



**Rimberia v Miriti (Originating Summons E002 of 2020)  
[2023] KEELC 17920 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ORIGINATING SUMMONS E002 OF 2020**

**CK NZILI, J**

**MAY 31, 2023**

**BETWEEN**

**GERALD MWITI RIMBERIA ..... PLAINTIFF**

**AND**

**ELINA KATHAMBI MIRITI ..... DEFENDANT**

**RULING**

1. Through an application dated 4.4.2023, the court is asked to grant several orders, namely;- allow the firm of Mbaabu M'Inoti to come on record for the defendant to set aside the judgment issued on 4.5.2022; to grant the defense leave to file a defense or response to the originating summons; to issue an inhibition order on LR Meru/Nyayo Sirimon Scheme/540; to order for production of a copy of the cheque No. 000005 of Kshs.40,000/= as alleged by the plaintiff and lastly to issue summons upon Zakayo Mutua Mutea & Peter Karanja the process servers alleged to have served the summons upon the defendants. The application is premised on the grounds on the face of the application and an undated supporting affidavit signed by Elina Kathambi Miriti.
2. The applicant deposed that she is the owner of the suit land as per the attached title deed dated 9.8.2016 and that she only came to know about the case in February 2023, when the respondent, now registered as the owner, came to demand that her son who occupied the land vacates it. Ever since she acquired the title deed, she had never sold or transferred the land to anyone, let alone the respondent, who was a stranger to her, that the respondent is now registered as the owner with effect from 6.2.2022, according to the court orders in this suit. She averred that she was never served with any summons to enter an appearance, and the affidavit of service by one Zakayo Mutua Mutea and Peter Karanja Waithera was full of falsehoods. Again, the applicant stated that the suit lacks merit, for it was not true that 12 years had elapsed since she only acquired a title on 9.8.2018 and therefore, could never enter into the sale agreement. She could not sell the land she did not own; the sale agreement was a forgery; the title deed could not be backdated, and the plaintiff was guilty of fraud and perjury. Given the alleged forgery, the applicant averred that the respondent may have also colluded with the process servers to lie and



- mislead the court on the service of the summons. She averred that since the purported daughter-in-law, Fridah, was a stranger to her, there could not have been any personal service upon her. Further, the applicant stated that the alleged Gitonga Julius said to have been served with the hearing notice dated 22.10.2021, was also a stranger to her necessitating the process servers to be cross-examined to ascertain the truth on service of summons. She should not be condemned unheard, and it was only fair to hear the matter on merits by each party being granted an opportunity to be heard.
3. That if the orders sought were not granted, the applicant would suffer a heavy loss, for she shall lose her land to the caprice and deceit of the respondent, who will not suffer any prejudice if the orders sought were granted, for he will still have his case heard on merits. The applicant has annexed copies of her initial title deed, copy of search, affidavit of service, and her proposed draft replying affidavit as annexures marked EMK 1-5, respectively.
  4. The application was opposed through a replying affidavit sworn by Gerald Mwiti Rimberia on 26.4.2023. He averred that it was full of pure falsehoods, was inept, misconceived, and an abuse of the court process. The respondent further averred that on 2.11.2006, he entered into a sale agreement with the appellant in her office and affixed her stamp as evidence which he honored and paid the considerations and took vacant possession of the land immediately. However, the appellant declined to attend the land control board meeting or sign the transfer form, and since all the payments had been made, the respondent filed a suit whose summons was duly served upon the applicant, leading to the hearing and the issuance of a decree which has been executed. Subsequently, the applicant lacks satisfactory reasons for this court to grant the orders. The respondent has attached the sale agreement, acknowledgment receipts, judgment, and the decree marked as annexures GMR 1 -6.
  5. With leave of court, parties were directed to file written submissions dated 2.5.2023 and 26.4.2023. The applicant submitted that there was no service of summons upon her and that the alleged affidavits by process servers were suspect, giving conflicting information and misleading.
  6. Therefore, the applicant submitted that out of no fault on her part or non-service, she was condemned unheard, the judgment was irregular, and that in the interest of justice, it should be set aside as of right and she be allowed to defend the suit since her defense has merits.
  7. The applicant further submitted that she risks suffering great prejudice and irreparable loss if the judgment was not set aside for her land to be taken by force. Reliance was placed on *Mbogo vs. Shah* (1968) E. A 93, *Patel vs East Africa Cargo Services Ltd* (1974) E.A 75 *Fidelity Commercial Bank Ltd vs Owen Amos Ndungu and another* HCC NO. 241 of (1998) (UR), *John Muthee Ngunjiri vs Ali Ibrahim* (2021) eKLR, *Zachary Kiarie Njuguna vs Nelius Wairimu Irungu & 2 others* (2018) eKLR.
  8. To the contrary, the respondent submitted that whereas Order 10 Rule 11 of the *Civil Procedure Rules* grants the court power to set aside an *ex parte* judgment, such discretion should be exercised judiciously and or with a sound reason but not in favor of a party seeking to deliberately obstruct or delay the case of justice by failing to transfer land such as the instant application on whether there was proper service, the respondent also submitted that the amended originating summons was clear and that the applicant was merely giving mere excuses. Further, the applicant knew about the case and the dates but chose not to attend court. Reliance was placed in *Lalji Bhimji Shangani Builders & Contractors vs City Council of Nairobi* (2012) eKLR.
  9. On whether the application for setting aside should be allowed, the respondent submitted that no sufficient cause had been shown other than quoting the rules of natural justice and fair hearing. Reliance was placed on *Wachira Karani vs Bildad Wachira* (2016) eKLR, on the proposition that sufficient cause was a question of fact and a defendant must demonstrate that he was prevented from attending court by enough cause.



