



**Dado v Noor & 6 others (Environment and Land Appeal 010 of 2024)
[2024] KEELC 6020 (KLR) (23 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6020 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISILOLO
ENVIRONMENT AND LAND APPEAL 010 OF 2024
PM NJOROGE, J
SEPTEMBER 23, 2024**

BETWEEN

DIBA HUSSEIN DADO APPELLANT

AND

MOHAMMED NOOR & 6 OTHERS DEFENDANT

RULING

1. This application is dated 13th May, 2024 and seeks orders;
 1. That this application be certified as urgent, heard ex-parte in the first instance and service hereof dispensed with.
 2. That this Honourable Court be pleased to set aside the proceedings, Judgment and all other consequential orders made herein on 6th May, 2024.
 3. That the Honourable court be pleased to re-open the case to enable the Plaintiff/Applicant give evidence, and recall all the Defendant/Respondent's witnesses for cross-examination, and the matter to be heard on merits.
 4. That the costs of this application be in cause.
2. Prayer 1 in the application is spent.
3. The application has the following grounds;
 - i. That the suit proceeded for hearing on 8th April, 2024 in the absence of counsel for the plaintiff/Applicant or the Plaintiff/Applicant, and a judgment was delivered on 6th May, 2024 dismissing the Plaintiff/Applicant's suit with cost.
 - ii. That the hearing of 8th April, 2024 was exparte, as there was no-attendance by the Plaintiff/Applicant or his advocate on record.



- iii. That the non-attendance of the Plaintiff/Applicant was due to the fact that the Plaintiff/Applicant was observing the holy month of Ramadhan and was fasting, hence was not in a position to proceed with the hearing on the said date.
 - iv. That further, the Plaintiff/Applicant had only been served with a joint defence by the Defendants seeking to set aside the injunction granted to the plaintiff/applicant.
 - v. That accordingly, the suit was not ready for hearing, as the pleadings had not closed and no pretrial conference had been held, the matter having proceeded *ex parte* on 5th February, 2024, 4th March, 2024, and 12th March, 2024.
 - vi. That it will be in the interest of justice and a fair hearing, that the proceedings of 8th April, 2024 and the judgment delivered on 6th May, 2024 and all other consequential orders be set aside, and the suit heard afresh on its merit.
 - vii. That the Plaintiff/Applicant is ready and willing to meet any conditions that may be imposed by the court in order to set aside the proceedings and judgment, and recall the Defendant/Respondent witnesses for cross-examination to have the matter heard on its merits.
 - viii. That unless the orders sought are issued, the Plaintiff/Applicant stand to suffer substantial loss as he will not only have been denied an opportunity to be heard, and condemned unheard, but his right to property under Article 40 of the constitution will be contravened.
 - ix. That no undue prejudice will be caused if the application is allowed and the proceedings and judgment set aside, the Defendant/Respondents witnesses recalled and all the parties will have opportunity to test the authenticity of each other's evidence for a fair hearing.
 - x. That it is just and mete in the circumstances of the case for orders sought to be granted.
 - xi. That this application has been made without unreasonable delay.
 - xii. That it is in the interest of justice and further the overriding objective of the Civil Procedure Act of doing justice between the parties that the application be allowed.
 - xiii. That this court has a duty to ensure that matters before it are resolved fairly and as provided by the law. Further, the court should also be guided by the principle of ensuring that justice is administered without undue technicalities.
 - xiv. That the instant application is brought in good faith and the plaintiff/applicant is deserving of the discretionary reliefs sought herein, and the Honourable Court has discretion to make such orders that are necessary for ensuring that ends of justice are met.
4. The Plaintiff's Advocate has submitted that the impugned Judgment ought to be set aside for the reason that the suit was heard in the absence of his advocate and the plaintiff.

The plaintiff's advocate has proffered the following authorities:

- i. *JTM v RGA* (Civil Case 43 of 2016) [2021] KEHC 15385 (KLR) for his assertion that the court has unfettered discretion to set aside an *ex parte* order.
- ii. *Phillip Keipto & Another v Augustine Kubende* [1986] eKLR, for his assertion that setting aside of an *ex parte* order is amenable to overreach. unless there is fraud, intention, there is no error or default that cannot be put right by payment of costs.



