



Elmi v Opeyo & Cheruiyot (Sued as the Legal Representatives of the Estate of Paul Kipchirchir Cheruiyot alias Paul Cheruiyot) & 2 others (Environment & Land Case E005 of 2020) [2024] KEELC 1715 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E005 OF 2020**

**MC OUNDO, J
APRIL 11, 2024**

BETWEEN

ALINOOR ABDI ELM I PLAINTIFF

AND

**FLORINE CHERONO OPEYO & CORNELIA CHELANGAT CHERUIYOT
(SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PAUL
KIPCHIRCHIR CHERUIYOT ALIAS PAUL CHERUIYOT) 1ST DEFENDANT**

THE DIRECTOR OF SURVEY 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. Pursuant to delivery of an ex-parte judgment on the 3rd March 2022, the 1st Defendant/Applicant filed two applications, the first one dated the 27th March 2023 seeking to set aside the ex-parte judgment and Decree therein issued, and thereafter grant them leave to file their defence and counterclaim so as to defend the suit. The Applicant also sought for stay of execution and lifting of the warrants of arrest and orders issued thereafter committing her to civil jail.
2. The second application dated the 10th May 2023, was more or less like the first one but had sought for further orders of temporary stay and/or setting aside of the committal orders of 4th April 2023 made by the Deputy Registrar committing the Applicant to civil jail in execution of the judgment and Decree entered on 3rd March 2022.
3. The applications were supported by the grounds therein as well as the supporting affidavit sworn by Florine Cheron Opeyo and Cornelia Chelangat Cheruiyot respectively, to the effect that they were joint administrators of the estate of the deceased Paul Kipchirchir Cheruiyot alias Paul Cheruiyot who was the proprietor of land parcel No. Kericho Municipality Block 5/230.



4. That pursuant to the filing of the suit herein, the Plaintiff/Respondent had never served them with the pleadings wherein he had proceeded to obtain an ex-parte judgment despite there having been no service. That subsequently he had taxed a bill of costs dated 14th March 2022 without service, wherein he sought to execute the award of the decretal sum of Ksh. 2,819,391/= being the cost of the suit.
5. That the Respondent and then proceeded to file an application dated 13th October 2022 seeking their committal to civil jail in execution of the Decree despite lack of service upon them personally.
6. That they had since filed a defence and counterclaim which was arguable and raised triable issues. That the provisions of Order 22 Rule 34 of the Civil Procedure Rules that lay down circumstances under which the judgment debtor could be committed to civil jail for nonpayment of decretal sum had not been proved. That the Decree holder had not demonstrated that he had exhausted all other modes of enforcing the Decree before resorting to committal to civil jail. That should the applications not be allowed the Applicants would serve a term in civil jail, the deceased's estate shall greatly be prejudiced where it stood to suffer irreparable loss and damage.
7. In response to the applications, the Respondent only filed their grounds of opposition to both the Applications to the effect that at all material times since the inception of the suit, the Applicants had always been served personally at Ainamoi Village and subsequently through their Counsel on record M/S Stella Koech Advocate. That the application had been overtaken by events as the orders issued therein had already been executed and Bill of Costs taxed.
8. That interim orders of status quo had been issued in the presence of their Counsel wherein parties had been ordered to comply with pretrial directions but had failed to comply. That the Applicants were not interested in the prosecution of the matter and had not given any justifiable reason why the ex-parte judgment should be set aside. That the defence filed herein did not raise any triable issues and equity aided the vigilant not the indolent.
9. That the Taxing Master had exercised his discretion to issue the warrants of arrest in execution of a decree and on the right principles of law. That the Application before the court seeking the setting aside of its order was therefore in contravention of the provisions of Order 45 Rule 2(1&2) of the Civil Procedure Rules. The Respondent sought for the application to be dismissed.
10. The applications were disposed of by way of written submissions to which the Applicants submitted that; vide Kericho Magistrate Court in Succession Cause No. 143 of 2019, the suit property herein being Kericho/Municipality Bloc 5/230 had been listed as comprising the estate of the deceased Leah Njeri Njoroge and thereafter transferred and registered in the name of the Plaintiff through transmission. Thereafter, the Applicants had sought to have the property struck out from the list of assets of the deceased via an application dated 24th September 2020 for which a determination was pending. In the meantime by a consent order dated 14th October 2020, the court had issued interim orders of prohibition against dealing with the said suit property pending the hearing and determination of the said application.
11. Subsequently the Plaintiff filed the current suit against them alleging fraudulent and negligent acts against them as particularized in his Plaint dated 28th October 2020.
12. The Applicants framed their issue for determination as to whether or not the ex-parte judgment entered was regular or irregular to which they submitted that in order to set aside the ex-parte judgment, the court had to take into account the reason that may have occasioned their default in appearance and their explanation as deposed in her supporting affidavit. In so submitting they relied



