



**Githui v Thiongo & 2 others (Environment & Land Case E002 of 2024)
[2025] KEELC 574 (KLR) (Environment and Land) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E002 OF 2024
MC OUNDO, J
FEBRUARY 13, 2025**

BETWEEN

JOHN GITHUI PLAINTIFF

AND

VINCENT MBUGUA THIONGO 1ST DEFENDANT

LAND REGISTRAR, NAIVASHA SUB-COUNTY 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. What is before me for determination is the 1st Defendant's Application dated 30th September, 2024 brought under the provision of Order 51 of the Civil Procedure Rules and Sections 3 and 3A of the *Civil Procedure Act* and all the enabling provisions of law where the 1st Defendants seeks for the setting aside of the proceedings in the instant matter so as to grant him an opportunity to defend the suit.
2. The said Application was supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by the 1st Defendant herein who deponed that on 18th September 2024, the instant matter had proceeded for hearing on formal proof wherein the same had been closed. That upon perusing the court file, he had found out that the firm of Rumba Kinuthia & Company Advocates had only filed a Memorandum of Appearance and not a Defence despite having obtained the relevant instructions from him. That he would be condemned unheard hence it was only fair and in the interest of justice that the court allows his application.
3. In response, the Plaintiff vide his Replying Affidavit dated 3rd October, 2024 deponed that an application to set aside proceedings proceeded from two distinct premises. Firstly, under the provisions of Order 10 Rule 11 where proceedings are taken in default of appearance and defence, and secondly,



under Order 12 Rule 7 where a party failed to attend the hearing. That subsequently, a party ought to specify the provisions of the law on which he seeks exercise of discretion. That the instant Application having been based inter alia on the provisions of Order 51 and the general provisions of the Civil Procedure Act, the same was a non-starter.

4. That despite the 1st Defendant having accused the court of condemning him unheard, yet the proceedings showed that he had been granted several opportunities to comply to the effect that when the matter came up for hearing on 18th September, 2024, his Counsel had appeared online wherein he had sought time allocation for 11.00 am since he had been travelling from Nairobi, which request the court had gladly granted.
5. At 11:00am, his Advocate did not show up and despite having been granted more time to call the said advocate before the matter could proceed, it had turned out that both the Applicant and his Advocate had not been candid as the Advocate was not within Naivasha town as the court had been informed. The matter then proceeded for hearing wherein the Plaintiff proceeded with his evidence in chief and was cross-examined by Counsel for the 2nd Defendant.
6. That nevertheless, when the court invited the 1st Defendant/Applicant to cross-examine the Plaintiff, he had declined and instead his friend who had accompanied him stood and asked that he be joined in the proceedings which informal application the court had declined. That from the foregoing, it was clear that the instant Application was frivolous since the proceedings taken before the court had not been ex parte.
7. That whilst an Application for setting aside was an invitation for the court to exercise discretion, the Applicant ought to have come to court with clean hands which he did not and had now accused the court of condemning him unheard.
8. That the discretion to set aside proceedings was a judicial discretion which proceeded from well-established principles which the Applicant had not met. That in any case, now that the Applicant blamed his advocate for failure to file the defence, he had recourse in the law on professional negligence but not to derail the court process. That subsequently, the instant Application should be dismissed with cost.
9. In a rejoinder, the 1st Defendant/Applicant in his Further Affidavit dated 11th October, 2024, deponed that he had not demonstrated any intention to derail the court process, but was seeking a fair hearing as enshrined under the provisions of Articles 47 and 50 of the Constitution. That in any case, the aim of the court was to dispense justice without due regard to technicalities of procedure thus the court ought to exercise its discretion, aimed at arriving at a decision justifiably after hearing the case on merit.
10. That indeed his advocate had appeared online at the time and taken time allocation only to fail to appear at the time of hearing. That therefore, it was only fair and in the interest of justice that the court allows the instant Application.
11. The Application was canvassed by way of written submissions, wherein 1st Defendant/ Applicant's Submissions after reiterating what transpired in court and based on the decision in the decided case of *Johnson Gacau Kibera v Lawrence Maina Mwangi* [2020] eKLR, was that it was only fair and in the interest of justice that the court allows the instant Application.
12. The Plaintiff's Submissions on the other hand in opposition to the Applicant's Application and based on the principles of setting aside proceedings was that firstly, the Applicant must demonstrate that there were proceedings or judgement which had been entered in default of appearance and defence and secondly, he ought to demonstrate that his circumstances fitted within the principles applicable in the



exercise of the discretion to set aside. That the decided case of *Shah v Mbogo and Another* [1967] EA 116 laid down the basis upon which the courts discretion could be exercised.

