



Gakuha v Embakasi Ranching Company & 4 others (Environment & Land Case 708 of 2017) [2024] KEELC 7208 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 708 OF 2017
OA ANGOTE, J
OCTOBER 31, 2024**

BETWEEN

JAMES MBURU GAKUHA PLAINTIFF

AND

EMBAKASI RANCHING COMPANY 1ST DEFENDANT

SAMUEL MWANGI THUITA 2ND DEFENDANT

JAMES KARANJA MWANGI 3RD DEFENDANT

NDUBAI NGEERA 4TH DEFENDANT

LAND REGISTRAR - NAIROBI 5TH DEFENDANT

RULING

1. Before the Court for determination is the 4th Defendant's Notice of Motion dated 13th February 2024 and brought under Sections 3, 3A, 63(e), 80, 1A and 1B of the *Civil Procedure Act* and Order 22 Rule 22, Order 45 and Order 51 Rule 1 and 3 of the Civil Procedure Rules. The 4th Defendant is seeking orders that:
 - a. The Court be pleased to vacate, vary, set aside and/or review part of its orders made on 8th February 2024 directing the 4th Defendant to pay the Plaintiff throw away costs of Kshs. 100,000 within 21 days of the ruling delivered on 8th February 2024.
 - b. That in the alternative the Court be pleased to vacate, vary, set aside and/or review its orders made on 8th February 2024 directing the 4th Defendant to pay the Plaintiff throw away costs of Kshs. 100,000 within 21 days of the ruling delivered on 8th February 2024 and substitute it with an order directing the said



amount or lesser amount be deposited in the Court pending the determination of the main suit.

- c. In the further alternative the Court be pleased to order all Defendants to share the throw away costs of Kshs. 100,000.
 - d. The Court be pleased to give further orders and directions as it may deem fit and just.
2. The application is based on several grounds and supported by an affidavit sworn by Ndubai Ngeera, the 4th Defendant/Applicant, who deponed that an ex-parte judgment was entered against him in this case on 4th November 2021 and that he consequently filed an application dated 15th December 2022 to have the judgment set aside.
 3. It was deponed that by a ruling dated 8th February 2024, the ex-parte judgment was set aside by the Court on condition that the Defendants file their defences and the 4th Defendant pays the Plaintiff throw away costs of Kshs. 100,000.
 4. The 4th Defendant has averred that the Kshs. 100,000 is exorbitant as the case is still in the pretrial stages; that it is unfair that he is the only one who was condemned to pay the throw away costs yet the other Defendants had supported the application and that the 1st Defendant had filed a similar application to set aside the ex-parte judgment. The 4th Defendant also noted that the costs incurred by the Plaintiff in advertising could not amount to Kshs. 100,000.
 5. In asking that the Court considers reviewing the throw away costs downwards or in the alternative paying the Kshs. 100,000 to the Court instead of the Plaintiff, the 4th Defendant stated that he had reason to believe that the Plaintiff would not be able to reimburse the same at the end of the suit.
 6. The Plaintiff filed a Replying Affidavit dated 19th February 2024. He stated that since instituting the suit in 2017, he has been desirous of prosecuting it but the Defendants have come up with delaying tactics including the filing of applications like the current one.
 7. He stated that he had served the Defendants with the Plaint including serving the 4th Defendant by placing an advertisement in the newspaper; that it was after this that judgment in default of appearance was entered and that when the judgment was set aside, the Court awarded him throw away costs for the expenses he had incurred in prosecuting the case.
 8. The Plaintiff averred that the Court has discretion to issue the throw away costs and its discretion should not be interfered with; that he incurred other costs apart from placing the advertisement in the newspaper and that the other costs included process server's fees and advocate fees.
 9. The 4th Defendant filed a further affidavit dated 13th February 2024. He stated that the Plaintiff was concealing material facts as the 2nd, 3rd and 4th Defendants were not served with the summons to enter appearance and the ex-parte judgment was consequently set aside. The parties filed submissions which I have considered.

Analysis and Determination

10. On 4th November 2021, the Court entered an ex-parte judgment against the Defendants. The same was challenged by the 1st and 4th Defendants. The Court, in a ruling dated 8th February 2024, found that the 4th Defendant had established sufficient grounds for setting aside the judgment.



