



REPUBLIC OF KENYA



**Kisinzi v Kisinzi (Environment and Land Appeal 15 of 2020)  
[2024] KEELC 7226 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7226 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL 15 OF 2020  
TW MURIGI, J  
OCTOBER 23, 2024**

**BETWEEN**

**BONIFACE KINYANZWII KISINZI ..... PLAINTIFF**

**AND**

**FRANCIS NGUNDO KISINZI ..... DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 11<sup>th</sup> October, 2023 brought under Articles 159 (2) (a), (b), (d) of *the Constitution* in addition to Order 50 Rule 1 and Order 45 Rule 1, 2 & 3 of the Civil Procedure Rules in which the Applicant seeks the following orders: -
  - i. Spent.
  - ii. Spent.
  - iii. Spent.
  - iv. Spent.
  - v. That this Honourable Court be pleased to review and set aside the judgment delivered on 22<sup>nd</sup> June, 2022 and all the consequential orders thereto.
  - vi. That upon grant of prayer 5 above, the Honourable Court do issue an order granting leave to the Defendant/Applicant to put in his defence out of time and prosecute the same.
  - vii. That the cost of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Boniface Kinyanzwii Kisinzi sworn on even date.



### **The Applicant's Case**

3. The Applicant averred that the Respondent has begun executing the judgement delivered by this Court on 22<sup>nd</sup> June, 2022 by issuing proclamation notices.
4. It is the Applicant's case that after he was served with the summons to enter appearance, he instructed the firm of Munyasya & Co. Advocates to act on his behalf. That all along he was aware that he was represented because whenever he visited the law firm of his former advocates, he would be informed that the case was on course.
5. He deposed that he became aware that that the matter proceeded without the participation of his Counsel when auctioneers visited his home to proclaim livestock and household goods pursuant to the judgment entered against him.
6. That later on he established that the matter proceeded as undefended as his former Advocates did not file a defence to the Plaintiff's claim. The Applicant asserted that he was condemned unheard and argued that the mistake of his previous Advocates should not be visited upon him.
7. The Applicant averred that the orders issued by this court are incapable of compliance since the Defendant is the registered owner of land Parcel No. Makueni/Utangwa/2474 which is distinct from the suit property. He further averred that he has no interest with the suit property and urged the court to allow the application as prayed.

### **The Plaintiff/Respondent's Case**

8. The Respondent filed a replying sworn on 30<sup>th</sup> October, 2023 in opposition to the application. He averred that the Applicant has not demonstrated merit in the application for the reason that: -
  - i. The period of delay in filing the application herein is lengthy and inordinate;
  - ii. No cogent reasons to substantiate the delay have been advanced;
  - iii. No draft defence has been annexed to showcase the Applicant's defence as having high chances of success or raising any triable issues;
  - iv. The Plaintiff stands to be highly prejudiced if the application is allowed.
9. He contended that the firm of Munyasya & Co. Advocates filed an application dated 8<sup>th</sup> December, 2020 seeking leave to cease from acting for the Defendant for want of instructions. That the application was brought to the attention of the Defendant and the same was eventually allowed on 28<sup>th</sup> January, 2021.
10. He further contended that the Defendant cannot feign ignorance of the proceedings herein as he was served with the court processes in person. He further contended that on several occasions, he led his Advocates to the Defendant's home and personally identified him for the purposes of effecting service.
11. That after the judgment herein was delivered, the Defendant was issued with a demand letter dated 5<sup>th</sup> August 2022 copied to the Officer Commanding Station, Mbooni Police Station, seeking for the payment of general damages and costs of the suit.
12. That after the Defendant failed to comply with the decree of the court, his Advocates made an application dated 7<sup>th</sup> September, 2022 seeking for police assistance in enforcing the eviction of the Defendant.



