



**Nyambu v Abudi & another (Miscellaneous Application
E001 of 2024) [2024] KEELC 4402 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION E001 OF 2024**

FM NJOROGE, J

MAY 29, 2024

BETWEEN

IGNACE MCHANA NYAMBU PLAINTIFF

AND

AGNES KILONZO 1ST DEFENDANT

ABUDI SHOSHI ABUDI 2ND DEFENDANT

RULING

1. By a notice of motion application dated 28th February 2024, the Applicant sought orders that: -
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to set aside the ex-parte orders of demolition made and/or issued herein on 20th February 2024 and 21st February 2024 respectively and/or any other consequential orders made herein, pending the hearing and determination of these proceedings.
 - d. Spent.
 - e. That this honourable court be pleased to stay the execution of the ex-parte orders of demolition made and/or issued herein on 20th February 2024 and 21st February 2024 respectively and/or any other consequential orders made herein pending the hearing and determination of these proceedings.
 - f. That this honourable court be pleased to grant unconditional leave to the 2nd Defendant/ applicant herein to defend these proceedings by filling any necessary responses and/or defences against the plaintiff/respondent's application and or suit, if any.



- g. That costs of this application be borne by the plaintiff/respondent in any event.
2. The basis of the application is in the supporting affidavit sworn by the Applicant on 28th January 2024 and the grounds at the foot of the application. The applicant deposed that the respondent obtained the *ex-parte* demolition orders dated 20th February 2024 without serving the Applicant with the pleadings herein and that she only became aware of the same on 28th February 2024 when police officers from Watamu Police Station served her with the demolition orders. According to the Applicant, the Respondent is guilty of material non-disclosure and the impugned orders if implemented will render the suit nugatory and defeat the course of justice. She added that she stands to suffer irreparable loss and damage as she will have been condemned unheard.
 3. In opposition, the Respondent filed a replying affidavit that he swore on 6th March 2024, wherein he deposed that the application is frivolous, vexatious and an abuse of the court process; that the applicant is a perpetual non-attendant to judicial and quasi-judicial processes; that the parties herein went through a quasi-judicial process whose demolition order the Applicant was at liberty to appeal to this court but failed to do so. He urged the court to dismiss the application.
 4. A brief history of this matter is that on 10th January 2024, the respondent herein filed a miscellaneous application seeking orders that this court adopts the orders of the Kilifi County Lands, Energy, Housing, Physical Planning and Urban Development Department dated 9th October 2023 directing the applicant to demolish structures built on riparian land and otherwise obstructing the respondent's ocean view. The respondent also sought leave to enforce those orders through the OCS Watamu. On 20th February 2024, the court noted that the application was unopposed and allowed the same. The Applicant now wants a stay of those orders, setting aside and leave to defend the application dated 9th January 2024 and filed on 10th January 2024.
 5. The law on setting aside of *ex parte* orders is found under Order 12, rule 7 of the [Civil Procedure Rules, 2010](#) which provides: -

“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.”
 6. This provision is amplified by Order 51 rule 15 which provides that the court may set aside an order made *ex parte*. In setting aside *ex parte* orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause.
 7. In the instant case, the applicant was properly served on 12th January 2024 and an affidavit of service filed. The affidavit of service was sworn on 15th February 2024 by Vincent Mogaka Nyaboga, the Respondent's advocate. According to Mr. Mogaka, the applicant acknowledged receipt but declined to sign on the receipt copy. I am therefore satisfied that the Applicant was adequately served.
 8. The question that follows therefore is whether the Applicant's non-compliance with respect to filing a replying affidavit in due time and non-attendance of court on 20th February 2024 constituted an excusable mistake, or was meant to deliberately delay the cause of justice, and whether there is an explanation given for these failures. I have thoroughly perused the present application and supporting affidavit, I find no explanation whatsoever for non-compliance or non-attendance. There is no basis for this court to exercise discretion in favour of the applicant. Accordingly, I decline to set aside the orders issued on 20th February 2024.



9. The effect is that the application dated 28th February 2024 is unmerited and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29TH DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