10. The power of a court to set aside an *ex parte* judgment has been discussed in various cases. In [\*Sainagbi t/a Panel Beaters vs Kasuku\*](#) (1988) eKLR, the court cited with approval [\*Karatina Garment Ltd vs Nyanarua\*](#) (1976) KLR 94, that the power was discretionary and unqualified and where the party had denied service of summons, the court had to inquire into the aspect of the matter and examine the deponent of the affidavit of service on oath to try and ascertain the truth which was a matter of fact on which party was to be believed. The court said that in such a scenario, the evidence of the process server and that of the appellant should have been recorded to assist the court in resolving the issue as to who was telling the truth.
11. In the case of [\*Njoroge vs Kiarie\*](#) (1988) eKLR, the court held that under Order 1 Rule 12 [\*Civil Procedure Rules\*](#), a statement of service which did not say that the process server could not find the defendant so for that the reason he chose to serve on the defendant's wife was suspect. The court set aside the *ex parte* judgment. In the case of [\*Patel vs E. A\*](#) (supra), the court held that the court's discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence, and excusable mistake or error. In [\*Mohamed and Another vs Shoka\*](#) (1990) KLR 463, as cited in [\*David Kiptanui Yego & 134 others vs Benjamin Rono & 3 others\*](#) (2021) eKLR, the court said that it should consider if the judgment was regular if there was a defense on merit, the reasonable explanation of the delay and lastly the prejudice to the other side.
12. Additionally, in [\*James Kanyitta Nderitu & Another vs Mairos Philotas Ghikas & another\*](#) (2016) eKLR, the court addressed its mind on the distinction between a regular default and an irregular default judgment. On the former, the court said it was where a defendant had been duly served with a summons to enter an appearance, but for one reason or another, he had failed to appear or file a defense resulting in a default judgment. The court said that in such a case, the factors to consider on whether to set aside the judgment as the reason for the failure, length of time if the defense has triable issues, the prejudice each party was likely to suffer, and whether or not it was in the interest of justice to set aside the default judgment as held in [\*Mbogo vs Shah\*](#) supra & [\*CMC vs Nzioki\*](#) (2004) 1KLR 173.
13. As regards irregular default judgment, the court said it was where judgment had been entered against a defendant who had not been served or adequately served with a summons to enter an appearance, in which case the judgment should be set aside as a matter of right without the court being moved by any party or venturing into consideration of whether the intended defense raises triable issues or whether there has been inordinate delay in applying for setting aside. The court said that the reason that such a judgment must be set aside as of right is that the right to be heard before an adverse decision is made, is a fundamental right that permeates the entire judicial system, as held in the supreme court of India in [\*Sangram Singh vs Election Tribunal Koteb\*](#) AIR (1955) AIR SC 664, that men should not be condemned unheard and that a decision should not be reached behind their backs and those proceedings that affect their lives and property, should not continue in their absence and should not be precluded from participating in them.
14. On the court's overriding objective, in [\*Nicholas Salat vs IEBC & 6 others\*](#) C. In Application No. 228 of (2013), the court held that courts should strive to sustain rather than strike out pleadings, and where a procedural infraction caused no injustice by injury or prejudice to a person, such violation should not have an invalidating effect.
15. On non-service of summons, the court in [\*Ali Bin Khamis vs Salim Bin Khamis Kirobe & others\*](#) (1956) 1 EA 195 held that where an order was made without service upon a person affected by a procedural cook-up will not deter the court as of right from setting aside such an order.
16. On triable issues, the court in [\*Zedeiah Khate Silenge vs Simon Biketi Wekesa\*](#) (2002) eKLR said that if the judgment was regularly obtained, the circumstances before and after the entry of judgment had to