13. He averred that the Defendant was served with the application dated 7<sup>th</sup> September, 2022 by a licensed court process server in the presence of the Area Assistant Chief, Utangwa Sub-location as shown in the affidavit of service dated 10<sup>th</sup> November, 2022.
14. The Plaintiff deposed that the party and party bill of costs dated 12<sup>th</sup> March, 2023 was brought to the attention of the Defendant vide the Notice of Taxation dated 9<sup>th</sup> May, 2023 as shown in the affidavit of service dated 30<sup>th</sup> May, 2023. That a further demand letter dated 11<sup>th</sup> September, 2023 for general damages and costs of Kshs. 630,000/= was issued to the Defendant. That after failing to satisfy the decree, the execution process ensued resulting in the issuance of warrants of sale dated 2<sup>nd</sup> October, 2023 followed by the proclamation notices.
15. According to the Plaintiff, the application herein is a knee-jerk reaction aimed at wasting the court's judicious time. The Plaintiff further averred that he dutifully prosecuted the suit and that the Defendant was kept in the loop at all times. He asserted that he will suffer prejudice in the event that the Defendant's application which he described as a mockery of the court process is allowed as prayed. He urged the Court to dismiss the application with costs.
16. The parties were directed to canvass the application by way of written submissions.

#### **The Defendant/Applicant's Submissions**

17. The Applicant's submissions were filed on 30<sup>th</sup> September 2024.
18. On his behalf, Counsel submitted that the Defendant was all along aware that he was well represented in court by the firm of Munyasya & Co. Advocates. Counsel further submitted that the Defendant was not aware that the matter proceeded without the participation of his Counsel and that he only became aware of the matter at the execution level.
19. Counsel further submitted that the Applicant's former Counsel did not file a defence and hence he was condemned unheard contrary to the dictates of *the Constitution* and the principles of natural justice.

#### **The Plaintiff/respondent's Submission**

20. The Plaintiff/Respondent filed his submissions dated 16<sup>th</sup> May, 2024.
21. On his behalf, Counsel identified the following issues for the Court's determination: -
  - i. Whether the Applicant was given an opportunity to defend his case and whether he failed to do so
  - ii. Whether the judgment should be set aside or reviewed?
  - iii. Whether the Applicant should be granted leave to file his defence?
  - iv. Who should bear the costs.
22. On the first issue, Counsel reiterated the contents of the Plaintiff's replying affidavit in support of his submissions. In addition, Counsel submitted that the present application goes against the equity maxim that equity favours the diligent and not the indolent.
23. On the second issue, Counsel submitted that there has been inordinate delay of more than one year in the filing the present application and that no cogent reasons have been advanced to explain the delay. Counsel further submitted that the Applicant has not annexed a draft defence to demonstrate that



it raises triable issues. Counsel asserted that the Applicant has not satisfied the conditions for setting aside the judgment under Section 80 of the *Civil Procedure Act*.

24. On the third issue, Counsel submitted that Defendant did not annex a draft defence to enable the court to determine if it raises any triable issues or whether it has chances of success. Counsel contended that the Plaintiff dutifully litigated his case and is therefore entitled to enjoy the fruits of his judgment.
25. Concluding his submissions, Counsel urged the court to dismiss the application with costs.
26. None of the authorities cited by Counsel were availed for the Court's perusal.

### **Analysis and Determination**

27. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the ex parte judgment delivered on 22<sup>nd</sup> June 2022 should be reviewed and/or set aside.
28. The Applicant relied on the provisions of Order 45 Rule 1 of the Civil Procedure Rules to seek for a review of the judgment delivered on 22<sup>nd</sup> June 2022. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules.
29. Section 80 of the *Civil Procedure Act* 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.
30. Order 45 Rule 1 of the Civil Procedure Rules provides that: -  
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 the judgment to the court which passed the decree or made the order without unreasonable delay.
31. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR* where the Court held that:-  

“In the High Court both the *Civil Procedure Act* in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”



32. Similarly, in Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR the court held that: -

“Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”

33. As regards the first requirement, the Applicant must show that there is discovery of new or important matter of evidence which after due diligence was not within his knowledge or could not be produced at that time.

34. The Applicant has not shown that there is discovery of new or important matter of evidence that he could not have placed before the judgment was delivered.

35. With regards to the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of Nyamogo & Nyamogo Vs Kogo (2001) EA 170 the court held that;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.”