- on the decisions in the case of James Kanyita Nderitu & Another vs. Marius Phillotas Chika & Another [2016] (sic) and Shah vs Mbogo [1967] EA 166.
13. That as two administrators to the estate of Paul Kipchirchir Cheruiyot, they had been sued jointly wherein Florine Opeyo, one of the administrators had not been served with summons to enter appearance because they did not reside at the same place.
 14. That the interlocutory judgment entered on the 25th June 2021 without leave of court was contrary to the provisions of Order 10 Rule 11 of the Civil Procedure Rules and was therefore irregular.
 15. That the matter proceeded for formal proof hearing on 1st November 2021 contrary to the court's direction of 5th October 2011(sic) since there had been no return of service filed by the Plaintiff. Reliance was placed on the decision in the case of Patel vs East African Cargo Handling Services Limited [1974] EA 75.
 16. That they had now annexed a joint statement of defence and counter claim which raised triable issues and therefore the court to grant them leave, albeit out of time, to defend their case unconditionally.
 17. That save for the fact that the Plaintiff/Respondent had opposed both the applications on the ground that judgment had been executed, he had not challenged the averments in their affidavits sworn on 27th March 2023 and 10th May 2023. That the consent order by the parties dated 14th October 2020 in the Chief Magistrate's court had not been reviewed and/or set aside and therefore the execution of the improperly obtained judgment was non-consequential.
 18. That since the judgment was irregularly entered there ought to be stay of execution of the Decree dated 3rd March 2022.
 19. That the Bill of Costs was not served upon them and the alleged service through the Advocate's firm is the vehemently denied as the Plaintiff's Counsel had been instructed via e-mail to effect personal service upon the 1st Defendant/Applicant. The Applicants sought that both their applications be allowed as prayed.
 20. In opposition to the applications and in support of their grounds of opposition, the Plaintiff/Respondent's submission in regard to the application dated 27th March 2023 framed his issues for determination as follows;
 - i. Whether the instant application is merited.
 - ii. Whether the warrants of arrest should be lifted and the order of committal to civil jail set aside.
 - iii. Who should bear costs of the application?
 21. On the first issue for determination the Respondent submitted that the application had already been overtaken by events whereby the Decree had been executed and the application was therefore stale and could not be granted as there was nothing to stay. That there had been no appeal filed. Reliance was placed on the decision by the Court of Appeal in the case of Elijah Kimani Kimuyu & 2 others vs. Francis Mburu Kamau Nyeri C A Civil Application No. E005 of 2021 and Kenya Revenue Authority vs. Everlyne Onyango Obondo Nairobi CA Civil Appeal No. 36 of 2017.
 22. That the Applicants had always been served with the relevant documents but had dilly dallied for over a year in prosecuting the matter. That due to her indolence she was not entitled to the orders so sought as equity aided the vigilant and not the indolent. That there was no explanation given as to why there was a delay for over a year after judgment had been entered in making the current application.



23. On the second issue for determination as to whether warrants of arrest should be lifted and the order for committal to jail set aside, the Respondent submitted that there had been a finding by the Deputy Registrar that the warrants were worth issuing, the Applicants not having shown any interest in prosecuting the matter. That although there had been issued a Notice to Show Cause why the warrants should not issue, there was no appearance by the Applicants or their Counsel to dispense of with the said notice and therefore there should not be any cry of foul play citing lack of service. That the Applicants had several opportunities to respond but did not utilize any of the avenues available to them by the law and as such they were not entitled to the orders sought.
24. On the last issue for determination as to who should bear the cost of the application, the Respondent submitted that it was trite that costs followed the events. That the Applicants' application could not succeed and therefor they should be slapped with the costs.
25. In regard to the application dated 10th May 2023, the Respondent framed their issues for determination as follows;
 - i. Whether the application for grant of stay has been overtaken by events.
 - ii. Whether the order of review as sought by the Applicant is correctly before the honorable court
 - iii. Whether the Applicant was the represented by Miss Stella Koech.
 - iv. Who should bear the costs of the application
26. On the first issue for determination, the Respondent submitted that indeed the application had been overtaken by events, the decree dated 3rd March 2022 had been executed wherein the 2nd Defendant had effected orders as directed by the court and cancelled the impugned title held by the deceased, Paul Kipchirchir Cheruiyot alias Paul Cheruiyot. That the warrants of arrest had also been issued and executed and which issue was not in contention. That the order sought was stale and could not be granted.
27. On the second issue as to whether the order for review as sought by the Applicants was properly before the court, it was the Respondent's submission that the Applicants were on a fishing expedition, the order for committal was made in accordance with the law, and the certificate of costs had not been appealed against and was still in force.
28. That pursuant to the provisions of Order 45 Rue 21-of the Civil Procedure Rules, this court lacked jurisdiction to review the decision made by the Deputy Registrar unless it was referred to it on appeal or through supervisory jurisdiction.
29. On whether the Applicants were represented by Counsel Miss Stella Koech, it was the Respondent's submissions that the courts record was clear that Miss Stella Koech came on record for the Applicants on 2nd March 2021 wherein a consent was recorded for the maintenance of the status quo and parties directed to comply with pre-trial directions. There was no evidence that a notice had been filed by Counsel to cease acting for the Applicants.
30. Lastly the Respondent sought that the Applicants be condemned to pay costs as provided for under Section 27 of the *Civil Procedure Act*.