11. The ex parte judgement was consequently set aside and the 4th Defendant ordered to pay the Plaintiff throw away costs of Kshs. 100,000.
12. The 4th Defendant is challenging the order awarding the Plaintiff throw away costs on the grounds that: there were other Defendants in the suit and he was the only one asked to pay the costs; the costs are exorbitant; the judgment had been set aside, and lastly that he had met the grounds for review.
13. The Plaintiff has maintained that the Court had discretion to award the throw away costs and that the discretion was exercised properly.
14. Section 27 (1) of the [Civil Procedure Act](#) provides as follows:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

15. Based on the foregoing, it is clear that the Court had discretion to award the throw away costs. The question now turns as to whether such discretion was properly exercised. The first ground put forth by the 4th Defendant to challenge the discretion is that he is the only one that was ordered to pay the throw away costs, and not the other Defendants.
16. A perusal of the ruling dated 8th February 2024 reveals that the Court considered applications by the 1st and 4th Defendants. The other Defendants did not file applications challenging the judgment. The Court could not have asked (and should consequently not ask) the 2nd, 3rd and 5th Defendants to pay throw away costs as they did not participate in the application in which the throw away costs were awarded.
17. The Court found that the 1st Defendant had failed to rebut the presumption that the Plaintiff had duly served it with summons to enter appearance. The judgment entered against the 1st Defendant was therefore found to be regular.
18. On the other hand, the Court found that the presumption that the 4th Defendant would see the advertisement in the newspaper was rebutted as there was no proof that he saw it. The judgment was therefore set aside on this ground. From the foregoing, it is clear that though the two applications sought similar orders, it is only the 4th Defendant’s application that was successful.
19. The purpose of throw away costs was stated as follows in the case of County Government of Tana River & Another vs Hussein Fumo Hiribae [2021] eKLR:

“In my view the award of costs either in the classification defined in section 27 as those that follow the event or throw away costs as it’s in the case herein, the uniting factor is closely linked to adjudicative procedures before courts by a litigating party. These procedures can consume time, energy and money. This award of costs may be one route to improve due diligence and efficiency in our legal system as a whole....In my strong view the respondent



being awarded throwaway costs are to cater for substantial indemnity costs to reflect time that was wasted and would be duplicated when the trial is rescheduled.”

20. The import of the foregoing is that throw away costs are issued to compensate a litigant who put time and energy into litigating a case whose judgment was then set aside. The 1st Defendant could not have been ordered to pay the throw away costs to the Plaintiff as it was unable to prove its case for setting aside. The judgement against it was found to be regular. The benefit accruing to the 1st Defendant is by default.
21. The Court therefore rightfully exercised its discretion in ordering the 4th Defendant to solely pay the throw away costs.
22. The 4th Defendant has also argued that he had proven his case against the Plaintiff and had the judgment set aside. It is worth noting that the costs in question in this suit are not those that follow the event but throw away costs. The costs were issued to indemnify the Plaintiff who had put in time, money and energy to prosecute the case. Even though the 4th Defendant was the victorious party in the application, he was not awarded costs and was instead asked to pay the Plaintiff throw away costs as the circumstances of the case warranted such a cause of action.
23. The 4th Defendant also argued that the costs were exorbitant. In *County Government of Tana River & another vs Hussein Fumo Hiribae (Supra)* it was stated that:

“In my view the appellants raised the issue due to the screaming nature of the quantum assessed at Kshs.150, 000/= without necessarily taking into account the broad spectrum of the litigation. I would therefore decline the appeal with no orders as to costs.”
24. The import of the foregoing is that the amount awarded in throw away costs should be assessed vis a vis the broad spectrum of litigation. The Plaintiff brought this out in his submissions when he noted that the costs incurred in litigating the case amounted to Kshs. 137,305. I consequently agree with the Plaintiff that the Kshs. 100,000 throw away cost was not exorbitant.
25. The 4th Defendant also argued that he has met the grounds for review. Section 80 of the *Civil Procedure Act* which provides as follows:

“Any person who considers himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
26. Order 45 Rule 1 of the Civil Procedure Rules provides:

“(1) Any person considering himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within



his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

27. The 4th Defendant has not proven that there is discovery of new evidence that was not within his knowledge nor that there is an error apparent in the ruling. Additionally, while he argued that the throw away costs order was prejudicial to him as he was the only Defendant ordered to pay the same, I do not find that that constitutes a sufficient reason under Order 45 Rule 1. This court has shown in the preceding paragraphs that the Court properly exercised its discretion in issuing the said order. The 4th Defendant is therefore not entitled to an order of review.
28. In view of the foregoing, I find that the 4th Defendant’s application lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Odhiambo for Plaintiff’s/Respondent

No appearance for Defendant

Court Assistant: Tracy

