



REPUBLIC OF KENYA



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Ngingo v Nganga & 6 others (1st - 5th Defendants Trustees Muthirimo wa Gakenye Self Help Group); Kabutha (Interested Party) (Environment & Land Case 272 of 2018) [2023] KEELC 16761 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16761 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 272 OF 2018
BM EBOSO, J
MARCH 22, 2023

BETWEEN

MUCHANGI NDUATI NGINGO PLAINTIFF

AND

SALOME NJOKI P NGANGA 1ST DEFENDANT

MARY WANJA KAGUNDA 2ND DEFENDANT

PETERSON MWANGI KIGOTHO 3RD DEFENDANT

PETER MAINA THUNGUYU 4TH DEFENDANT

PETERSON GITHAIGA MAINA 5TH DEFENDANT

MBO-I-KAMITI FARMERS CO LIMITED 6TH DEFENDANT

THE NATIONAL LAND COMMISSION 7TH DEFENDANT

**1ST - 5TH DEFENDANTS TRUSTEES MUTHIRIMO WA GAKENYE SELF
HELP GROUP**

AND

RAHAB WAMBUI KABUTHA INTERESTED PARTY

RULING

1. The plaintiff initiated this suit through a plaint dated November 8, 2018. His case was that, at all material times, he was the lawful transferee of fifteen (15) plots, namely Ruiru/Kiu Block 4/2038, 2039, 2041, 2042, 2043, 2044, 2045, 2012, 2011, 2010, 2009, 2008, 2006, 1723 and 1726 legally allocated to him by the 6th defendant, Mbo-I-Kamiti Farmers Co Ltd, to cover part-payment of legal fees due and owing to him from the 6th defendant, for professional services rendered to the 6th



- defendant. He averred that upon allocation of the said plots to him by the 6th defendant, a formal agreement dated June 15, 2007 was duly executed by the two parties for transfer of the said plots to him. Pursuant to the said formal agreement, the 6th defendant duly executed transfers conveying the 15 plots to him. The 6th defendant released all the original conveyance documents to facilitate conveyance of the 15 plots to him.
2. The plaintiff contended that all the files relating to the 15 plots were opened by the 7th defendant and the preparation of leases commenced. While the documents were with the 7th defendant awaiting finalization of the exercise, some files relating to the 15 plots would on several occasions be untraceable, prompting him to complain to the 7th defendant. It subsequently turned out that the 6th and 7th defendants had colluded with third parties and had prepared leases relating to some of the plots in favour of the third parties. Among the plots affected were Ruiru/Kiu Block 4/2045, 2038 and 2039 [the suit properties] which had been conveyed to the 1st; 2nd; and 3rd to 5th defendants, respectively. Aggrieved, the plaintiff brought this suit seeking to recover the three plots. He contended that the defendants acted fraudulently in procuring leases and conveying the said plots to the 1st; 2nd; 3rd - 5th defendants.
 3. Service of summonses was effected through a notice in the print media pursuant to an order issued by Lady Justice Lucy Mbugua on September 2, 2020. None of the defendants entered appearance nor filed defence in the suit. Consequently, hearing proceeded *ex-parte* before me on September 30, 2021.
 4. This court subsequently rendered a judgment dated November 15, 2021 in which it found that the plaintiff had proved his case to the required standard. The court granted the plaintiff the following reliefs:
 - a. That a declaration be and is hereby made that Ruiru/Kiu Block 4/2045, Ruiru/Kiu Block 4/2038 and Ruiru/Kiu Block 4/2039 lawfully belong to the plaintiff and all the necessary documents should be registered and released to him forthwith.
 - b. That declaration be and is hereby made that any transaction between the defendants and any third parties in respect of Ruiru/Kiu Block 4/2045, Ruiru/Kiu Block 4/2038 and Ruiru/Kiu Block 4/2039 is null and void and that the registration of transfers in favour of the 1st, 2nd and the 3rd – 5th defendants are hereby revoked and the relevant parcel registers are hereby rectified to reflect the plaintiff as the owner of the above properties.
 - c. That the relevant land register is hereby ordered to effect the rectifications.
 - d. That plaintiff is hereby awarded general damages of Kshs 1,000,000/= against the 6th defendant for their post-contract transgressions.
 - e. That the plaintiff shall have costs of the suit to be borne by the 6th defendant.
 5. Four months later, Salome Njoki P Nganga (the 1st defendant) and Rahab Wambui Kabutha (the proposed interested party) brought an undated notice of motion seeking the following verbatim orders:
 1. (Spent)
 2. That the firm of Makuno Gacoya & Associates be allowed to come on record for the 1st defendant and the proposed interested party after judgement, which was delivered on November 15, 2021.



