



**Crest Properties Limited & another v First Quantum Holdings Limited;
English Press Limited (Intended Defendant) (Environment & Land Case
754 of 2012) [2023] KEELC 851 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 851 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 754 OF 2012
J OMANGE, J
FEBRUARY 16, 2023**

BETWEEN

CREST PROPERTIES LIMITED 1ST PLAINTIFF

CORONATION BUILDERS (1974) LIMITED 2ND PLAINTIFF

AND

FIRST QUANTUM HOLDINGS LIMITED DEFENDANT

AND

ENGLISH PRESS LIMITED INTENDED DEFENDANT

RULING

1. This suit relates to the parcels of land known as LR No 209/8786/2 Industrial Area, Nairobi and LR No 209/9482 Dandora Nairobi.
2. By a judgment dated and delivered on May 28, 2020, this court (Hon Justice Komingoi) before this court entered judgment against First Quantum Holdings Limited as follows:
 - a. A permanent injunction is hereby issued restraining the defendant, by itself, its agents, servants, or any of them whatsoever from alienating, selling, disposing the said property LR No 209/8786/2 Industrial Area, Nairobi and LR No 209/9482 Dandora Nairobi.
 - b. That a declaration is hereby issued that the transfer of the plaintiff's property known as LR No 209/8786/2 Industrial Area Nairobi and LR No 209/9482 Dandora was fraudulent and illegal.



- c. That an order for specific performance is hereby issued to compel the defendant to pay the balance of the purchase price being Kshs 46,000,000/- together with interest at court rates with effect from November 2011 until payment in full.
In the alternative an order is hereby issued for cancellation of the transfer of the property LR No 209/8786/2 Industrial area Nairobi and LR No 209/9482 Dandora Nairobi.
 - d. General damages for breach of contract Kshs 500,000/-.
 - e. Costs of the suit and interest.
3. The costs of the suit were subsequently taxed on April 22, 2022 and the matter closed.

The 1st Defendant's Application

4. However, by an application dated June 22, 2022, the defendant sought the following reliefs:
 - a. Spent.
 - b. Leave be granted to the firm of Bansbury Associates Advocates LLP to come on record and take conduct of this matter on behalf of the defendant/ applicant.
 - c. That this honourable court be pleased to set aside the *ex parte* judgment issued on May 28, 2020 against the defendant in purported consequence of the defendant's failure to enter appearance or file defence and all orders subsequent thereto.
 - d. This honourable court do grant leave to the defendant to enter appearance and file a defence out of time.
 - e. That costs incidental to this application be borne by the plaintiff/ respondent.
5. The application is supported by the affidavit of Caroli Omondi and Maurice Otieno- Omuga on the basis that the 1st defendant was not aware of the cause having not been served, thus it was condemned unheard.
6. That the 1st defendant had purchased the suit properties and paid the purchase prices fully as agreed, that that the judgment was obtained without full disclosure of material facts and on deception and concealment of material facts by the plaintiffs.
7. The 1st defendant contended that it had a very strong defence and counterclaim against the plaintiff herein as it does not owe the plaintiffs and had even paid more than the agreed purchase price.
8. The affidavit of Caroli Omondi narrated the history of the transaction, noting that the 1st defendant had made payments in excess by Kes 3,250,000 which the plaintiffs had long committed to refund. He attached a draft defence and counter claim.
9. The affidavit of Maurice Otieno Omuga Advocate attested to the details of the transaction, to the effect that he acted for both the 1st plaintiff and the 1st defendant in the transaction relating to LR 209/8786/2, as well as the 2nd plaintiff and 1st defendant in relation to LR 209/9482. He states that the had plaintiffs misled the court, therefore inviting this court to assess why the plaintiff's advocates wrote to him on June 19, 2013 yet did not disclose the existence of the suit and the fact that payments had been made to Mr Bhangra on Mr Sethi's behalf.
10. He supported the motion and stated that the *ex parte* judgment was irregularly obtained and should be set aside to allow the defendant to be heard on merits. He adduced the transactional documents.



