Rama v Fikiri & 3 others (Environment & Land Case 81 of 2007) [2023] KEELC 9 (KLR) (13 January 2023) (Ruling)

Neutral citation: [2023] KEELC 9 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 81 OF 2007

MAO ODENY, J

JANUARY 13, 2023

BETWEEN

LYDIA NJOROGE RAMA ..... PLAINTIFF

AND

WILLIAM FIKIRI ..... 1ST DEFENDANT

HEZRON MWADORI ..... 2ND DEFENDANT

LAWRENCE MAZERA ..... 3RD DEFENDANT

CHARO DAU ..... 4TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated May 12, 2021 by the Defendant/Applicants seeking the following orders: -

    a. Spent

    b. Spent

    c. That there be a temporary stay of execution of the Decree herein pending the hearing and determination of this application inter-partes for being in contravention of Order 22 Rule 18 of the *Civil Procedure Rules*.

    d. That the *ex-parte* proceedings and subsequent judgment be set aside and the suit herein be set aside for hearing on its merits.

    e. That costs to this Application be provided for.

2. Counsel agreed to canvas the application *vide* written submissions which were duly filed.

3. In response to the application, the Respondent swore and filed a Replying Affidavit on March 18, 2022 claiming reluctance on the part of the Applicants to effect service of the application therefore should not benefit from the available remedies. The application was canvassed by way of written submissions as follows: -

Applicants' Submissions

4. It was the Applicant's case that on September 28, 2018, judgment was delivered in this Court and a decree signed on February 22, 2019 in favour of the Plaintiff herein. That subsequently, warrants to give vacant possession were issued on November 23, 2020. According to the Applicants, their former advocates never informed them of the hearing date and that they only became aware of the judgment when they were served with a letter dated April 14, 2021.

5. The Applicants stated that this prompted them to file the present application seeking orders *inter alia* that the *ex parte* proceedings and judgment be set aside and the suit be set down for hearing on merits.

6. Counsel for the Applicants submitted that the application for execution having been made a period more than one year from the date of the decree, notice to show cause ought to have been issued first in accordance with Order 22 rule 18 of the *Civil Procedure Rules*.

7. Counsel argued that the mistake of an advocate, in this case the Defendants' former advocate, should not be visited upon a litigant and that allowing the application will not prejudice the Respondent in any manner.

8. Counsel further submitted that the Defendants have a good defence with overwhelming chances of success and that the Defendants have disclosed how they came to know about judgment herein. Further that they have acted without undue delay upon discovery of the entry of judgment.

Respondent's Submissions

9. Counsel for the Respondent submitted that the Applicants failed to establish sufficient cause for the orders of stay to be granted as envisaged under Order 42 Rule 6 of the *Civil Procedure Rules*.

10. Counsel added that there has been unreasonable delay in filing the application and it is in the interest of justice that the Respondent be allowed to enjoy the fruits of judgment.

11. Counsel relied on the cases of *John Gikonyo Ngara v Mary Wambui Njagi* Nyeri Succession Cause No 889 of 2015 and *Butt v Rent Restriction Tribunal* [1979] and submitted that the Applicants have not established what substantial loss they will suffer if the orders are not granted.

Analysis And Determination

12. The issue for determination is whether the Applicant has met the threshold for setting aside judgment and whether the court can grant an order of stay of execution.

13. It is pertinent to point out that there are two type of *ex parte* judgments: regular and irregular. The difference between the two was highlighted by the Court of Appeal case of *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another*, Civil Appeal No 6 of 2015 eKLR (Msa), where the learned Judges of Appeal explained: -

> "We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment

that is regularly entered and one, which is irregularly entered. 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 other. See *Mbogo & Another v Shah* (supra), *Patel v EA Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v Kubende* [1986/ KLR 492 and *CMC Holdings v Nzioki* [2004/ 1 KLR 173).

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 a 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 raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason 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. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango 0100 v Attorney General* [1986-19891 EA 456)'.

14. In the present case, the impugned judgment being a regular exparte judgment, it is important therefore to consider whether the conditions for setting aside such a judgment have been met.

15. The hearing date, December 7, 2017, was taken at the registry by the Respondent's then advocates George Wakahiu & Njenga Advocates. On the hearing date, counsel told the court that he served the hearing notice to the Defendants' advocate as per the affidavit of service. The court being satisfied with the service, proceeded to hear the Plaintiff's case. Indeed, service of the hearing notice was not disputed. The Defendants' contention was that their former advocates did not inform them of the hearing date.

16. The Applicants have instructed a new advocate in place of their previous advocate whom they claim not to have informed them of a hearing date. Advocates do not own the cases of the parties that instruct them. They do it on behalf of the litigants, therefore parties should be vigilant and follow up their cases once they instruct their advocates. It is not enough to pack a case at the advocates' office and wait for miracles to happen.

17. A party must be part and parcel of the case that they have either sued or been sued. It is not enough to blame the advocate for not informing you of the hearing date. If it was a genuine mistake the previous counsel should have filed an affidavit stating the same or file the current application for setting aside judgment and explaining what transpired.

18. In the case of *Bl Mech Engineers Ltd v James Kahoro Mwangi*, [2001] eKLR Justice Waki JA as he then was held; -

> " The applicant had a duty to pursue his advocate to find out the position of the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocate. It is not enough simply to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter.
>
> If the advocate was simply guilty of inaction that is not an excusable mistake which the court may consider with some sympathy. "

19. Further, the present application was filed over two years after judgment was delivered and a decree issued. This delay is neither been explained at all nor satisfactorily explained hence it amounts to inordinate.

20. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR where the court held that: -

> " Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of *Christopher Kendagor v Christopher Kipkorir* Eldoret E&L 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land".

21. Similarly, in the case of *Utalii Transport Company Ltd & 3 Others vs NIC Bank Ltd & Another* 2014 eKLR the Court had this to say: -

> " Whereas there is no precise measure of what amounts to inordinate delay and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case the subject matter of the case, the nature of the case, the explanation given for the delay and so on and so forth.
>
> Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable, conclusion that it is inordinate and therefore caution is advised for courts not to take the word "inordinate" in its dictionary measuring but in the sense of excessive as compared to normality".

22. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JANUARY, 2023.

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M.A. ODENY__JUDGE__

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

MALINDI ELC CASE NO. 81 OF 2007 RULING 3