



REPUBLIC OF KENYA



**Ngoka v Wambari (Environment and Land Appeal 22 of 2022)
[2023] KEELC 241 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 22 OF 2022
EK MAKORI, J
JANUARY 25, 2023**

BETWEEN

SHARIF BAYA NGOKA APPELLANT

AND

ATHANASE MWAMBA WAMBARI RESPONDENT

*(Appeal against the Ruling of the Principal Magistrates Court at Mariakani
(PMC. ELC E001 of 2020 by Hon. N.C Adalo delivered on 28th June 2022)*

RULING

1. The Applicant in his Application dated July 15, 2022 prays for the following orders: -
 - a. Spent
 - b. That in the interim, pending hearing and determination of this Application inter parties this Honourable Court be pleased to issue an ex parte order of stay of execution of the judgment/ or decree passed in Mariakani PMCC No E01 of 2020.
 - c. That pending hearing and determination of the appeal filed herein, this Honourable Court is pleased to issue an order of stay of execution of the judgment/ or decree passed in Mariakani PMCC No E01 of 2020.
 - d. That the Costs of this application be provided for.
2. The Respondent filed the Main suit at the Principal Magistrate's Court at Mariakani on September 7, 2020. After service of Summons upon the Defendant, the firm of BN Otieno and Company Advocates entered Appearance via a Memorandum of Appearance dated September 25, 2020. The matter later proceeded for Pre-trial on June 13, 2021 and was later heard on September 28, 2021 ex-parte and judgment was delivered on November 12, 2021.



3. An application was filed to have the ex parte judgment and orders set aside and the Appellant to be granted leave to defend. It was dismissed on June 28, 2022 provoking the current appeal.
4. The Memorandum of Appeal has raised the following grounds for consideration: -
 - a. The trial court erred in finding that the filed defence was a mere general denial
 - b. The trial court erred in finding that the defence was not meritorious.
 - c. The trial court erred in finding that the Appellant was aware of the pendency of the case and failed to participate in the hearing.
 - d. The trial court erred in the manner it appreciated the principles of setting aside ex parte judgment and determining applications brought under Order 12 of the Civil Procedure Rules.
5. The issues for determination in this application are whether the court should grant a stay pending appeal and the principles applicable in setting aside ex parte judgment under Order 12 Rule 7 and stay of execution under Order 42 Rule (6)(2) of the Civil Procedure Rules.
6. At the direction of the court, parties did file written submissions on the application.
7. On the November 12, 2021, the trial court at Mariakani pronounced ex parte judgment in favour of the Respondent. This was after hearing the Respondent in the absence of the Appellant who allegedly had been served but failed to attend the hearing. The tenor of the judgment was that the Appellant fraudulently obtained money from the Respondent under the deception of selling him land. The trial court ordered a refund to the Respondent to the tune of Kshs Eight hundred and eighty thousand (880,000/-), with interest at commercial rates of 18% pa from the date of filing suit until payment in full.
8. The quarrel by the Appellant in the grounds of appeal, supporting affidavit, and submissions are that he never participated in the hearing but had entered an appearance and placed a defence on record. The Appellant had the service of Counsel representing him, but he failed to notify him of the hearing date.
9. The Appellant applied to set aside the ex parte judgment. By its ruling dated June 28, 2022, the trial court declined to set aside the ex parte judgment on grounds that the Appellant was well aware of all the mention and hearing dates but neglected to attend court and the judgment in place was therefore regular and ought not to be disturbed. In all the dates when the matter was due for hearing, there is a return of service to show service of the hearing and mention dates directed to the firm of Otieno B.N who was in the conduct of the matter for the Appellant.
10. The issue of service of hearing and mention notices on the Advocate for Appellant is not in contestation, but the Appellant says the Advocate never informed him and that the parties were negotiating for a settlement since the land in question was family property.
11. The trial court delved into the principles applicable under Order 10 Rule 11 Which is similar in procedure to Order 12 Rule 7 of the Civil Procedure Rules – which rules deals with ex parte default Judgments when no appearance or defence is filed, and judgment is obtained ex parte when appearance and defence are filed but the Defendant fails to appear to defend respectively. The court further considered the decisions in *Patel Vs EA Cargo Handling Services [1974] EA 75* and *Shah Vs Mbogo [1967] EA 166*. The court arrived at a finding that there was nothing to persuade it to set aside the ex parte judgment since the Appellant had been properly served with hearing notice.
12. The Appellant thinks that the trial Magistrate misdirected herself on this issue and that the Appellant ought not to be punished for mistakes committed by counsel.