36. Similarly, in the case of Timber Manufacturers and Dealers Vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992, Emukule J held that:-

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

37. The Applicant has not pin pointed the errors that are apparent on the face of the record.

38. The Court is also mandated to consider if there are sufficient reasons to review the Court’s judgment.

39. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR stated that:-

“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

40. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court’s ruling.

41. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.



42. The judgment sought to be reviewed was delivered on 22/06/2022. The instant application was filed on 11<sup>th</sup> October 2023. That duration is far from reasonable and the same has not been explained.
43. In so finding, I am persuaded by the findings in the case of John Agina Vs Abdulswamad Sharif Alwi C.A Civil Appeal No. 83 of 1992, where the court stated as follows;

“An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy of the court.”

From the foregoing, I find that the Applicant has not satisfied the conditions for the grant of review of the judgment delivered on 22/06/2022.

#### **Whether the Judgment delivered on 22<sup>nd</sup> June 2022 should be set aside**

44. The Applicant is seeking to set aside the judgment delivered on 22<sup>nd</sup> June 2022. Order 10 Rule 11 of the Civil Procedure Rules provides that ex parte interlocutory judgments in default of appearance or defence may be set aside. It stipulates as follows: -

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

45. Courts have discretionary power to set aside ex parte judgment with a view of doing justice to the parties.

46. The well established principles of setting aside interlocutory judgment were set out in the case of Patel vs East Africa Cargo Handling Services Ltd (1974) EA 75 where the court held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment, except that if he does vary the judgment, he does so on such terms as may be just. 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”.

47. In the case of James Kanyita Nderitu & another v Marios Philotas Ghika & another (2016) eKLR, the Court of Appeal set out the criteria to be adopted when exercising jurisdiction to set aside a regular and an irregular ex-parte judgment 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 appearance 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, whether on the whole it is in the interest of justice to set aside the default judgment, among others.

In an irregular default 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 the 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 raised triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reasons 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.”

48. In *Shah v Mbogo & Another* (1967) E.A 116, the Court of Appeal stated that the discretion to set aside an ex parte judgment is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable error but not to assist a party who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice.
49. The record shows that the Plaintiff instituted this suit against the Defendant vide a Plaint dated 13<sup>th</sup> July 2020 and amended on 3<sup>rd</sup> November 2021 seeking the following orders:-
- a. An order compelling the Defendant to compensate the Plaintiff with land measuring 10,000 ft<sup>2</sup> for which the Plaintiff lost due to the Defendant’s failure to compensate him as per the agreement preceding the adjudication and subdivision of their deceased father’s land.
  - b. An order compelling the Defendant to compensate the Plaintiff with land measuring 2,110 ft<sup>2</sup> with respect to the portion of land illegally alienated by the Defendant from the Plaintiff’s plot No. Makueni/Utangwa/2475.
  - c. An order of declaration be issued to the effect that the Plaintiff is the beneficial owner of Plot No. Makueni/Utangwa/2463 by dint of adverse of possession and the same should be registered in his (the Plaintiff) favour.
  - d. An order compelling the Defendant to compensate the Plaintiff with land measuring 8,125 ft<sup>2</sup>, which the Plaintiff lost due to the Defendant failure to transfer Plot No. Makueni/Utangwa/2463 to the Plaintiff, the same having been a subject of a transfer agreement.
  - e. In the alternative to prayers (a) (b) and (c) above and without prejudice thereto the Defendant be compelled to offer monetary compensation to the Plaintiff for the total acreage of 20,235 ft<sup>2</sup> based on the market value of the land.
  - f. Based on prayer (d) (1) above, the Defendant be compelled to pay the valuation fees of the land and other charges attendant thereto.
  - g. The honourable court be pleased to issue an order of permanent injunction against the Defendant, his agents and/or servants from entering, tilling, encroaching and interfering in any manner whatsoever with the boundary to land Parcel Number Makueni/Utangwa/2461.
  - h. An order of eviction against the Defendant owing to his trespass into Plaintiff’s Plot No. Makueni/Utangwa/2461.
  - i. General damages for trespass into the Plaintiff’s Plot No. Makueni/Utangwa/2461.
  - j. An award of mesne profits on account of the Defendant’s unlawful occupation and use of the Plaintiff’s land.
  - k. The Honourable court be pleased to grant the Plaintiff damages for the destroyed nursery, banana plants and loss of use of land and earnings from the proceeds of sale of vegetables.



