



Waita (Suing as the Legal Representative of the Estate of Jimmy Waita Lole) v Musembi (Environment & Land Case E002 of 2022) [2024] KEELC 13465 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E002 OF 2022
TW MURIGI, J
NOVEMBER 20, 2024**

BETWEEN

**REGINA MONICA WAITA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JIMMY
WAITA LOLE**

AND

JOSEPH NDAVI MUSEMBI DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 4th October 2023 brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 10 Rule 11 of the Civil Procedure Rules in which the Applicant seeks the following orders:-
 1. That the Honourable Court do grant an order setting aside the interlocutory judgment entered herein for failure to file the defence
 2. That the Honourable Court be pleased to allow the filing of the defence out of time and the annexed defence be deemed as properly filed upon payment of the lawful charges.
 3. That the costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. It is the Applicant's case that he was served with the Plaint together with an application for injunction which was determined vide the ruling delivered on 15th February 2023. He averred that on 17th April



- 2023, he was granted 21 days to comply with the pre-trial directions including filing of the defence, witness statement and list of documents.
4. He further averred that on 17th May 2023, he signed his witness statement at his Advocates office and confirmed that the Defence and list of documents were ready for filing. That his Advocate compiled the documents and forwarded the same to a process server based in Makueni to file the same. That on 13/9/2023, his Advocate was served with a hearing notice for the formal proof hearing for 1/11/2023 which was received under protest as the date was not convenient.
 5. That on 18th September 2023, his Advocate wrote a letter to the firm of Munyasya and Co. Advocates requesting for another hearing date to be agreed upon by the parties. That later on 26th September 2023, his Advocate received a letter from the firm of Munyasya & Co. Advocates notifying him that the matter was coming up for formal proof hearing on 1/11/2023 as interlocutory judgment was entered against the Defendant for failure to file a defence.
 6. That upon perusal of the court record, his Advocate confirmed that a defence was not amongst the documents that were filed on 19/05/2023. He further averred that the court process server confirmed to him that he did not file the defence as he forgot the same in his bag by mistake. He argued that his defence raises triable issues since he is the registered owner of the suit property and as such, he will be prejudiced if the orders sought are not granted.

The Respondent's Case

7. The Plaintiff/Respondent filed a replying affidavit in opposition to the application.
8. She averred that by the time the Applicant visited his Advocate's offices to sign his witness statement on 17th May, 2023, the 21-days granted to him to comply with pre-trial directions had already lapsed. She further averred that on 22nd May, 2023, the Applicant was granted a further 7 days to fully comply with pre-trial directions which he failed to comply with.
9. That despite being served with a copy of the Plaint, the Applicant only filed a memorandum of appearance dated 11th February, 2023 and failed to file a Defence. She contended that the interlocutory judgment was entered on 28th June, 2023 after the court confirmed that the Applicant had failed to file a defence. She further contended that the Defendant's Counsel was served with a hearing notice for the formal proof hearing but the same was received under protest by the Defendant's Counsel on 13th September, 2023.
10. According to the Applicant, the Respondent has been indolent as he did not seek to set aside the interlocutory judgment after the hearing notice for the formal proof hearing was received by his Advocate on 13th September, 2023. In addition, she argued that there was no proof that the annexed Defence marked "JNM 3" was filed as there was no court receipt to ascertain that any documents had been filed as at 17th May, 2023.
11. The Respondent contended that the court should not exercise its discretion in favour of the Applicant because he failed to comply with the court's directions. She further contended that the application seeks to prevent her from having her day in court and the matter being heard and determined expeditiously. It was her contention that if the court is inclined to allow the application, the Applicant should be ordered to pay throw away costs of Kshs. 60,000/= to cater for the Respondents travelling expenses and costs of the application.
12. In conclusion, the Respondent contended that the Applicant has not satisfied the conditions necessary for setting aside the interlocutory judgment and urged the court to allow the application as prayed.



The Response

13. In a further affidavit dated 27/11/2023 the Applicant reiterated that the failure to file the defence was caused by inadvertence on the part of the court process server. He insisted that he has a good defence and urged the court to grant him an opportunity to defend the suit
14. The application was canvassed by way of written submissions.

The Defendant/applicant's Submissions

15. The Defendant's submissions were filed on 27th November, 2023.
16. In his submissions, Counsel reiterated the contents of the affidavit in support of the application. Counsel submitted that the court has discretion to set aside the interlocutory judgment herein. To buttress this point, Counsel relied on the provisions of Order 10 Rule 11 of the Civil Procedure Rules. Counsel further submitted that the Applicant has given a reasonable explanation as to why he failed to file his defence on time. Counsel relied on the provisions of Article 50 of *the Constitution* to submit that that the Applicant has a right to fair hearing which includes the right to be heard.
17. To buttress his submissions, Counsel relied on the authorities attached to the submissions.

