



REPUBLIC OF KENYA



Wachira & 2 others (Suing as Chairman, Secretary and Treasurer of Umoja II Residents Welfare Association) v Ndirangu & 2 others (Environment & Land Case 512 of 2017) [2024] KEELC 3959 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 512 OF 2017**

**OA ANGOTE, J
MAY 16, 2024**

BETWEEN

**BURTON WACHIRA 1ST PLAINTIFF
GATHIMBA N MWANGI 2ND PLAINTIFF
JOHN GITONGA 3RD PLAINTIFF
SUING AS CHAIRMAN, SECRETARY AND TREASURER OF UMOJA II
RESIDENTS WELFARE ASSOCIATION**

AND

**BENSON NDIRANGU 1ST DEFENDANT
FRED KINYUA 2ND DEFENDANT
BEATRICE KIRARA 3RD DEFENDANT**

RULING

1. Vide a Motion dated 23rd August, 2023, brought pursuant to the provisions of Section 19(2) of the *Environment and Land Court Act* and Orders 9 Rule 9(a) and 10, 10 Rule 11, 22 Rule 15 of the *Civil Procedure Rules*, 2010, the 3rd Defendant/Applicant seeks the following reliefs;
 - i. Spent.
 - ii. That this Honorable Court be pleased to grant leave to the firm of W.J. Ithondeka & Co. Advocates to come on record on behalf of the 3rd Defendant.
 - iii. Spent-That this Honorable Court be pleased to order a stay of execution of the Decree issued on the 19th April, 2023, pending hearing and determination of this Application.



- iv. That this Honorable Court be pleased to set aside the Judgement entered against the 3rd Defendant on the 28th July, 2022.
 - v. That this Honorable Court be pleased to grant leave to the 3rd Defendant to file a Statement of Defence and evidence and give directions for the hearing of the suit inter partes.
 - vi. Spent-That this Honourable Court be pleased to grant prayer 2 in the interim and pending inter-partes hearing of the Application.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Ms Beatrice Kirara, the 3rd Defendant/Applicant herein of an even date.
 3. Ms Kirara deponed that she is a Kenyan Citizen but primarily resides and works in the United States of America; that she is the proprietor of Nairobi /Block 107 /1135 having acquired it by way of purchase in the year 2001; that she purchased the property, then identified as Plot No.16 from Daniel Maranga Kamau, Peter Ndung'u Ngure and Samuel Maina Weru, trustees of Kariti Umoja II Welfare Society and that at the time of the purchase, the vendors were the registered proprietors of the property known as Nairobi/Block 107/1105. (herein after referred to as the mother property).
 4. According to Ms Kirara, pursuant to the terms of the agreement, the property was to be subdivided from the mother property in a scheme that anticipated 64 subdivisions therefrom; that upon completion of the purchase price, and while waiting for the completion of the sub-divisions, she was issued with a Share Certificate by Kariti Umoja II Welfare Society and that she took possession of the suit property around the year 2003.
 5. She deponed that after sub-division, her plot was identified as Nairobi/Block 107/1135 (the suit property); that subsequently, she made payments for the processing of the sub-division and lease in respect of the plot and that the letter for collection of the lease in respect of the suit property was thereafter issued.
 6. Ms Kariri deponed that she has developed rental units on the suit property from which she derives income; that the allegations that the property has encroached onto public land are untrue; that she was not served with the hearing notice in respect of the matter and was not aware of the hearing and that on or about 8th August,2023, her tenants were served with a notice of entry of Judgement and Decree.
 7. The 3rd Defendant/Applicant urges that if the Decree is executed, the buildings she has constructed will be demolished and her tenants removed from the suit property; that she stands to suffer great losses as a result of the foregoing and that she has filed a draft Defence which raises triable issues.
 8. In response, the Plaintiffs/Respondents, through the Chairman of Umoja II Residents Welfare Association, swore a Supplementary Affidavit on the 6th November, 2023. His initial response, the Replying Affidavit dated 11th October, 2023 was, upon his request expunged from the Court record on 7th November, 2023.
 9. In the Supplementary Affidavit, The Plaintiff's chairman, Mr Wachira, deponed that by a Plaint dated 27th July, 2017, they instituted a suit against the Defendants who had unlawfully encroached and developed some buildings on LR. No Nairobi/Block 107 /1057 (Original Plot No. 1113); that the parcel measuring 0.6104 Ha (Approximate 1.508 Acres) had been sub-divided by Nairobi City Council and set aside as public land where Umoja II Estate Market was constructed and that the market was built by the County and allocated to successful allottees who operate their stalls to date.