- l. Costs of this suit together with interest thereon at the rates and for such period as this Honourable court may deem fit.
  - m. Any other relief this Honourable Court may deem fit and just to grant.
50. It is not in dispute that the Defendants/Applicant was served with the summons to enter appearance and the Plaintiff. The Respondent averred that he instructed the firm of Munyasya & Co. Advocates to act on his behalf in the proceedings herein. The record shows that the firm of Munyasya & Co. Advocates filed a memorandum of appearance on 31<sup>st</sup> August, 2020. On 9<sup>th</sup> December 2020, the firm of Munyasya Co. Advocates filed the application dated 8<sup>th</sup> December, 2020 seeking leave to cease from acting for the Defendant citing lack of instructions and failure to co-operate as grounds in support thereof.
  51. The affidavit of service sworn by Benson Sila Mulumba, a licensed Court Process Server, shows that the application was served upon the Applicant on 8<sup>th</sup> January 2021 at Ngaani village within Utangwa Location. The application was allowed by this Court on 28<sup>th</sup> January, 2021.
  52. Since then, the Defendant has been unrepresented and service of court process upon him has been effected through the Plaintiff's law firm. The matter proceeded for hearing as undefended on 15<sup>th</sup> February, 2022. The court rendered its judgment on 22<sup>nd</sup> June, 2022 and thereafter issued a decree. The Plaintiff annexed Exhibit "FNK-1" which is a copy of his Advocates demand to the Defendant to comply with the decree. The demand letter was served upon the Defendant and a copy thereof received by the OCS, on 16<sup>th</sup> August, 2022.
  53. Thereafter, the Plaintiff filed an application dated 7<sup>th</sup> September, 2022 seeking for police assistance to enforce the decree of this court. The application was served upon the Defendant on 5<sup>th</sup> October, 2022 by one Jimmy Malusi, a licensed Court Process Server, with the assistance of the area Chief, Utangwa Location. The said application was heard and allowed vide the Ruling dated 15<sup>th</sup> February, 2023.
  54. Pursuant to the bill of costs filed against the Defendant, a Notice of Taxation was served upon the Defendant on 23<sup>rd</sup> May, 2023 by one Jimmy Malusi with assistance of the area Assistant Chief, Winfred Mutindi Muthoka. The ruling on the taxation proceedings was delivered on 28<sup>th</sup> August, 2023 and notice of the same brought to the attention of the Defendant vide the letter dated 11<sup>th</sup> September, 2023 (annexure FNK5).
  55. From the foregoing, it is clear that the Applicant chose to forego the opportunity to be heard by failing to file a defence within the stipulated period. The judgment entered is therefore a regular judgment.
  56. The Applicant did not request or apply to cross examine the court process servers to challenge the veracity of their averments contained in the affidavit of service sworn on 8<sup>th</sup> January 2021, 10/11/2022 and 30/05/2023.
  57. The court is also called upon to determine whether the Defendant has shown sufficient cause to enable the court to exercise its discretion in their favour. The Applicant alleged that all along he was under the impression that he was represented and that his Advocate had filed a defence. It is crystal that the Applicant was served by the firm of Munyasya & Co. Advocates with the application seeking leave to cease from acting and therefore his argument is without merit.
  58. The next issue for determination is whether the Applicant should be granted leave to file a defence. The Applicant did not annex a draft defence to his application. It is therefore difficult for the court to determine whether he has a defence that raises triable issues. The application herein was filed more than one year after judgment had been entered and subsequent proceedings heard and concluded.



59. In the end, I find that the Applicant has not met the threshold for setting aside the ex parte judgment dated 22/06/2022. Accordingly, the application dated 11/10/2023 is devoid of merit and the same is hereby dismissed.

60. As the parties herein are closely related, I hereby order that each party bears its own costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23<sup>RD</sup> DAY OF OCTOBER, 2024.**

In the presence of:

Court assistant Steve

Hassan holding brief for Muli for the Defendant/Applicant.