Determination.

31. Before delving into the merits of the application it must be noted that orders issued or proceedings conducted in the Magistrate's court do not bind this court and are none consequential to fresh proceedings herein filed unless on an appeal.
32. Having considered the Applications herein filed to set aside the ex-parte judgment and stay the execution of the decree thereto, I have also considered the application seeking temporary stay of committal orders of 4th April 2023 made by the Deputy Registrar committing the Applicants to civil jail in execution of the judgment and Decree entered on 3rd March 2022. Further, having also considered the response thereto opposing the same as well as the subsequent written submissions for and against allowing the said application, I find the issues arising for my determination as follows.
 - i. Whether there has been raised sufficient ground to set aside the judgment and if so;
 - ii. Whether there should be stay of execution of the impugned judgment.
 - iii. Whether there should be stay of of committal orders of 4th April 2023 made by the Deputy Registrar.
 - iv. Who should bear the cost.
33. The law applicable for setting aside judgment or dismissal is Order 12 Rule 7 of the Civil Procedure Rules which provide 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.”
34. Setting aside a judgment is a matter of the discretion of the court, as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). 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. It also goes without saying that the reason for failure to attend should be considered.”
35. The Court of Appeal for Eastern Africa in the case of Mbogo v Shah [1968] EA 93, held that for the court to set aside a judgment, the court must be satisfied about one of the two things namely:-
 - a. either that the Defendant was not properly served with summons; or
 - b. that the Defendant failed to appear in court at the hearing due to sufficient cause.”



36. I have considered the reasons as presented by the Applicants in their quest to set aside the judgment delivered on the 3rd March 2022 to wit that the same was irregular there having been no service, of the pleadings and summons to enter appearance, upon her. Secondly there had been no service of a Notice of the hearing on formal proof or delivery of the judgment. That further the warrants of arrest issued against the Applicants in execution of a decree on the detrital sum on costs was unjustly and irregularly awarded. They sought leave be granted to file, out of time, their defense and counterclaim which was arguable and raised triable issues.
37. The Respondent opposed the Applicants' applications for reasons that the applications had already been overtaken by events and the judgment executed wherein the 2nd Respondent had already cancelled the impugned titles. That the Deputy Registrar had taxed the Bill of Costs wherein a Notice to Show Cause had been issued with no response and warrants of arrest had subsequently been issued in execution of the decree. That the application was stale and could not be granted as there was nothing to stay. That the Applicants had always been served with the pleadings through their Counsel but had been disinterested in defending the case. That the annexed defence did not raise any triable issues. And lastly no explanation had been given for the inordinate delay in filing the application.
38. In the case of *Shah vs Mbogo & Another* (1967) EA 116 it had been held that;
- “The discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.
39. Since the Applicants' argument for seeking to set aside the ex-parte judgment was based on the reason that there had been no service, I have taken the liberty to peruse through the court record to satisfy myself as to the genuineness of their argument so as to determine whether the ex-parte judgment was as a result of an accident, inadvertence, excusable mistake an error or otherwise and whether the Applicants had established a sufficient cause to have the same set aside.
40. It is on record that the suit herein had been filed by the Plaintiff vide a Complaint dated the 28th October 2020 on the 29th October 2020. On the 13th November 2020 interim orders of status quo were granted. On the 2nd March 2021, Counsel Miss Stella Koech came on record for the Applicants/Defendants wherein by consent parties agreed to have an application dated 28th October 2020 dispensed with by an order of status quo pending the hearing of the main suit. Parties had then been granted 21 days to comply with pre-trial directions.
41. It is on record that from the 2nd March 2021, the Applicants had neither filed their defence nor appeared in court wherein on 25th June 2021, the Respondent filed their request for interlocutory judgment against them for reason that they had neither entered appearance nor filed their defence within the prescribed time. The said Notice was served upon the Applicant as per the Affidavit of service sworn on 25th July 2021. On the 5th September 2021, the court entered judgment against them and the matter was scheduled for formal proof on the 1st November 2021 on which day there was no appearance by the Applicants or their Counsel. The matter was heard on formal proof and the impugned judgment delivered on 3rd March 2022.
42. I find that although the Applicants had an obligation to defend their case diligently even when Counsel was on record, they also ought to have attended Court to follow the progress of their case and/or to ensure that their Counsel filed the necessary documents on time and attended Court to prosecute their matters diligently. Indeed it is clear from the Applicants' Application and written submissions that it



