



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna & 31 others v Karanja & another (Environment & Land Case E009 of 2021) [2023] KEELC 16208 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16208 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E009 OF 2021  
FM NJOROGE, J  
MARCH 16, 2023**

**BETWEEN**

**ZACKARIA KIMANI NJUGUNA & 31 OTHERS ..... PLAINTIFF**

**AND**

**MARGARET NJOKI KARANJA ..... 1<sup>ST</sup> DEFENDANT**

**AGATHA NJAMBI KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of the Defendants/Applicants Notice of Motion dated November 21, 2022 which seeks the following orders:
  - a. Spent.
  - b. Spent.
  - c. The Judgment delivered by this Honourable court on October 24, 2022 and the consequent decree ensuing therefrom as well as the proceedings herein be and are hereby set aside forthwith.
  - d. In the alternative and without prejudice to prayer 3 above, upon setting of the judgment delivered on October 24, 2022 and the consequent decree ensuing therefrom as well as the proceedings herein, the Defendants be and are hereby granted unconditional leave to defend this suit and to file their defence/ response and all the necessary documents within sixty (60) days.
  - e. Upon setting aside of the judgment delivered on October 24, 2022 and the consequent decree ensuing therefrom as well as the proceedings herein, the matter be heard together with Nakuru ELC No 040 of 2021.



- f. Costs of this application and of the suit be borne by the Plaintiffs.
2. The application is supported by the affidavit sworn by Margaret Njoki Karanja, the 1<sup>st</sup> Defendant herein. She deposed that together with the 2<sup>nd</sup> Defendant they are the legally registered owners of the property known as LR No 1556/125; that upon perusal of the court file revealed that the Plaintiff's process server filed an affidavit of service dated May 26, 2021 claiming to have served her with the court documents on May 22, 2021; that it is not true that she was served with the said documents on that day or any other day; that on May 24, 2021 she received a call from Jacob SA Obulumire who identified himself as a police officer investigating the land issue; that their failure to enter appearance and defend this suit was not deliberate but due to the fact that they were not served with the court documents; that they have been pursuing the change of user and subdivision of the plots and the delay in issuance of titles was beyond them; that there is a similar case relating to other buyers of plots from the same mother title being Nakuru ELC No 40 of 2021; that the two cases should be heard together to avoid conflicting decisions; that the ex parte judgment was obtained irregularly and ought to be aside and they be given a chance to file their defence/replying affidavit(s).

### Response

3. The Plaintiff/Respondents filed their Replying Affidavit dated January 17, 2023 sworn by the 1<sup>st</sup> Plaintiff/Respondent. He deposed that the application is fatally defective and incompetent and should not be entertained by this court. He further deposed that the said application has been filed late and has ignored the judgment delivered on November 24, 2022 by this court. He added that it is founded on falsehood and material non-disclosure as well as misrepresentations.
4. He deposed that this court is already functus officio and ought to be reluctant to interfere with the judgment on record. He further deposed that the Defendants/Applicants have not annexed any draft statement of defence to demonstrate that they have a formidable defence. He added that the Defendants/Applicants acknowledge that the Plaintiffs/Respondents are entitled to be issued with the title deeds as ordered by the court.
5. He stated that the Defendants/Applicants are not truthful and that the whole application is based on falsehoods and half-truths. He further stated that it is not the first time the Defendants/Respondents are claiming to not having been served so as to delay the determination of this dispute since a similar application had been filed in Nakuru ELC E40 of 2021 based on the same falsehoods. He also deposed that the said application was heard and determined where the court found that the Defendants/Applicants had been duly served under Order 5 Rule 12 of the *Civil Procedure Rules*.
6. He deposed that the Defendants/Applicants do not deny knowing the process server thus confirming that they were duly served. He added that the Defendants/Applicants are in no hurry to file their defence or prosecute their matter since they are enjoying the current status. He further deposed that the Defendants/Applicants have not demonstrated any prejudice they will suffer if the decree is enforced.
7. In conclusion, he deposed that the Plaintiffs/Respondents will be greatly prejudiced if the judgment is set aside and urged the court to dismiss the instant application with costs.