11. The application was opposed by the affidavit of Habinder Singh Sethi where he reiterated the transaction and the fact that the 1st defendant was served by way of substituted service.
12. He contended that the defendant had not paid the full purchase price as alleged, that he had never entered into an agreement dated August 16, 2010 nor amended it, and that the defendant had only paid Kes 15,500,000 and failed to pay the balance of Kes 46,000,000. He asserted that he subsequently filed a Police complaint and an Ethics Complaint against Mr Maurice Amuga over the transaction, and that the counterclaim was time- barred. He therefore urged court to dismiss the application.

The 2nd Defendant's Application

13. Shortly after the 1st defendant's, by an application dated June 27, 2022, English Press Limited- the intended 2nd defendant (the 2nd defendant) sought the following reliefs:
 - a. Spent
 - b. Spent
 - c. This honourable be pleased to join the applicant herein as 2nd defendant to these proceedings and the plaintiff be directed to amend the plaint to include the applicant as the 2nd defendant.
 - d. This honourable court be pleased to set aside the *ex parte* proceedings and the judgment delivered on May 28, 2020.
 - e. This honourable court be pleased to set down the suit for hearing and the applicant be allowed to participate in the hearing of the matter.
 - f. The costs of the application be provided for.
14. The 2nd defendant's application is based on the grounds that appear on the face of the pleadings together with the affidavit of Shreeti Kaplan Patel in support thereof.
15. It is the 2nd defendant's case that the plaintiff sued the defendant for specific performance and a finding that the transfer of the suit property- LR 209/8786/2 Industrial Area was fraudulent and illegal and a cancellation of the transfer to the defendant, which suit was heard and granted on May 28, 2020 without the participation of the defendant.
16. The 2nd defendant asserts that by the time the judgment was delivered, it was the owner of the suit property having purchased it from the 1st defendant through a sale agreement dated April 16, 2014 and transfer of August 12, 2014.
17. That the on May 26, 2022, the 2nd defendant received a letter from the Chief Land Registrar informing that the Registrar had received a court order cancelling the transfer of the suit property from the 1st plaintiff to the defendant, and on June 7, 2022, that it should surrender the title within 30 days otherwise a new title would be issued to the 1st plaintiff.
18. That having not participated in the proceedings where an adverse decision that directly affected its proprietary interest was made, it was necessary to set aside the judgment and the 2nd defendant be granted the opportunity to participate in the case.
19. The 2nd defendant asserted that if a stay is not granted, it would suffer substantial loss as the title in its favour would be cancelled and a new one be issued to the plaintiff.



20. Further, the 2nd defendant contended that the fact that it is the proprietor of the suit property was brought to the attention of the plaintiff and of the court by the Principal Land Registrar during the hearing of the case, they were not served with the pleadings and no prejudice would be occasioned if they were allowed to participate in the case.
21. In support of the application, the 2nd defendant attached a copy of the title document, the transfer document, the charge to Barclays Bank, application for removal of caveat, the Registrar's letter dated May 26, 2022, June 7, 2022 and a copy of the said judgment.
22. The plaintiffs opposed the application by the replying affidavit of Harbinder Singh Sethi dated October 20, 2022 reiterating that an agreement between the plaintiff and the 1st defendant dated August 16, 2010 where the plaintiffs were to sell the property to the 1st defendant, but the 1st defendant did not fulfill the terms thus they filed the instant suit.
23. It's the plaintiffs' case that they were not parties to the transaction between the 1st and 2nd defendant and that the 2nd defendant should seek remedies against the 1st defendant and not challenge the judgment.
24. That to allow the 2nd defendant's application would be unfair and extremely prejudicial to the plaintiff who after 10 years of seeking justice finally got a favourable judgment. They therefore attached a copy of the agreement, affidavit in support of a motion for substituted service, and an affidavit of service with the advertisement attached.
25. I have considered the twin applications before me by the 1st defendant, and the other by the intended 2nd defendant, the submissions as well as the response thereto filed by the plaintiffs. The central issue for determination before me is whether the judgment of May 28, 2020 should be set aside, and the defendants granted leave to defend the suit.
26. Incidental to the foregoing are the motions to allow the firm of Bansbury Associates Advocates LLP to represent the defendant and the joinder of the 2nd defendant as such.
27. Joinder of parties is prescribed under order 10 rule 2 of the [Civil Procedure Rules](#) thus:
 1. Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
 2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added
28. The Court of Appeal in [Civicon Limited v Kivuwatt Limited and 2 others](#) [2015] eKLR held as follows on the same:

“Again the power given under the rules is discretionary which discretion must be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of



proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined....from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in order i rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

29. In this case, English Press Limited has demonstrated that it is the proprietor of LR No 209/8786/2 which was transferred to them from the 1st defendant in August 12, 2014. This fact was indeed stated by the plaintiff's own witness (see paragraph 5 of the judgment).
30. It is also clear that despite being the proprietor, English Press was neither joined into the proceedings or served with the proceedings, only came to learn about the judgment and orders when the Registrar made a routine notification. Subsequently, the suit property was charged to Barclays Bank of Kenya, now ABSA.
31. In line with the foregoing rules and the authorities I have cited, I find that English Press Limited has made a case for the grant of the relief of joinder, which I hereby make.
32. On the 1st defendant's application to be granted leave to be represented by counsel, I find the same as unnecessary, as order 9 rule 9 and 10 on which the application is based relates to change of advocates. It is clear that the 1st defendant has never been previously represented by counsel, thus there is no need for leave to come on record.
33. On to the central motion before me for setting aside and allowing the defendants' participation in the fresh trial, The law is now well settled that in an application for setting aside *ex parte* judgement, the court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The court has wide discretion in such cases to set aside *ex parte* judgement.
34. It is settled that the court's power to set aside a judgment is exercised with a view of doing justice between the parties. 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 facts and circumstances both prior and subsequent and of the respective merits of the parties.
35. In *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oebal* (2014) e KLR, the court stated that the purpose of such discretion to set aside *ex-parte* judgment is to avoid injustice or hardship resulting from accident, inadvertence or excusable error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice. I hold a similar view.
36. There are no limits or restrictions on this court's discretion except that if a judgment is set aside or varied, it should be done on such terms as may be just.
37. In this case, the 1st defendant states that it was not served with the pleadings, thus was not aware. It particularly took issue with some correspondences in 2013 with the plaintiff's advocate when the



existence of the suit was not mentioned. On the other hand, the plaintiffs asserted that there was proper service and the 1st defendant elected not to participate.

38. From the responses to the 1st defendant's application, what I can read is that there are contentions whether the 1st defendant paid the purchase prices in full or not. While the 1st defendant alleges that this happened, the plaintiff holds otherwise. This court would otherwise best determine these rival positions if both parties are heard on the merits.
39. In line with the decision in *Rayat Trading Co Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR where the court held that, "if the court sets aside a default judgment, it may do so on terms. In most cases the defaulting defendant will be ordered to pay the claimant's costs thrown away. In addition, the court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim". I will impose certain conditions towards setting aside the judgment for the 1st plaintiff.
40. I note that the 1st defendant has attached a draft defence and counterclaim to its application. The same relates to the order of specific performance for payment of Kes 46,000,000 and the cancellation of the transfer. On face value, it raises triable issues.
41. No doubt, the cancellation of the transfer to the 1st defendant would affect the 2nd defendant. On this basis, I find that it would have been prudent to join the 2nd defendant or even serve it with the pleadings.
42. I am also cognizant of the fact that as at May 28, 2020, the plaintiffs were successful litigants who also have a right to enjoy the fruits of their judgment.

Determination

43. Consequently, I allow the defendants' application in the following terms:
 - a. English Press Limited be and is hereby joined to this suit as the 2nd defendant;
 - b. The ex parte judgment delivered on May 28, 2020 be and is hereby set aside on condition that the 1st defendant shall pay the sum of Kshs 150,000 as thrown away costs to the plaintiffs within 14 days of this ruling;
 - c. The plaintiff, shall within 14 days of this ruling, serve the defendants with copies of the pleadings, statements and exhibits as filed in this case;
 - d. The defendants shall within 14 days of receipt of the plaintiff's pleadings, statements and documents, file and serve their respective defence and counterclaim(s), witness statements and trial bundle of documents.
 - e. In default of any of the foregoing timelines imposed on the defendants, the judgment of May 28, 2020 shall stand and the plaintiffs shall be at liberty to execute it forthwith.
 - f. The costs of the application shall abide the final outcome of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 16TH DAY OF FEBRUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Baithari for Mr. Mwangi for Plaintiff



Mrs Aremo for Wetangula for Defendant

