



**Oudia v Okelo & 2 others (Environment and Land Appeal
31 of 2021) [2023] KEELC 16793 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 31 OF 2021**

AY KOROSS, J

APRIL 13, 2023

[ORIGINALLY KISUMU ELCA E7 OF 2020]

BETWEEN

JAMES OMOLLO OUDIA APPELLANT

AND

JOTHAM OPATA OKELO 1ST RESPONDENT

SAMSON OGOLA OKELO 2ND RESPONDENT

JEREMIAH OKACH OKELO 3RD RESPONDENT

RULING

2nd and 3rd respondents case

1. Pursuant to the provisions of Articles 50 (1), 159 (2) (a) and (d) of the *Constitution* of Kenya, Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Orders 9 Rule 7, 10 Rule 11, 45 and 51 Rule 1 of the *Civil Procedure Rules*, the 2nd and 3rd respondents filed the instant notice of motion dated 28/12/2022 against the appellant in which they sought the following reliefs;
 - a) Spent;
 - b) Spent;
 - c) Spent;
 - d) That the 2nd and 3rd respondents be granted leave of court to join as parties to the appeal, they be properly served with pleadings and be granted leave to file and serve their responses to the appellant's pleadings;



- e) That the 2nd and 3rd respondents be granted leave of court to file a notice of appointment of advocates and the annexed notice of appointment of advocates be deemed as properly filed;
 - f) Spent; and
 - g) That the costs of the application be in the cause.
2. The motion was based on grounds set out on its face and on the annexed supporting affidavits of the 2nd and 3rd respondents Samson Ogola Okello and Jeremiah Okach Okelo both deposed on 28/12/2022.
3. Their affidavits were similar. According to them, the appellant obtained judgment on appeal ex parte against them. They were never served with pleadings pertaining to the appeal which could ostensibly have been caused by a misspelling of their names; their names were respectively Samson Ongalla Okelo and Jeremiah Akach Okello. The wrong parties could have been served. They only became aware of the judgement from a relative. They would be prejudiced if the prayers sought were not granted.

The appellant's case

4. The motion was opposed by the appellant who filed a replying affidavit dated 06/02/2023. In it, he stated that the respondents were duly served as evidenced by the return of service. The respondents had always been parties from inception of the suit. The respondents had not met the threshold set out in Order 22 Rule 22 of the *Civil Procedure Rules* to warrant stay of execution.

2nd and 3rd respondents' further affidavits

5. The 2nd and 3rd respondents filed further affidavits both deposed on 21/02/2023 in which they disparaged an affidavit of service by the appellant's process server deposed on 28/07/2022 which was annexed to the appellant's replying affidavit. They asserted that this return of service evidenced the appeal's pleadings were not served during its pendency.

The 2nd and 3rd respondents written submissions

6. Mr. Victor Omondi, counsel for the respondents, filed his written submissions dated 02/02/2023. Counsel identified 3 issues; (i) whether the 2nd and 3rd respondents were duly served with the appeal documents (ii) whether there were real and triable issues warranting the setting aside of the judgment; and (iii) whether it was just and fair to allow the instant motion.
7. On the 1st issue, and relying on Order 10 Rules 2 and 10 and Order 12 Rule 7 of the *Civil Procedure Rules*, Mr Omondi submitted the 2nd and 3rd respondents were not served with pleadings pertaining to the appeal and there was sufficient reason to warrant the setting aside of the judgment. Further, they were denied a right to fair hearing contrary to Article 50 of the *Constitution*. He placed reliance on the case of *Mwala v Kenya Bureau of Standards* EA LR [1001] 1 EA 148 which cited David Kiptanui.
8. On the 2nd issue, counsel relied on *David Kiptanui Yego & 134 others v. Benjamin Rono & 3 others* [2021] eKLR and submitted that the 2nd and 3rd respondents had raised real and triable issues and the appeal should be heard inter parties on merits.
9. On the 3rd issue, counsel highlighted the case of *Jomo Kenyatta University of Agriculture and Technology v Musa Ezekiel Oeal* [2014] eKLR where the court observed that the purpose of being entrusted with the discretion to set aside an ex parte judgment was to avoid injustice or hardship resulting from accident, inadvertence or excusable error.



The appellant's written submissions

10. M/s Omollo, counsel for the appellant, filed written submissions dated 31/01/2023. Counsel identified a single issue; whether the respondents had met the threshold to warrant the setting aside of the judgment and stay of execution as per Order 36 Rule 10 and Order 22 Rule 22 of the *Civil Procedure Rules*.
11. Counsel submitted that setting aside judgment was a matter of discretion of the court and the court needed to have been supplied with sufficient reasons why pleadings had not been filed within the stipulated timelines. According to counsel, the excuse given by the respondents that they were never served with the appeal's pleadings did not hold water.
12. It was counsel's position that the discretion of the honourable court to set aside judgment was intended to avoid injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.
13. To buttress her position, counsel placed reliance on the case of *Rayat Trading Company Limited v. Bank of Baroda & Tetexi House Limited* [2018] eKLR where the court stated that in the exercise of its discretion, the court should consider; prospect of success, good reason and if a defendant should be allowed to defend his claim.
14. It was counsel's submission that the 2nd and 3rd respondents had raised new issues which had not been pleaded before the trial court.

