



**Hashi Energy Ltd v County Government of Kisumu & 2 others (Environment & Land Case E015 of 2020) [2023] KEELC 17605 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 17605 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE E015 OF 2020**

**E ASATI, J  
JANUARY 26, 2023**

**BETWEEN**

**HASHI ENERGY LTD ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... 1<sup>ST</sup> RESPONDENT**

**CITY MANAGEMENT BOARD, KISUMU ..... 2<sup>ND</sup> RESPONDENT**

**MICHAEL ABALA WANGA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of the Defendants’/Applicants’ Notice of Motion application dated May 17, 2022 and filed in court on May 18, 2022. It seeks for orders inter alia that the proceedings conducted herein on April 26, 2022 be set aside and the Defendant be allowed to defend the suit and prosecute their counter-claim. The application is supported by the averment contained in the Supporting Affidavit of Edwin Mong’eri Advocate, sworn on May 17, 2022.
2. The application was opposed vide the Replying Affidavit of Rodney Odhiambo Onyango, Advocate sworn on May 19, 2022 and the annexures thereto.
3. I have read the application, the Supporting Affidavit and written submissions dated November 7, 2022, filed on behalf of the defendant by the firm of Mong’eri Kinyanjui & Company Advocates I have also read the Replying affidavit sworn on May 19, 2022 by Rodney Odhiambo Oluoch Advocate in response to the application.
4. The Applicants’ explanation for failure to participate in the proceedings that are sought to be set aside is that they were not informed of the hearing date. That they came to learn that the suit had proceeded to hearing ex parte from a clerk in the Plaintiff’s advocate’s office. It was submitted on behalf of the Defendants that the Defendants’/Applicants’ Counsel uses only one email address namely;



edomon@hotmail.com and that that is email address supplied by them via the Memorandum of Appearance filed herein for use in these proceedings.

5. The Respondent on the other hand contended that the matter proceeded to hearing ex parte only after the court had ascertained that the Respondent had been properly served with hearing notice but failed to attend court. To the Replying Affidavit, the Respondent annexed a copy of affidavit of service and email print out and a copy of the hearing notice to demonstrate service. The Affidavit of Service was sworn by Rodney O Oluoch on April 25, 2022 that on January 24, 2022 at 1830hours, the deponent sent an email to the firm of Mongeri Kinyanjui & Company Advocate, the advocates representing the Defendants with a notice for hearing of the matter on April 26, 2022. The email print out shows that the same was sent to mongerikinyanjuiadvocates@yahoo.com on January 24, 2022 at 1830hrs. The deponent stated that it was the same email address the Respondent had used on various occasions to serve process upon the Defendants' Counsel and demonstrated this by the annexures to the Replying Affidavit.
6. I have perused the pleadings filed by the Defendants herein prior to the proceedings sought to be set aside. I note that the Defendants' advocate email address is indicated only in the Memorandum of Appearance. The email address indicated is edomon@hotmail.com. It is not clear how the Plaintiff's Counsel obtained the other email address namely mongerikinyanjuiadvocates@yahoo.com to use. Though receipt of processes previously served on this email address is not denied by the applicant, the officially provided e mail address is the one in the pleadings filed in court. There is no explanation why the email provided in the memorandum of appearance was not used.
7. The law gives the court discretion to set aside its orders under O.12 Rule 7 where a matter has proceeded in the absence of a party. The court may on an application set aside or vary a consequent judgment or order. Case law has held that the discretion must be excused judiciously.
8. I have considered the application, reply thereto and the submissions made. I find that justice will be served if the Defendant is given a chance to present their defence and counter claim. The Respondent can be compensated by an award of costs considering that the suit had proceeded, evidence taken, both Plaintiff and defence case closed and submissions drawn and filed. The application has merit and the same is allowed on the following terms;
  - a. The order made on April 26, 2022 closing the Plaintiff's case is hereby set aside.  
The order made on April 26, 2022 closing the Defence case is hereby set aside.  
All witnesses who testified on behalf of Plaintiff be recalled for cross-examination by the defence.
  - d. Defendant is at liberty to prosecute its case.
  - e. Thrown away costs of Kshs 20,000 to the Plaintiff.

Orders accordingly

**RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**E. ASATI  
JUDGE.**

**In the presence of:**

Maureen: Court Assistant.



Mwalo Advocate for the Plaintiff/Respondent

Mong'eri Advocate for the Defendants/Applicants