### Submissions

8. The Defendants/Applicants filed their submissions dated January 16, 2023 on the same day where they gave a brief background of the case and identified three issues for determination. Firstly, whether the Defendants/Applicants were served with this application. They relied on the case of Supreme Court of India in *Sangram Sing v Election Tribunal, Kotah*, AIR 1955 SC 664 at 711 cited in the case of *Gerita*



*Nasipondi Bukunya & 2 Others v Attorney General* [2019] eKLR. They denied service of the pleadings and refuted the allegations of service.

9. The second issue whether the ex parte judgment entered on October 24, 2022, they submitted that the fact that there was no service renders the ex parte judgment as an irregular judgment. They cited the case of *Mwala v Kenya Bureau of Standards* EA LR (2001) 1 EA 148 and submitted that from their replying affidavits they have an arguable defence that discloses triable issues. They further submitted that in the event this court finds that the ex parte judgment is a regular judgment, they urge the court to exercise its judicial discretion in their favour and set aside the judgment based on the replying affidavit that raises triable issues.
10. The third issue is whether the matter should be heard together with Nakuru ELC No 40 of 2021. The Defendants/Applicants relied on the cases of *Patel v EA Handling Services Ltd* (1974) EZ 75 and *Tree Shade Motor Ltd v DT Dobie Co Ltd* CA 38 of 1998 and *Thayu Kamau Mukigi v Francis Kibaru Karanja* (2013) eKLR. They submitted that this matter should be heard together with Nakuru ELC 40 of 2021 since the issues are substantially the same so as to avoid an instance where the court gives conflicting decisions.
11. The Plaintiffs/Respondents on the other hand filed their submissions dated January 16, 2023 on January 17, 2023 where they gave brief facts of the case and identified five issues for determination. First, whether the judgment delivered on October 24, 2022 is regular, they argued that the Defendants/Applicants do not deny that on May 22, 2022 a process server visited their residence with the intention of serving them. They submitted that from the affidavit of service, they were duly served and were also fully made aware of the suit against them. They further added that from the admissions in the application, the same is beyond reproach that the Defendants/Applicants were duly served. That the judgment against them was therefore proper, regular and out to be left undisturbed.
12. Second issue is whether the Defendants/Applicants have satisfied any ground for setting aside a regular judgment. They relied on numerous cases including the case of *James Wanyoike & 2 Others v CMC Motors Group Limited & 4 Others* [2015] eKLR and submitted that the judgment is regular since the Defendants/Applicants have failed to satisfy the conditions for setting aside a regular judgment. They further submitted that the defence is more or less full of admissions that do not warrant the setting aside of the judgment. They submitted that if the court was to find that the conditions have been satisfied and opts to exercise its discretion, they seek to be awarded thrown away costs of Kshs 200,000. They cited the cases of *Elijah Abdul V Patrick Lang'at & another* [2020] eKLR and *Kenya Alliance Insurance Co Limited v Eunice Nyaboke Nyaribari & NIC Bank Limited* [2021] eKLR.
13. The third issue is whether the Applicants were indolent and has there been undue delay in determination of this dispute. They submitted that the Defendants/Applicants by admission were served on May 22, 2021 and failed to take steps until November 24, 2022 after the judgment was delivered to file the instant application. They submitted that the Defendants/Applicants were clearly indolent and not keen to defend the suit and therefore do not deserve this court's sympathy. They argued that the application is a mere afterthought and ought to be dismissed.
14. The fourth issue is whether an order of the suit to be heard de novo should issue. They argued that the fact that this court is already functus officio having already delivered its judgment then this court cannot order that the suit be heard de novo. They relied on the case of *Kenya Anti-Corruption Commission v Michael K Gituto* [2015] eKLR. They further submitted that it is trite law that litigation must come to an end and with that urged this court to dismiss the application since the Defendants/Applicants were well aware of the existence of this suit.