- be considered in addition to whether or not there was a triable defense put forward by the applicant, which if set aside would be determined by the court and the only prejudice being the respondent was capable of compensation by way of costs. The court said that a mere delay could not defeat the course of justice without the intention on the part of the applicant to obstruct the course of justice.
17. Given the above-beaten route on the parameters and principles to apply in setting aside, the central issues in this application are whether the applicant was properly served with summons to enter an appearance and, if not so, whether her right to a fair hearing was infringed.
  18. The applicant sought to call the process servers for cross-examination in this application. The respondent, on the other hand, did not avail the process servers for cross-examination or obtain any of their affidavits to counter the assertions by the applicant that there was no personal service and that the persons alleged to have accepted service on her behalf did not exist and or were not her relatives. The respondent did not address himself to those specific allegations by way of calling for responses from the process servers or offering them for cross-examination.
  19. Going to the affidavits of service, the first one by Susan Kaburu does not specify in which particular place in Timau town service was affected. The respondent has not said he was present during that service of summons on 2.10.2020. With the affidavit sworn by Zakayo Mutua Mutea, the deponent does not say who identified the applicant and where exactly she was in Riverside Village. In the affidavit by Peter Karanja Waithera, the deponent did not state how he came to know that Fridah was her daughter-in-law. It does not say what efforts were made to trace the defendant to opt for service upon a third party on her behalf, the exact position obtained with the affidavits sworn on 6.10.2021, 27.5.2021, and 21.11.2021. See *John Muthee Ngunjiri vs Ali Ibrahim* (supra), Zachary Njuguna (supra).
  20. Regarding triable issues and the prejudice likely to be occasioned, the applicant has confirmed that a new title deed has been issued to the respondent. The respondent is yet to take vacant possession. The draft replying affidavit appears to be raising some triable issues, which the respondent has also identified in his replying affidavit. See John Muthee Ngunjiri (supra). If then the respondent was yet to take vacant possession, and since the sale agreement indicates that there was a balance to be cleared upon the transfer, which the respondent was yet to pay, I think the prejudice to be suffered would be more on the applicant, than the respondent who can be compensated by way of costs.
  21. The upshot is that I find it in the interest of justice to set aside the exparte judgment on condition that the applicant deposits Kshs.50,000/= throwaway costs before the court within 14 days from the date hereof. The respondent shall also file a replying affidavit to the originating summons. Inhibition orders shall and issue against the new title deed to subsist until the disposal of this suit. Mention before the court on 27.7.2023 for a case conference.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31<sup>ST</sup> DAY OF MAY 2023**

**In presence of**

C.A John Paul

Githinji for Inoti for applicant

Karanja for respondent

**HON. CK NZILI**

**ELC JUDGE**