The 2nd and 3rd respondents' supplementary submissions

15. The 2nd and 3rd respondents filed supplementary submissions dated 21/02/2023. Counsel raised six issues. Some of them were a reiteration of their affidavits and earlier submissions. In summary, the affidavit of service related to a different party and not the 1st respondent, the motion disclosed triable issues, the appellant would not suffer prejudice if the motion was allowed and the affidavit of service of 7/02/2023 was intended to deceive the court.

Analysis and determination

16. After carefully considering the residual prayers of the motion, grounds, affidavits, rival submissions, provisions of law and authorities that have been well cited by counsels, the issues falling for determination are: -
 - a) Whether the 2nd and 3rd respondents were already parties to these proceedings.
 - b) Whether leave was required for the 2nd and 3rd respondents' counsel to come on record.
 - c) Whether the 2nd and 3rd respondents were properly served with the record of appeal.

a. Whether the 2nd and 3rd respondents were already parties to these proceedings

17. From the record of appeal and judgment of this court, the 2nd and 3rd respondents have for all intents and purposes been parties to the appeal and proceedings before the trial court. At no time did they ever cease being such.
18. My understanding is that it was their argument that the 2nd and 3rd respondents were strangers to them since they (the applicants in this motion) are respectively known as Samson Ongalla Okello and Jeremiah Akach Okello.



19. This argument is superfluous and is merely intended to mislead this court. This court will endeavour to refresh the 2nd and 3rd respondents' memories.
20. In their defence dated 2/08/2017, the respondents including the 1st respondent described their names as Jotham Opata Okello, Samson Okello and Jeremiah Okach Okello. These names are erringly similar to the names appearing in the appeal. Additionally, the respondents admitted in their defence that the appellant's plaint had properly described them. I need not say more. This prayer fails.

b. Whether leave was required for the 2nd and 3rd respondents' counsel to come on record.

21. Order 9 Rules 9 and 10 of the *Civil Procedure Rules* provides that post judgment, any change of advocate has to be carried out with leave of the court.
22. In my considered view and as has been held in various court decisions, the intent of Order 9 Rule 9 and 10 of the *Civil Procedure Rules* was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court exercised original jurisdiction, I would not have hesitated but to uphold that once judgement has been rendered, leave has to be sought from the trial court.
23. However, the scenario is different in the instant case, this court is sitting as an appellate court. In my view, Order 9 Rules 9 and 10 of the *Civil Procedure Rules* do not apply in instances of an appeal because the then respondents' advocate's instructions in the lower court were exhausted at the conclusion of the suit. At an appellate stage, the 2nd and 3rd respondents had a right to legal representation of their choice. I am persuaded by the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR which held thus; 'Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.'
24. The firm of V.O. Omondi & Company Advocates are properly on record and they did not need to seek leave at an appellate stage. This relief by the 2nd and 3rd respondents is misplaced.

c. Whether the 2nd and 3rd respondents were properly served with the record of appeal.

25. This court is yet to understand the attack on the affidavit of service deponed by the process server Julius Otieno Raminya on 28/07/2022. Contrary to the 2nd and 3rd respondents' assertions, the court's receiving stamp that is borne on this affidavit is the date the appellant filed his replying affidavit; it was annexed to it.
26. From the court record, this affidavit of service was filed in court on 21/09/2022 and therefore the allegation that it was filed on 7/02/2023 does not suffice.
27. By another affidavit of service filed on 3/11/2022, the same process server served the 2nd respondent with a judgment notice who accepted service on behalf of the respondents.
28. In rendering its judgment, this court considered the affidavits of service and it satisfied itself that there was proper service against the respondents. The mysterious person who allegedly disclosed to the 2nd and 3rd respondents the outcome of the judgement of this court has not been described by name.
29. It is curious how the 2nd and 3rd respondents were able to establish the particulars of the case including the case number before filing the instant motion yet they were allegedly not aware of the appeal.



30. One would have expected them to seek to cross examine the process server, which they have not. My position has not wavered; I find the 2nd and 3rd respondents were properly served with documents pertaining to the appeal.
31. Before I issue my disposal orders, I have observed that the 2nd and 3rd respondents have strangely alleged that the instant motion has raised triable issues. Triable issues usually emanate from parties' substantive pleadings which from the nature of the case that was the subject of the appeal, was the parties' plaint and defence. They could not emanate from a motion. This court was not a court of first instance, it has rendered itself and is functus officio.
32. It is my ultimate finding that the motion is not merited. I must therefore dismiss it with costs to the appellant.

DELIVERED AND DATED AT SIAYA THIS 13TH DAY OF APRIL 2023.

HON. A. Y. KOROSS

JUDGE

13/04/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the Presence of:

Mr. Victor Ochieng for the 2nd and 3rd Respondents

N/A for the Appellant

Court assistant: Ishmael Orwa