15. On the final issue of costs, the Plaintiffs/Respondents submitted that they are entitled to the costs of this application in line with Section 27 of the [Civil Procedure Act](#).

### **Analysis and Determination**

16. This court has considered the Application, and the main issue for determination is whether the Defendants/Applicants have met the threshold for setting aside the Ex Parte Judgment delivered on October 24, 2022.
17. Order 12 Rule 7 of the [Civil Procedure Rules](#) provides as follows:-

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

Further the provision is buttressed by Order 51 Rule 15 of the [Civil Procedure Rules](#) which provides:-

“The court may set aside an order made ex parte”

18. The jurisdiction of the court to review and set aside its decisions is wide and unfettered. In *Shah V Mbogo and Another* [1967] EA 116 the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

19. In deciding whether to set aside or not, this court is guided by the decision of the Court of Appeal in the case of [James Kanyita Nderitu & Another](#) [2016] eKLR, where the court of Appeal stated thus:

“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 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 default judgment, and will take into account such factors as the reason for 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 and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See *Mbogo & Another –vs- Shah* (1968) EA 98, *Patel –vs- EA Cargo Handling services Ltd* (1975) EA 75, *Chemwolo & Another –vs- Kubende* (1986) KLR 492 and *CMC Holdings –vs- Nzioka* [2004] I 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 justiae, 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.”

20. This court is of the view that before it can set aside the judgment, it is trite law that it must consider whether the Defendants/Applicants have any Defence that raises triable issues. The Defendants/Applicants contend that they have attached draft replying affidavits which disclose triable issues and ought to be heard on merit.
21. The Defendants/Applicants also contend that they were never served with the pleadings. The Plaintiffs/Respondents on the other hand argued that they were indeed served vide the annexed Affidavit of Service sworn on May 10, 2022. This court has carefully gone through the said Affidavit of Service and notes that it was sworn by a process server one Jacob SA Obulemire. He explained in detail how he was able to identify the Defendants/Applicants.
22. Order 5 Rule 15 of the [Civil Procedure Rules](#) provides that:

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”
23. It is this court’s view that the said process server clearly indicated how he was able to identify the Defendants/Applicants and with such identification, this court is satisfied that there was indeed proper service. Consequently, in view of the same, I find that there is a regular judgment on record.
24. This court is also alive to the fact that before it can set aside the judgment, it is trite law that it must consider whether the Defendants/Applicants have any Defence that raises triable issues and whether the application was brought without undue delay. The Defendants/Applicants contend that they have attached draft replying affidavits which disclose triable issues and ought to be heard on merit.
25. I have carefully perused the draft Replying Affidavits to the Originating Summons and find that the same raises no triable issue as the only issue in contention is the payment of additional Kshs 112,000 as processing fees of the titles which are to be issued to the Plaintiffs/Respondents. This court is of the view that the issue of the processing fees is something that can be sorted out without having to hear the case afresh.
26. The Defendants/Applicants have not stated the exact date they became aware of the judgment /decree though they filed the instant application on November 24, 2022. This is about a month after the judgment was delivered thus there was no inordinate delay on their part.
27. In view of the foregoing, this court finds and holds that the Defendants/Applicants have not met the threshold for setting aside of the judgment delivered by this court on October 24, 2022.
28. Consequently, the Defendants/Applicants Notice of Motion Application dated November 21, 2022, is without merit and the same is dismissed entirely with costs.
29. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16<sup>TH</sup>  
DAY OF MARCH 2023.

A rectangular image showing a handwritten signature in blue ink on a light-colored background. The signature is cursive and appears to read 'Mwangi Njoroge'.

MWANGI NJOROGE  
JUDGE, ELC, NAKURU

