



REPUBLIC OF KENYA



KENYA LAW
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**Mudigo v Agui & another (Environment & Land Case
20 of 2022) [2023] KEELC 17732 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 20 OF 2022
MN MWANYALE, J
MAY 25, 2023
(FORMERLY ELD ELC CASE 259 OF 2013)**

BETWEEN

BARNABAS OMBIMWA MUDIGO PLAINTIFF

AND

DENNIS KIPTANUI AGUI 1ST DEFENDANT

ANTONY KIMAGUT AGUI 2ND DEFENDANT

RULING

1. This ruling related to the notice of motion application dated October 4, 2022 which sought orders as here follows;
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. The honourable court be pleased to set aside, annul or vary the judgment entered against the defendants/applicants on the May 14, 2020 and all consequential orders.
 - v. Consequent to prayer (4) herein above being granted, the honourable court be pleased to grant the defendants/applicants leave to file its statement of defense and counterclaim out of time.
2. The application is based on grounds interalia, that;
 - i. plaintiff obtained *ex parte* judgment against the defendants/applicants.
 - ii. plaintiff is on the verge of executing a decree that arose from the proceedings the applicant did not participate in.



- iii. the plaintiffs advocates have threatened to execute against the defendants/applicants anytime from now.
 - iv. that the applicants learnt of instant suit on August 24, 2022 when they were served with a taxation notice.
 - v. the initial suit was filed in 2013, and they were never served with copies of summons to enter appearance, plaint that culminated to the entry of judgment in favour of the plaintiff/respondent.
 - vi. the court was misled to believe that the defendants/applicants were served yet the affidavit of serve does not disclose how the process server identified the defendants.
 - vii. the defendants/applicants have a strong defence and counterclaim with cogent triable issues and ought to be allowed to defend.
3. The above grounds have been reiterated in the supporting affidavit of Deniss Kiptanui Agiui, which affidavit annexes interalia the draft defence, and counterclaim as well as an authority to co-defendant.
 4. The application is opposed by the replying affidavit of the respondent Barnabas Ombimwa Mudigo, who deposes interalia;
 - i. that he accompanied the court process server to effect service of summons on the applicants and on the basis of that affidavit of service, the matter proceeded for formal proof after the court being satisfied of service.
 - ii. that judgment was delivered on May 14, 2020 and the application was not made promptly and no reasons for setting aside the default judgment have been advanced.
 - iii. application was filed 9 years after the applicants were served and the application is thus an afterthought.
 - iv. that the draft defence and counterclaim raises no triable issues and it is meant to delay justice, the fruits of judgment.
 5. In the replying affidavit, the respondent has annexed the affidavit of service, dated June 25, 2013, a request for judgment and the judgment sought to be set aside.
 6. Parties were directed to file written submissions to canvass the instant application.
 7. Upon careful consideration of the application, the rival affidavits, and the submissions on record, the court frames two issues for determination.
 - i. Whether or not there was service of summons and the pleadings on the defendants.
 - ii. Whether the draft defence and counterclaim raises triable issues.
 8. Among the grounds on which the application is founded is that the court process server did not indicate how he identified the defendants/applicants for purposes of effecting service on them.
 9. As indicated in paragraph 4(i) above, the respondent depones that he accompanied the court process server at the time of service of the pleadings, the affidavit of service by the court of process server dated June 25, 2013 paragraph 3 thereof indicates that the process server was accompanied by the plaintiff now respondent, who pointed out the homes of the defendants.



10. It is clear from that paragraph that it is the plaintiff/respondent who identified the applicants for purposes of service of pleadings.
11. It is this same affidavit of service, that the trial court (Ombwayo J) relied on to allow the matter proceed for formal proof after a request of judgment was entered, hence the learned judge had found service to be proper and I would have no basis to depart from that finding; in any event, the fault attributed to the service is that the person who identified the defendants/applicants was not indicated yet paragraph 3 of the affidavit of service is very clear that it is the plaintiff who identified the defendants, and that ground thus has no factual support.
12. The court thus returns a finding that there was proper service of the summons and pleadings on the applicants and answers issue number 1 in the affirmative.
13. On whether or not they are triable issues in the draft defence so as to set aside the judgment *ex debito justitiae*; from paragraphs 3 to 6 of the plaint, it is clear that at the time the suit was filed, the plot number 667 koibarak “a” had been adjudicated on but no title in respect of the same had been registered and issued to the plaintiff. Indeed at paragraph 3 of the plaint the plaintiff had pleaded that he was awaiting issuance of the title deed.
14. The draft defence and counterclaim, as annexed has pleaded, adverse possession by way of continuous possession and occupation for more than 12 years at paragraph 12 thereof, and the defendant/applicant has pleaded that the plaintiffs title be extinguished in favour of the defendants by virtue of section 37 and 38 of *Limitation of Actions Act*, as pleaded at paragraph 13 and 14 of the draft defence and counterclaim.
15. Without going to the merits or otherwise of the case and purely based on the pleadings the court shall examine whether the draft defence of occupation and possession for more than 12 years, hence entitling to counterclaim via adverse possession.
16. Whereas at a glance this looks like a triable issue, the same is not a triable issue, because at time of filing the suit the plaintiff has not been registered as owner of title number Nandi/Koibarak/667, and was still waiting for issuance of the title, although the adjudication process had been finalised as pleaded in the plaint.
17. In civil appeal No 110 of 1997 *Francis Gitonga Macharia v Muiruri Waitbaka*, the Court of Appeal stated;

“Limitation period for purposes of adverse possession only starts running after registration on the property in the name of the respondent.”

Since at time of filing suit the plaintiff had not been registered as the owner, the issue of adverse possession as pleaded by the applicant as a triable issue, thus cannot arise, and the court does find no triable issues in the draft defence, so as to set aside the *ex parte* judgment *ex debito justitiae*.
18. Having found that there was proper service of the summons and pleadings on the applicants and that the draft defence and counterclaim raises no triable issues, the upshot is that the application dated October 4, 2022 is not merited and it is hereby dismissed with costs to the respondent.
19. The interim orders previously issued in this matter are consequently vacated.

DELIVERED AND DATED AT KAPSABET THIS 25TH DAY OF MAY, 2023.

HON. M. N. MWANYALE,



JUDGE

In the presence of;

Mr. Kiprono for Defendant/Applicant

Ms. Mukamo for Plaintiff/Respondent