13. I have weighed in on the submissions by counsels and the authorities as placed before me. On the issues at hand and the findings by the trial court.
14. On the principles governing the setting aside of ex parte judgments generally, is as stated in the case of *Francis Gichuki vs Martin Leposo Tamoo Civil Appeal No 530 of 2002 [2004] eKLR*:-

' The power of this court to set aside or vary its judgments obtained in default of attendance is regulated by Order IXB Rule 8 of the Rules. That Rule provides as follows:

' Where under this order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.'

This is a discretionary power that which is to be exercised by the courts without limitation except that if the court decides to allow an application under that Rule it must do so on terms which are just in the circumstances of the particular case. (See *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75). Although a reason may persuade the court to easily exercise its discretion, it is now well settled that such is not a precondition for the exercise of the court's discretion in these matters. In *Girado vs Alam & Sons (V) Ltd* (1971) EA 448, the Appellant applied to set aside a judgment given in the absence of his Advocate a year previously. The affidavits in support of his application were contradictory. Goudie, J although not satisfied with the explanation given for the default went ahead to say as follows:

' I am very far from satisfied that sufficient cause for non-appearance has been shown under Order 9, Rule 20. At the same time all the authorities support the view that the court has inherent power to restore a suit dismissed for default even if no sufficient cause is shown ...'

That is so. That is what the Counsel for the Applicant has urged. The reason for this is that the discretion under the Rule is to be employed to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error. (See *Shah vs Mbogo & Another* (1967) EA 116 at page 123 cited with approval in *Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others vs David N Njogu Civil Appeal No 101 of 1994* (unreported).

However, did the facts in the case before this Court giving rise to the default Judgment arise from 'accident, inadvertence, or excusable mistake or error'?

I think not. The Appellant here was tardy and disinterested in the outcome of his case. Default Judgment was entered herein because of the failure of his advocate to attend Court on several occasions. Even then he did nothing to set aside that Judgment. He fully participated in the hearing for formal proof, and then waited for a full two years after Judgment was passed, to make an application for setting aside.

This is definitely not the kind of litigant who deserves the discretion of this Court. In fact, this is the kind of litigant envisaged in *Shah vs Mbogo* (supra) as 'a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.'

15. The file in the Lower Court shows that there are three appearances on record when the matter was dealt with - one at the Registry on April 22, 2021, when a date for pre-trial was issued, on July 13, 2021, when the matter was set down for pre-trials, and on September 28, 2021 when the matter proceeded to hearing. On all the occasions, the Appellant and Counsel were not in attendance and the matter



proceeded ex parte. In the two occasions when the matter was before the trial court, there is evidence that Counsel for the Appellant had been served and therefore ostensibly the Appellant was served since he had Counsel on record.

16. Since there was proper service on record the hearing conducted on September 28, 2021 and the subsequent judgment on November 12, 2021- was regular since there was proper service. It does not matter that it was the first time the suit had set down for a hearing. What was important was that there was a notice of the hearing on the appointed date and no cogent explanation had been given at all to the court to warrant adjournment. The court observed that in the past, albeit served – the Appellant failed to attend court.
17. Where there is a regular judgment in place, and an application is brought to have the same set-aside, the court proceeds in the manner as set in [*Elizabeth Kavere & another v Lilian Atho & another \[2020\] eKLR*](#): -

' The court respectfully accepts the principle of law set out in the Court of Appeal *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another* (2016) eKLR urged by the counsel for applicant that an irregular default judgment, that is one in which the judgment debtor has not been heard by reason of lack of proper service of summons is one which the court should set aside ex debito justitiae. However, as held in *Philip Keiptoo Chemwolo & Another v Augustine Kubende*, Court of Appeal Civil Appeal No 103 of 1984, it is also settled practice of court to require a defence on the merits, so called prima facie defence, where it is sought to set aside a judgment, which is entered regularly.

Existence of triable issues

11. Defence on the merits.

In considering 'the respective merits of the parties the court must consider any defence put forward by the applicant who seeks leave to defend, whether such defence is disclosed in a draft defence filed with the application for setting aside, even where the defence is irregularly brought to its notice. See *Sebei District Administration v Gasyali* (1968) EA 300. This Court is also aware of a Court of Appeal decision on principle for consideration as to whether to grant conditional or unconditional leave to appeal. See *Continental Butchery Limited v Nthiwa* [1978] KLR where the court (Madan, JA with whom Wambuzi and Law agreed) held:

' With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enjoyment of their property the court is empowered in an appropriate suit to enter judgment for the claim of plaintiff under the summary procedure provided by order 35 subject to there being no bona fide triable issue which would entitle a defendant leave to defend. If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham. This would be in accord with the well-known words of Jessel MR and the Lord Chancellor (Halsbury), spoken respectively in *Anglo – Italian Bank v Wells*, 38 L T at page 201, and in *Jacobs v Booths Distillery Company*, 85 LT Reports at 262, as follows:-

Jessel, MR: When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff.