10. It is the Plaintiff's case that on 29th August, 2017, all the Defendants were served with their respective Plaints and Court Summons and an Affidavit of Service duly filed in that regard; that on 1st October, 2018, the 3rd Defendant/Applicant appointed M/S Moindi & Co. Advocates who filed a Notice of Appointment and served their Advocate and that despite the foregoing, no Defence was filed.
11. The Plaintiff's chairman deponed that the matter was thereafter certified ready for formal proof hearing on 21st September, 2018 and 24th February, 2022 and that Judgement was entered on 28th July, 2022 and that it is apparent that the 3rd Defendant did not deny any of the statements in the Plaint and as such, this was a regular Judgment which cannot be set aside.
12. It was deponed that in any event, the 3rd Defendant claims to be the proprietor of parcel Nairobi/Block 107/1135, a different parcel from the one they claim to have encroached on Umoja II Market being L.R. No Nairobi/Umoja 107 /1105; that the 3rd Defendant should file a separate suit in respect of her alleged land Block 107 /1135; and that the Judgment declared that the encroachment on the suit property Nairobi/ Block 107 /1057 (1113) Nairobi be demolished.
13. Mr Wachira urged that the 3rd Defendant has knowingly concealed that she had appointed an Advocate who did not file a Defence or participate in this matter; that the 3rd Defendant has not attached a lease or title deed of her alleged Plot No. Block 107 /1105; that he does not know Kiriti Umoja II Welfare Society; that if the 3rd Defendant was sold a parcel of land by Kiriti Umoja II Welfare, she should find recourse from them and that the suit property is a public utility which must be protected by the Court against grabbers.
14. The 3rd Defendant filed a Further Affidavit in which she deposed that the Replying Affidavit by Mr Wachira is fatal having been sworn by one Lucy Wambui Muthondu, a person not a party to the proceedings and that nonetheless, the Advocates known as Omondi & Co. Advocates are unknown to her and she has no recollection of giving instructions to them to act on her behalf explaining her lack of participation in the proceedings.
15. She deponed that her property is Nairobi/Block 107/1135; that the Plaintiff allege that the property encroaches on the market land, which she disputes; that the Court should consider her evidence which raises triable issues in order to make a just determination of the matter and that she remains exposed to the demolition of her property. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

16. Having considered the Motion, responses and submissions, the issues for determination before this Court are;
 - i. Whether the firm of W.J Ithondeka & Co Advocates should be granted leave to come on record on behalf of the 3rd Defendant?
 - ii. Whether the Judgement of 28th July, 2022 should be set aside and the 3rd Defendant granted leave to defend the suit?
17. The rules and procedure for engagement of an Advocate post judgment are set out under Order 9 rule 9 of the [Civil Procedure Rules](#) which provides as follows:

“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 without an 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.”

18. In elaborating on the provisions aforesaid, the Court, in the case of *Kazungu Ngari Yaa v Mistry V Naran Mulji & Co.* [2014]eKLR stated thus;

“The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was advocate on record. In first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person.

Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person.

In the second scenario under Rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court.”

19. The 3rd Defendant is seeking the leave of the Court for her new Advocates to come on record. Indeed, the Court recognizes the right to representation of ones choice as a constitutional right.

20. In the circumstances, the 3rd Defendant has followed the procedure as set out in the law. Further, no objection has been raised to the change of Counsel sought. Ultimately, the Court finds no reason to decline the same. This prayer is allowed.

21. The Courts’ jurisdiction to set aside ex-parte judgements is found in Order 10 Rule 11 of the *Civil Procedure Rules* which provides;

“Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

22. It is clear from the foregoing that the Court’s power to set aside an ex-parte judgment is discretionary in nature. This was affirmed by the Court of Appeal in *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* (1982-1988) KAR, where the Court held as follows:

“The Court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties”

23. The exercise of this discretion is not intended to aid a person who deliberately seeks to obstruct justice but to avoid hardship resulting from an accident, or excusable mistake or error. As aptly expressed by the Court of Appeal of East Africa in the case of *Shah v Mbogo & Another* (1967) EA 116;

“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.”