The Plaintiff's/respondent's Submissions

18. The Plaintiff's submissions were filed on 8th February 2024.
19. On her behalf, Counsel identified the following issues for the court's determination: -
 1. Whether the Applicant's application is merited'
 2. Who should pay the costs of this application.
20. On the first issue, Counsel relied on the provisions of Order 10 Rule 4(1) of the Civil Procedure Rules to submit on the consequences of non appearance and/or default of defence.
21. Counsel further relied on the contents of the affidavit in support of the application to submit that the Applicant failed to comply with the directions within 21 days as directed. Counsel further submitted that the Respondent requested for interlocutory judgment after the Applicant failed to comply with the provisions of Order 11 despite being granted more time to do so.
22. Counsel submitted that he notified the Applicant of the hearing date for the formal proof hearing even though he was not required to do so in view of the existing interlocutory judgment.
23. Counsel further submitted that despite being served with a hearing notice for the formal proof hearing, the Applicant did not move the court to set aside the interlocutory judgment but instead wrote a letter dated 18th September 2023 indicating that the date was not convenient. Counsel contended that upon being served with a hearing notice for the formal proof hearing, Counsel ought to have known that the Applicant had no audience in accordance with Order 10 of the Civil Procedure Rules.
24. To buttress this point, Counsel relied on the case of *Ecobank Kenya Limited v Minolta Limited & 2 others* (2018) eKLR where the court held that:-

“That the default judgment that was entered herein on 14th September 2017 is to my mind a regular judgment which can only be set aside if there is a defence on merit”.



25. Counsel further submitted that the Respondent is unable to comprehend how the process server forgot to file the defence but allegedly filed the witness statements together with the list of documents. Counsel argued that the Applicant's averments in paragraph 6 of the supporting affidavit and paragraph 5 of the further affidavit amount to hearsay as the Applicant has not availed the process server for cross examination on his averments
26. Counsel further submitted that the judgment herein is a regular judgment for the reason that the interlocutory judgment was entered in accordance with the law.
27. To buttress this point Counsel relied on the case of *Moniks Agencies Limited v Kenya Airports Authority (KAA) (2019) eKLR* where the court set out the conditions to be satisfied in an application to set aside a regular default judgment.
28. Counsel further submitted that the Applicant has not given any valid reason why he did not file the application immediately after he received the hearing notice for the formal proof hearing or why his Advocate was not in court on 28th June 2023 when the matter came up for mention to confirm compliance on his part for the third time. Counsel submitted that the Applicant should not benefit from the discretion of this court as equity does not aid the indolent. To buttress this point, Counsel relied on the case of *Moses Kimaiyo Kipsng -v- Geoffrey Kirui & 2 others (2022) eKLR*.
29. Counsel further submitted that the actions and omissions by the Applicant have been tailored to prejudice the Respondent from having her day in court in the most cost effective and expeditious manner envisioned in Section 1A of the *Civil Procedure Act*.
30. Counsel further submitted that the annexed draft defence does not raise any triable issues as it contains mere denials.
31. On costs, Counsel submitted that if the court is inclined to allow the application, the Applicant should be condemned to pay the costs of the application before the hearing date.
32. In conclusion, Counsel urged the court to dismiss the application with costs.

Analysis And Determination

33. Having considered the application, the respective affidavits and the rival submissions, the following issues fall for determination:-
 - a) Whether the ex parte judgment should be set aside; and
 - b) Whether the Applicant should be granted leave to file his defence out of time.
34. The Applicant is seeking to set aside the judgment delivered on 22nd 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.”



35. Courts have discretionary power to set aside an ex parte judgment with a view of doing justice to the parties. The discretion should be exercised to avoid injustice. In the case of Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd Vs Augustine Kubende (1982-1988) KAR, the court held that;

“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 the facts and circumstances both prior and subsequent and of the respective merits of the parties.”

36. 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”.

37. 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.”

38. 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.



39. The record shows that the Plaintiff instituted this suit against the Defendant vide a Plaint dated 4th February 2022 alongside with a notice of motion which was determined vide the ruling delivered 15th day of February 2023. The matter was thereafter fixed for pre-trial directions. It is not in dispute that the Applicant did not comply with the pre-trial directions. Having failed to comply with the directions, the Plaintiff requested for interlocutory judgment which was entered on 19/7/2024.
40. It is not in dispute that the Applicant was served with a hearing notice for the formal proof hearing but failed to move the court to set aside the interlocutory judgment. The Applicant contended that he was under the impression that his Advocate had filed all his pleadings. The mistake of his counsel cannot t not be visited upon him.
41. From the foregoing, it is clear that the Applicant has given a reasonable explanation for failure to file his defence on time.
42. The court is also called upon to determine whether the Defendant has shown sufficient cause to enable the court to exercise its discretion in his favour. The Applicant alleged that all along he was under the impression that his Advocate had filed the defence together with the bundle of documents. I find that his argument is merited.
43. The next issue for determination is whether the Applicant should be granted leave to file a defence out of time. The Plaintiff contended that his defence raises triable issues which should be heard on merit. I have carefully perused the annexed draft defence in which the Applicant alleges that he is the registered proprietor of the suit property and denied having sold the same. In my view, these are issues which ought to be determined in a full hearing. The rules of natural justice provide that no man shall be condemned unheard.
44. Article 50 of *the Constitution* entitles every person to a fair hearing. From the foregoing it is clear that the right to a fair hearing is a fundamental human right. I find that no prejudice will be occasioned to the Respondent if this matter is heard and determined on merit.
45. I find that it would be unjust and indeed a miscarriage of justice to deny the Applicant the opportunity to defend his case. The upshot of the foregoing is that the application dated 4th of October 2023 is merited and the same is hereby allowed in the following terms:-

The ex parte judgment entered on 24th of April 2018 and all the consequential orders be and is hereby set aside.

- a. The Applicant is granted 7 days leave to file and serve its defence from the date of this ruling.
- b. The Applicant is condemned to pay thrown away costs of Kshs 30000/= within 7 days from the date hereof.
- c. In default of orders (a) and (b) above, the leave granted shall be deemed to have lapsed.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF NOVEMBER, 2024.

In The Presence Of:

Munyasya for the Respondent

Moriasi for the Applicant