3. That there be a stay of the execution of the *ex-parte* judgment and decree emanating from the judgment delivered on November 15, 2021, pending the inter-partes hearing of this application.
 4. That the judgment and decree emanating from the judgment delivered on November 15, 2021 be set aside or be reviewed and varied and substituted with new orders on such terms as the honorable court may deem fair and just pending herein of the suit on merit.
 5. That the 1st defendant be granted leave to file a defense to the suit and the proposed interested party be enjoined in the suit as an interested party and she be allowed to file her pleadings showing her interest in parcel of land Ruiru/Kiu Block 4/2045.
 6. That costs of this application be in the cause.
6. The above notice of motion is one of the two applications that fall for determination in this ruling. The second application falling for determination in this ruling is the 2nd defendant's notice of motion dated May 24, 2022 through which the 2nd defendant seeks an order setting aside the judgment rendered in this suit on November 15, 2021, on the ground that she was not served with summons to enter appearance, hence the judgment is irregular. I will summarize the parties' respective cases before I dispose the issues that fall for determination in the two applications.
 7. The 1st defendant and the proposed interested party brought the undated application, filed on March 15, 2022. Their case is contained in the grounds set out in the undated application; the supporting affidavit sworn on March 3, 2022 by the 1st defendant; and the written submissions dated May 4, 2022, filed by M/s Mukumo Gacoya & Associates Advocates. The case of the duo is that the 1st defendant purchased land parcel number Ruiru/Kiu Block 4/2045 (hereinafter referred to as "parcel number 2045") from the 6th defendant. The 6th defendant was registered as proprietor of parcel number 2045 in 2009. The 6th defendant subsequently conveyed the suit property to the 1st defendant. The 1st defendant subsequently sold parcel number 2045 to the proposed interested party on September 13, 2016. The 1st defendant handed possession of the said parcel to the proposed interested party. They contend that when the 1st defendant visited the land registry to convey the land to the proposed interested party, she learnt about this suit.
 8. The 1st defendant and the proposed interested party contend that they were not aware of this case. They add that they have defences to the suit and that they should be heard in the interest of justice.
 9. The plaintiff opposed the application by the 1st defendant and the proposed interested party through a replying affidavit dated April 1, 2022 and written submissions dated June 23, 2022, filed by M/s R.H Wanga & Co Advocates. The case of the plaintiff is that service of summonses was properly effected through a notice published in one of the local daily newspapers on October 6, 2020 as directed by the court. He further contends that the alleged sale of the suit property to the 1st defendant was fraudulent because the suit property was not available for sale, the same having been sold to him in 2007. He adds that the Judgment rendered by the Environment and Land Court in Nairobi ELC Case No 41 of 2009 disposed all the issues raised by the applicants. He urges the court to reject the applicants' plea.
 10. I will now outline in summary the cases of the applicant and the respondent in the application dated May 24, 2022. The 2nd defendant is the applicant in the said application. Her case is contained in the grounds set out in the application; the supporting affidavit sworn on May 24, 2022 by Ruth Kuria and the written submissions dated 10/11/2022, filed by M/s Wambui Kuria & Company Advocates. The case of the 2nd defendant is that she was not served with summons to enter appearance. She further contends that she was not served with a hearing notice. It is her case that the judgment entered by this court on November 15, 2021 is irregular and should be set aside.