24. More recently, the Court of Appeal in *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR discussing the role of a Court called upon to exercise discretion stated thus;

“...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

25. It is now accepted that in applications of this nature, the Court’s first point of call is a determination as to whether the default judgment was regular or irregular. This distinction is crucial for the reasons that where judgment is found to have been irregular, the Court has no discretion to set aside the same but must do so *ex debito justitiae*. This position was affirmed by the Court of Appeal in *James Kanyita Nderitu v Maries Philotas Ghika & Another* [2016] eKLR where it held as follows:

“...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 appearances 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 (see *Mbogo & Another V Shah* (supra); *Patel V EA 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 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. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue. Or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo V Attorney General* [1986 – 1989] EA 456). The Supreme Court of India forcefully underline the importance of the right to be heard as follows in *Sangram Singh V Election Tribunal*, Kotch, AIR 1955 SC 664, at 711:

“There must be never present to the mind the fact that ours of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs,



that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

26. The Court has considered the record. The Plaintiff instituted this suit against the Defendants *vide* a Plaint filed on 27th July, 2017 seeking inter-alia a declaration that the Defendants had encroached and illegally developed property within the Plaintiff's land on which stands Umoja Estate II market, a public utility and sought for the demolition of the aforesaid structures.
27. The Plaintiff adduced into evidence an Affidavit of Service filed on 23rd May, 2018, which shows that the Defendants were served with the Plaint and summons on 29th August, 2017. The 3rd Defendant, through Counsel M/S Moindi and Co Advocates entered appearance on 1st October, 2018.
28. The 3rd Defendant maintains that she does not recall issuing instructions to M/S Omondi & Co Advocates. It is not lost on the Court that the 3rd Defendant does not dispute receipt of the Plaint together with summons. Neither does she dispute issuing instructions to M/S Moindi and Co Advocates. The record shows that the firm of M/S Moindi & Co Advocates have in fact appeared before Court on the 3rd Defendant's behalf.
29. This being so, the Court finds that the 3rd Defendant was duly served with the Plaint and summons. Nonetheless, the 3rd Defendant maintains that she was not aware of the hearing, not having been served with the hearing date. It is trite that even where a party has not filed a Defence, having entered appearance, they are entitled to participate in the proceedings.
30. This was aptly stated by Munyao J in *Apollo Muinde & 2 Others v Ernest Oyaya Okemba* [2019] eKLR as follows:

“In a situation where no appearance is filed to such a suit, or an appearance is filed and no defence is filed within the specified period, the avenue of the plaintiff is to apply for a date for hearing, and even then, since he has no interlocutory judgment in his favour, he needs to serve the defendant with a hearing notice, unless the court orders otherwise, for the matter will actually be proceeding for full hearing on merits and the defendant needs to be informed of this and opt whether to attend or not. If the defendant has actually made an appearance, then clearly, he must be served through his counsel, if he has one, or if in person, he must be personally served.

31. There is no evidence to show that the 3rd Defendant or her Counsel were ever served with a hearing notice. This being so, it follows that the 3rd Defendant was condemned unheard and the only course open to the Court in this respect is to set aside the ex-parte judgment.
32. Having found that the judgment entered against the Defendant was irregular on account of non-service of the hearing notice, and the same having been set aside *ex debito justitiae*, the Court is not mandated to determine the question of whether or not the Defence raises triable issues. The Court will however proceed to determine the same for purposes of completion.
33. The Court of Appeal in the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* [2015] eKLR in defining what a triable issue observed as follows:

“A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.



34. In the Ugandan case of *Sebei District Administration v Gasyali* [1968] EA 300,301,302, the Court adopted the reasoning in *Jamnadas Sodha v Gordandas Hemraj* (1952) 7 ULR 7 where it was stated thus;

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

35. The Court has considered the Plaintiff and the draft Defence attached to the 3rd Defendant’s Supporting Affidavit. The Plaintiff’s claim is that the Defendants, the registered owners of L.R Nairobi Umoja 107/1105, have encroached on their parcel of land L.R Nairobi Block Umoja 107/1057 on which Umoja Estate II market stands being a public utility.

36. The 3rd Defendant vide her draft Amended Defence denies owing L.R Nairobi Block Umoja/1105 and denies encroaching on the Plaintiff’s property. She states that she owns L.R Nairobi Umoja 107/1135 and has constructed thereon. Critically, however, the 3rd Defendant has stated that her parcel 107/1135 emanated from the mother parcel 107/1105. This is the parcel of land alleged to have encroached on the suit property.

37. In view of the foregoing, it is apparent that there are triable issues, especially on the question of the precise location of the property alleged to be owned by the 3rd Defendant vis the alleged encroachment.

38. In conclusion, the Court finds the present Motion to be merited and proceeds to make the following determination;

- i. Leave is hereby granted to the firm of W.J. Ithondeka & Co. Advocates to come on record on behalf of the 3rd Defendant.
- ii. The Judgment dated 28th July, 2022 together with the consequential decree and all ex parte proceedings be and are hereby set aside;
- iii. The 3rd Defendant is hereby granted unconditional leave to defend the suit and is allowed to file her Defence in terms of the draft statement of Defence annexed hereto within 14 days hereof.
- iv. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF MAY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wanjohi for Plaintiff

No appearance for Defendant

Court Assistant - Tracy

