment provides opportunity to an aggrieved party in two scenarios. Firstly, where the judgment is irregular and secondly, where the judgment is regular. For an irregular judgment, it shall be set aside as of right because it means that the party was not given an opportunity to be heard and rules of natural justice cannot permit it to be that a party is condemned unheard. The distinction was well elaborated by the Court of Appeal in *James Kanyita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR as follows: -

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the *Civil Procedure Rules*, to move the court to set aside the default judgment 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 into 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 elapsed 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 other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986] KLR 492 and *CMC Holdings v. Nzioki* [2004] 1 KLR 173).

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right..."

27. In the present case, this suit was first instituted against the deceased 1st defendant alone on 31st July 2015. On 29th September 2015, the firm of Khaminwa & Khaminwa filed a memorandum of appearance and a defence on behalf of the 1st Defendant. The suit was dismissed suo moto on 28th March 2019 and later reinstated when the said Ornella Bontempi, was sued on behalf of the estate of the deceased as 1st Defendant. Consequently, the Plaintiffs filed an amended Plaintiff on 8th January 2020 and a further amended plaintiff dated 27th January 2020. There is on record an affidavit sworn by one Zebedee Namusasi Maina, on 11th March 2020, wherein he deposed that he proceeded to serve the 1st Defendant at her home in Mtangani area who advised him to serve her advocates, Katsoleh & Company Advocates, which he ultimately did on the same 11th March 2020. This to me amounts to sufficient service. The 1st Defendant's argument that she has never instructed the firm of Katsoleh & Company Advocates holds no basis. I am of the opinion that the 1st Defendant was all along aware of this suit, and should have done much more to follow up on its progress. The proposed interested party was not a party therefore there was no reason to serve him at that point. Having said that, I conclude that service was proper and that the judgment delivered on 1st March 2022 was regular.
28. The 1st Defendant's reason for failure to file her defence in time was that she was never served. Having already established that service was proper, I find that the 1st defendant has failed to explain to this court why she did not file her defence on time. Further, a substantial period of time has lapsed since the impugned judgment was delivered, and this delay has not been explained. In any case, the 1st Defendant did not attach a copy of a draft defence to enable this court determine whether it raises any triable issues.



For this reason, bearing in mind that setting aside of a regular judgment is purely at the discretion of the court, I see no merit in the application dated 5th September 2023. The same is dismissed. Similarly, the proposed interested party sought to have the impugned judgment set aside and that he is joined to the suit as an interested party. One of the orders that he seeks reads as follows:

That the proposed interested party, Mohamed Abdi Mohamed be and is hereby joined in these proceedings as an interested party and granted leave to file his response to the Plaint herein.”

29. Interestingly in his claim however, he states that he bought the suit property from the 1st Defendant on 22nd October 2019 as per an agreement of sale he annexed to his supporting affidavit. It must be remembered that as at that time, the Court of Appeal in a case between the Plaintiffs, 1st Defendant herein and others – *Bontempi Luigi & 2 others v Shariff Mohammed A. Omar & another* [2015] eKLR, had determined that the 1st Defendant had misappropriated company funds for personal use to buy properties. For this same reason this court concluded that the 1st Defendant’s titles were fraudulently acquired. Therefore, seeing that the proposed interested party’s claim streams from the 1st Defendant’s title already extinguished on grounds of fraud, I see no reason to reopen this case at the behest of the proposed interested party. In my view, he can adjudicate his grievances against the 1st Defendant in another suit. Having declined to set aside the impugned judgment, there is no reason to go into depth as to the merits of the third issue. Also, save for a grant of the prayer for his joinder as prayed in prayer no 5 in his application, and that joinder being for purposes of effectuating execution and nothing else, the other prayers in the proposed interested party’s application dated 15/8/2023 should face dismissal.
30. In the foregoing, I issue the following orders: -
- a. The 1st Defendant’s application dated 5th September 2023 is dismissed with costs;
 - b. Prayers nos 2,3, and 4, in the proposed interested party’s application dated 15th August 2023 are dismissed;
 - c. Prayer no. 5 in the proposed interested party’s application dated 15th August 2023 is allowed but only to the extent that the proposed interested party, Mohamed Abdi Mohamed is hereby joined in these proceedings as an interested party to facilitate execution of the orders of this court against him in this matter;
 - d. The Officer Commanding Police Division (OCPD) Malindi Police Station shall assist with the eviction of Mohamed Abdi Mohamed his agents, servants and/or nominees residing on Plot Number 7861 Malindi;
 - e. The costs of the application made by the proposed interested party dated 15/8/2023 shall be borne by the interested party.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 23RD DAY OF APRIL 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