11. The plaintiff's case in relation to the 2nd defendant's application dated May 24, 2022 is that the application is a sham, adding that proper service of summons was effected on the 2nd defendant through a notice published in "the local dailies". He further contends that the 2nd defendant has failed to disclose her interest in the suit properties and has similarly failed to disclose how she learnt about this suit. He reiterates that this court (Okongo J) had already pronounced itself on the question of ownership of the suit properties.
12. I have considered the two applications. One common question falls for determination in the two applications. The common question is whether the applicants have made out a case for the setting aside of the judgment rendered against them in this suit. As regards the proposed interested party, the question that falls for determination is whether she has made out a case for joinder. I will dispose the two questions sequentially in the above order.
13. The 1st and 2nd defendant were served through a notice published in the Star Newspaper October 6, 2020. One John K Angola subsequently swore and filed an affidavit of service exhibiting a copy of the notice that was published in the Star Newspaper. Substituted service was ordered by Mbugua J on September 2, 2020. Subsequently, on December 8, 2020, Gacheru J made the following verbatim orders:
 - (i) Substituted service was effected.
 - (ii) There is no defence
 - (iii) Matter can be fixed for formal proof
 - (iv) Formal proof on 10//2021."
14. The court record shows that hearing could not proceed when the matter next came up for trial because of power (electricity) failure. Consequently, on July 12, 2021 Gacheru J listed the matter for hearing on September 30, 2021. Against the above background, the matter proceeded for hearing as an undefended cause before Eboso J on September 30, 2021.
15. The 1st and 2nd defendants contend that they were not aware of this suit. Although they contend that the plaintiff has not presented an iota of evidence to demonstrate that there was service of summons upon them, the plaintiff exhibited a copy of the notice published in the Star Newspaper. What is not clear or what is in doubt is whether they saw the notice or had a reasonable opportunity to see the notice and deliberately elected to ignore it. One can therefore safely conclude that the *ex parte* Judgment was obtained regularly.
16. The prevailing jurisprudence on the court's jurisdiction to set aside an *ex-parte* judgment was elaborately outlined by the Court of Appeal in the case of *James Kanyitta Nderitu & another v Marios Philotas Gbikas & another* (2016) eKLR in the following words:

"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 Shab* (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 issue 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 Oloo v Attorney General* [1986-1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v Election Tribunal, Kotah*, AIR 1955 SC 664, at 711:

“[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”

17. The 1st and 2nd defendants contend that they were not aware of this suit. The intended interested party similarly contends that she was not aware of the suit and that the 1st defendant sold to her parcel number 2045. It does emerge from the court record that service upon the 1st defendant was effected through a notice in the Star Newspaper. There is no conclusive evidence that the two defendants and the proposed interested party saw the notice or were aware of the suit.
18. Guided by the approach outlined by the Court of Appeal in the case of *James Kanyitta Nderitu* (supra) the court will give the applicants the benefit of doubt. The court will conditionally set aside the Judgment only in relation to the 1st and 2nd defendants and only in relation to land parcel numbers Ruiru/Kiu Block 4/2045 and Ruiru/Kiu Block 4/2038. The court will, however, maintain the present status quo relating to the registration of the two parcels. The condition is that the two defendants will pay the plaintiff throw away costs of Kshs 25,000 to be borne by the two defendant equally.
19. On the question relating to the proposed interested party’s plea for joinder, she contends that she purchased parcel number 2045 from the 1st defendant through an agreement dated September 13, 2016. She has exhibited an agreement for sale bearing the said date. The 1st defendant and the proposed interested party contended that the proposed interested party was given possession of the suit property upon purchase of parcel number 2045. In the above circumstances, the court will admit the proposed interested party as the 8th defendant in this suit.



20. In the end, the undated application by Salome Njoki P Nganga and Rahab Wambui Kabutha filed on March 15, 2022 and the application dated May 24, 2022 by Mary Wanja Kagunda are disposed as follows:
- a. Subject to the 1st and 2nd defendants paying the plaintiff throw-away costs of Kshs 25,000 within 30 days, the judgment against the two defendants relating to parcel numbers Ruiru/Kiu Block 4/2045 and Ruiru/Kiu Block 4/2038 shall be set aside.
 - b. Rahab Wambui Kabutha is hereby admitted as the 8th defendant in this suit.
 - c. Subject to compliance by the 1st and 2nd defendants the claim against them shall be heard afresh alongside the suit against the 8th defendant.
 - d. The plaintiff shall amend the plaint forthwith to incorporate the added party.
 - e. Subject to compliance by the 1st and 2nd defendants the disposal orders in the judgment dated November 15, 2021 are varied to exclude parcel numbers Ruiru/Kiu Block 4/2045 and 2038.
 - f. The obtaining status relating to registration of the two suit properties will be maintained pending further orders of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF MARCH 2023

B M EBOSO

JUDGE

In the presence of:

Ms Mwangi holding brief for Kuria for the 2nd defendant

Hinga – Court Assistant