Lord Halsbury: People do not seem to understand that the effect of OXIV (the equivalent of our Order 35) is, that, upon the allegation of the one side or other, a man is not to be permitted to defend himself in a court, that his rights are not to be litigated at all.'

Or, on our home plane, in the words of Newbold, P, in *Zola and Another v Ralli Brothers Limited and Another*, [1969] EA 691 at p 694 that –

' Order 35 is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence, to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant.'

With respect, the foregoing was perhaps re-echoing in a different language the following words of Lord Halsbury in *Jacobs v Booths Distillery Company* (supra), ie:-

' There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.'

The Annual Practice, 1973, states, p 139, that the value of *Jacobs v Booths Distillery Company* (supra) as an authority against giving conditional leave to defend may not be as great as has been thought. In my opinion in Kenya there should be no hesitation in giving only conditional leave to defend if the circumstances so call for.'

18. The trial court directed its mind to the defence, which had already been filed, and concluded that it was a sham and meant to delay the refund sought by the Respondent. The trial court did not consider giving conditional leave to defend.

19. Normally an Appellate court cannot disturb the exercise of discretion of a lower court unless the discretion was exercised injudiciously – see the case of *Kenya Human Rights Commission & another v Attorney General & 6 others* [2019] eKLR: -

' As was espoused in the established case of *Mbogo & Another vs Shah*, [1968] EA, p.15;

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been wrong in the exercise of judicial discretion and that as a result there has been misjustice.'

20. The trial court found that the defence in place was a sham based on the already filed pleadings and ex parte hearing it undertook. The land which the Appellant sold to the Respondent was unavailable. Either, a third party was already on the ground developing it or it was family land. That is the narrative we have from the evidence before the trial court. The only remedy that was available to the Respondent was a refund of the purchase price. It will seem that the Appellant sold land to the Respondent without good title. The trial court found the Appellant to have been fraudulent and was using the court to shield himself from a prompt and timely refund. That is why the trial court did not consider giving conditional leave to defend.



21. I do not fault the trial court in arriving at the conclusion it did, based on the material placed before it, particularly in this era when parties file their testimonies and documents to be relied upon during a hearing. However, from the thread of authorities from this court (see Elizabeth Kavere & another v Lilian Atho & another [2020] eKLR) (supra), it is normally desirable to give a conditional leave to defend, even if to satisfy the desire of Art 50(1) of the Constitution to a party who seeks to be heard even if no cogent or arguable defence seems visible as could appear in this case: -

' It is settled that an arguable case need not be one that must eventually succeed at the end of trial. The triable issue herein raises an arguable case which may or may not succeed at the hearing but it is consistent with the right to hearing under Article 50 (1) of the Constitution that a fair hearing be gristed to the parties to the dispute in accordance with the law.'

22. The catch here will be that a party who genuinely wishes to be heard on merit (as in this case the Appellant) should ordinarily be ready to deposit the entire decretal amount or any other amount the court may think fit to impose for the due performance of a decree if an appeal does not succeed or if an ex parte judgment is set aside and the court finally decides for the Respondent. Alternatively, if the court finds in favour of the Appellant – the amount placed as security will revert to him. This is in accord with the fulfilment of Order 42 Rule (6) (2) of the Civil Procedure Rules. Both parties will not stagnate in the marshland and labyrinth of litigation when such an arrangement is in place. One party will not be stealing a match on the other. It achieves equality of arms.

23. Balancing the interests of both the Appellant and the Respondent - the Appellant's right to be heard and that of the Respondent's to enjoy the fruits of the judgment in place, I will partially allow the current Application for stay and or leave to defend and impose the following conditions:-

- i. The Appellant is hereby allowed to defend the suit at the Lower Court subject to depositing the entire decretal sum - that is Kshs 880,000/- with interest at court rates from the date of filing suit in an interest-earning account.
- ii. The amount be deposited in a reputable financial institution in the names of the Advocates appearing for the parties within 30 days hereof that is on or before February 27, 2023
- iii. The file is hereby remitted back to the PM Court Mariakani for a hearing on merit.
- iv. Failure, the Orders issued by the trial, judgment, and subsequent decree to revert for immediate implementation.
- v. Cost here and in the Lower Court, to abide by the outcome upon rehearing of the suit on merit.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 25TH DAY OF JANUARY 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

M/S Osman holding brief for M/S. Nyaboke for the Appellant

In the Absence of: -

S.W Maina for the Respondent