had only been on the 14th March 2023 when warrants of arrest had been issued that they had become aware of the execution proceedings.

43. As stated earlier, the provisions of Order 10 Rule 11 of the Civil Procedure Rules, bestow on the Court unfettered discretion to set aside or vary any default judgment, so long as it does so upon such terms as are just on the basis of rational considerations.

44. In the case of *Patel vs. East Africa Cargo Services Ltd* (1974) EA 75 this principle was expressed as follows:

“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules ... where it is a regular judgment as is the case here the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

45. In the case of *Fidelity Commercial Bank Ltd Vs. Owen Amos Ndung'u & Another*, HCCC No. 241 of 1998 (UR), Njagi, J. (as he then was) held as follows:

“A distinction is drawn between regular and irregular judgments. Where summons to enter appearance has been served, and there is default in the entry of appearance, the ex parte judgment entered in default is regular. But where ex parte judgment sought to be set aside is obtained either because there was no proper service or any service at all of the summons to enter appearance, such a judgment is irregular, and the affected Defendant is entitled to have it set aside as of right.”

46. From the above finding it is therefore imperative that I do ascertain, first and foremost, whether the impugned default judgment was regularly entered or irregularly entered. From the record herein there is no evidence that the Applicants herein was served with the Plaint and Summons to Enter Appearance as is provided for under the provisions of Order 5 of the Civil Procedure Rules. Indeed there is no Affidavit of Service filed in Court to that effect neither are there any affidavits of service filed evidencing service of Notice of the formal proof hearing or Notice of delivery of judgment. It therefore follows that the default judgment was irregularly entered flowing from which the Applicants are entitled to have it set aside as of right.

47. The Court of Appeal in the case of *Patel vs Cargo Handling Services Ltd* [1974] EA 75 defined the meaning of defence as follows:

“In this respect, a defence on the merit does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a ‘triable issue’.

48. Having considered the statement of defence and counterclaim annexed to the Applicants Application, I am persuaded that there are triable issues therein raised which would best be dealt with in a trial so that the Court can determine the matter on its merits.

49. On the last issue for determination, as to whether the Plaintiff/Respondent will be prejudiced by the setting aside of the interlocutory judgment, I find that although the Respondent has informed that court that the judgment and decree of the court had already been executed wherein the 2nd Defendant had effected orders as directed by the court and canceled the impugned title held by the deceased, Paul Kipchirchir Cheruiyot alias Paul Cheruiyot, no supporting documents were annexed in their response to support this statement which then remains a mere allegation, but even if it were true, there has been



no demonstration on how the Respondent would be prejudiced which prejudice if any, could not be reasonably compensated by costs for the delay occasioned by setting aside the interlocutory judgment.

50. In conclusion I find that setting aside of the ex parte judgment is a matter of the discretion of the Court whose main aim is doing justice between the parties as was held in the case of Esther Wamaitha Njihia & 2 others vs. Safaricom Ltd [2014] eKLR where the Court citing relevant cases on the issue held inter alia:-

“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd.) 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 deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo). 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. It also goes without saying that the reason for failure to attend should be considered.”

51. Taking into account the circumstances of this case, and the balance of convenience, the Court finds no prejudice on the Plaintiff/Respondent that cannot be remedied with the compensation in costs.
52. The setting aside of the ex-parte judgment dated the 3rd March 2022 herein means that there shall be stay of execution that flowed from the said judgment. To this effect both the Applications dated the 27th March 2023 and 10th May 2023 are herein allowed with no costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 11TH DAY OF APRIL 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