13. That subsequently, in an application to set aside ex-parte proceedings and judgment, two situations arise, firstly, where the proceedings were irregular on account of want of service and secondly where the summons to enter appearance had been served and the Defendant/Applicant has entered appearance hence the Applicant must explain the reason for failure to file his defence in time, and whether the intended defence raised triable issues.
14. That in the present circumstance, the Applicant had been granted time to file the defence but he had failed to comply and secondly, the proceedings herein had not been ex-parte since the Applicant, who had been present in court had been granted an opportunity to cross-examine the Plaintiff despite having not filed a Defence but he had declined to do so..
15. It was thus his submission that the discretion to set aside proceedings was not intended to underwrite ineptitude, crafty conduct, half-truths and deliberate attempt to delay proceedings and that claims of professional negligence ought to be redressed by way of specific court proceedings designed for that purpose. Reliance was placed in the decided case of *Omwoyo v African Highlands & Produce Co. Ltd* [2002] 1KLR to submit that the Applicant had not pleaded that the error of his Counsel had been a genuine mistake since he had deposed that the same had been a clear case of negligence and that the court could not underwrite cases of sheer negligence.
16. That the Applicant had the obligation to explain the reason for the delay of over 8 months before filing the defence and demonstrate that he had a meritorious defence, which he failed to do and instead blamed his Counsel for failure to appear and the court for condemning him unheard.
17. That the Applicant had neither filed an affidavit of merit or a draft defence as was trite that a defence that raised triable issues ought to have been accompanied by an affidavit of merit or a draft defence. That in the absence of the same, the Applicant's submissions had been a blank verse. That subsequently, the instant Application ought to be dismissed and the matter proceeds to its logical conclusion.

Determination.

18. I have considered the Applicants' application herein dated the 30th September, 2024 which seeks for the setting aside of the proceedings in the instant matter so as to grant him an opportunity to defend the suit. I have also considered the Replying Affidavit to the application as well as the parties' written submission.
19. I note that the present application has been brought under the provisions of Order 51 of the Civil Procedure Rules and Sections 3 and 3A of the *Civil Procedure Act*, provisions which do not give this Court jurisdiction to grant the prayers sought.
20. In the case of *Mumias Out growers Company (1998) Ltd -vs- Mumias Sugar Company Ltd* NRB HCCC No. 414 of 2008 the court held that when considering an application to set aside and/or vary a consent decree, that:

‘The Applicants has invoked the inherent jurisdiction of this court. I have always known the law to be that the inherent power of the court cannot be invoked where the rules have provided for the procedure to be followed’.



21. Bosire J (as he then was) in the case of Muchiri –vs- Attorney General & 3 others (1991) KLR 516 stated at page 530 that:-

“Inherent jurisdiction is invoked where there are no clear provisions upon which relief sought may be anchored, or where the invocation of rules of procedure will work an injustice.”
22. Order 12, Rule 7 of the Civil Procedure Rules grants the court discretion to set aside any ex parte proceedings upon such terms that it deems fit and just. It provides 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”.
23. The Plaintiff herein instituted the instant suit vide a Plaint dated 17th January, 2024 seeking that the registration of the 1st Defendant as the proprietor of parcel of land known as Naivasha/ Maraigushu Block 10 (Kedong) 992 be revoked forthwith for having been obtained fraudulently through corruption. That thereafter an order do issue to the 2nd Defendant to register the transfer by Chargee issued to the Plaintiff by KCB bank and then issue a title deed in favour of the Plaintiff.
24. Despite service, while the 2nd and 3rd Defendants neither entered appearance nor filed a Defence, the Applicant on the other hand entered appearance, but there was no Defence filed despite the court’s indulgence.
25. Subsequently, the matter had proceeded for formal proof on 18th September, 2024 wherein both the Plaintiff and the Defendants case were closed and parties directed to file their written submissions, pursuant to which the Applicant filed the present Application.
26. The issue for determination would therefore be whether it would be fair and in the interest of justice to allow the Applicant defend the suit.
27. The jurisdiction of the court to review or set aside its decisions is wide and unfettered. In *Shah v Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so 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 has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.” (emphasis added)
28. The legal threshold to consider before exercising the said discretion is whether the Applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte proceedings.
29. In this case, the reason given by the Applicant in their Application seeking to have the proceedings and order of the 30th September 2024 set aside was that after the instant matter had proceeded for hearing on formal proof, he had perused the court file only to find that his former Counsel on record had only filed a Memorandum of Appearance and not a Defence despite having obtained the relevant instructions from him. That the court rendering a judgment without his input he would therefore be condemned unheard hence it was only fair and in the interest of justice that the court allows his application so he can defend the suit.
30. The application was opposed by the Plaintiff/Respondent on the grounds that the Applicant had not explained the reason for the delay of over 8 months before filing the defence and neither had he filed an affidavit of merit or a draft defence that raised triable issues, but he had instead blamed his Counsel for



failure to appear and the court for condemning him unheard. That he had not satisfied the principles of setting aside the proceedings.

31. The court is alive to the fact that it is not in every case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court however in the case of *Muthaiga Road Trust Company Ltd vs Five Continents Stationers Ltd & 25 Others* (2003) KLR 714, the Court of Appeal had held that:-

“In an application for setting aside, 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”.

32. The decision whether or not to set aside *ex parte* proceedings is discretionary, but must be guarded to avoid injustice and hardship resulting from inadvertence or excusable mistake or error but not to obstruct or delay the course of justice. Importantly, the court should not be in a rush to remove a litigant from the seat of justice as denial of the right to be heard should always be the last resort. I find that the Applicant who had been represented by Counsel has shown sufficient cause why he should be allowed to defend the suit and in this regard, I find that in the interest of justice;

- i. That the Applicant shall be given an opportunity to defend the suit;
- ii. The proceedings of 18th September 2024 are herein set aside.
- iii. The Applicant shall file, serve his defence and comply with pretrial directions within 14 days.
- iv. The Applicant shall pay thrown away costs of Kshs. 20,000/= to the Plaintiff within the next 14 days failure of which the order herein will lapse and the court shall proceed with writing and delivery of judgment.
- v. Costs of the application shall be in the cause.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 13TH DAY OF FEBRUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