- iii. [*David Kiptanui Yego and 134 Others v Benjamin Rono & 3 Others*](#) [2021] eKLR for his assertion that the court has inherent authority to set aside its decision
 - iv. [*Trust Bank Limited v Amalo Company Limited*](#) [2002] eKLR for his assertion that where possible disputes should be heard on their own merit
5. The Defendant/Respondent's Advocate has submitted that the application lacks merit for the following reasons;
- i. Ex parte proceedings are not unlawful or illegal where the court is satisfied that the hearing date was known to the parties. He admits that a litigant must be accorded an opportunity to be heard but when the litigant opts not to be heard the court's hands must not be fettered. He says that such hearing is provided for by the law in the form of the existence of Order 12 Rules 1 and 2 of the [*Civil Procedure Rules*](#).
 - ii. The Plaintiff's Advocate has not explained to the satisfaction of the court why despite knowledge of the hearing date, he and his client had not come to court or even explained to the court on the day of the hearing any of their predicaments which would have moved the court to adjourn the hearing.
 - iii. Litigation must at one time come to an end and parties must learn to live with well grounded decisions of the court.
6. This is not an appeal. In an appeal the first appellate court is entitled to examine the evidence tendered in the lower court and upon apposite analysis to arrive at its independent decision. The court's duty when dealing with an application for review of its Judgment or decision is not as enorous. For review of applications the court carefully examines all the circumstances that led to the delivery of the impugned Judgment or decision.
- In the case of an ex parte Judgment the court must also consider if the judgment was delivered in full obeisance to the provisions of the law and especially the provisions of Order 12 Rules 1 and 2 of the [*Civil Procedure Rules*](#).
7. Although Order 12 Rule 2 of the [*Civil Procedure Rules*](#) allows the court to dismiss the suit where the plaintiff intentionally refuses to attend a scheduled hearing and if there is no counterclaim, this court nevertheless allowed the defendants to tender evidence so that the court could be properly apprised of apposite issues.
8. The courts have been blamed, in many instances, for causing untold delays in hearing and determination of cases. Order 12 of the [*Civil Procedure Rules*](#) is in the law books in order to facilitate expeditious hearing and determination of cases. Where a hearing proceeds in full consonance with the provisions of Order 12 of the [*Civil Procedure Rules*](#), that Judgment can only be set aside by the court Onlyif it is shown to its satisfaction that a satisfactory explanation has been rendered.
9. This court notes that there were several times when the plaintiff's advocate and his client did not come to court when this matter was being handled despite knowledge thereof. Examples of dates when the plaintiff and his advocate were not in court despite knowledge that the matter was being handled are 5/2/2024, 4/3/2024, 12/3/2024 and 8/4/2024.
10. This court notes that the ex parte hearing in this case took place on 8/4/2024. Judgment was delivered on 6/5/2024. A diligent litigant and his advocate had enough time of close to one month to move the court for appropriate orders. At least they should have come to the court registry to make inquiries



regarding what transpired during the hearing date which they had knowledge of and have not even attempted to deny knowledge thereof.

11. In the circumstances, I find that this application lacks merit. While acknowledging that this court has unfettered discretion to set aside its Judgments or orders, this discretion can only be invoked judiciously and always with good reason.
12. I do find that this is not a case where the refusal of the plaintiff to participate in its hearing can be put right by payment of costs. If payment of costs can cure refusal by parties to participate in proceedings, this can only spawn total confusion in the administration of justice. Money and not justice will veritably and fortuitously be crowned King!
13. In the circumstances of this case I find that the Plaintiff's conduct was deliberately intended to obstruct or delay the cause of Justice.
14. I issue the following orders:
 - i. This application is hereby dismissed.
 - ii. Costs shall follow the event and are awarded to the Defendants/Respondents.

DELIVERED IN OPEN COURT AT ISIOLO THIS 23RD DAY OF SEPTEMBER, 2024 IN THE PRESENCE OF:

Court Assistant: Balozi/Rahma

Isaac Wachira Wanjohi for the Applicant – Absent

J.O Ondieki present for the Defendants

HON. JUSTICE P.M NJOROGE

JUDGE

