



Karanja v Kosaini (being the legal representative of Estate of the late Kosaini Ole Kawuonko) (Environment and Land Appeal 9 of 2018) [2023] KEELC 17463 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 9 OF 2018**

MN GICHERU, J

MAY 16, 2023

BETWEEN

EDWARD KARANJA APPELLANT

AND

SAMUEL KOSAINI RESPONDENT

BEING THE LEGAL REPRESENTATIVE OF ESTATE OF THE LATE KOSAINI OLE KAWUONKO

JUDGMENT

1. This judgment is in respect of the appeal by the Appellant against the ruling of the Hon. Senior Resident Magistrate, W.N. Kaberia, in Kajiado SRMC No. 8 of 2007 dated 26/3/2009.
2. In the ruling, the learned Magistrate dismissed the Appellant's application which had sought to set aside the interlocutory judgment dated 10/2/2007 and a final judgment dated 14/3/2007.
3. The Appellant's contention was that he was never served with the summons to enter appearance or any other process and he had never resided in Westlands where the process server claimed to have served him.
4. In dismissing the application the Learned Magistrate found that the Applicant's failure to call for the cross-examination of the process server meant that he could not disprove service of the summons to enter appearance. The trial Magistrate also found that the suit land being Kajiado/Kaputie-North/1276 had already been subdivided and transferred to third parties who were not parties to the suit.
5. Dissatisfied with the ruling, the Appellant filed a memorandum of appeal dated 20/4/2009 raising four grounds of appeal as follows. The trial Magistrate erred in law and in fact:-
 - i. In finding that the Appellant was properly served with summons to enter appearance;



- ii. In finding that it was necessary to cross-examine the process server on his affidavit of service;
 - iii. In finding that the Appellant did not have a defence with merits to the Respondent's claim;
 - iv. In failing to appreciate that it was necessary and expedient for the instant application the subject of the appeal to be disposed off prior to bringing in other applications to join other parties to the suit.
6. The Appellant now seeks the following orders.
- a. This appeal be allowed and the ruling delivered on 26/3/2009 be set aside.
 - b. That the application dated 13/5/2008 be allowed and subsequently, the ex parte interlocutory judgment of 10/2/2007 and the final judgment of 14/3/2007 be set aside.
 - c. That the Appellant be granted leave to defend the Respondent's claim on such terms as the court may deem fit-
 - d. The Respondent do meet the costs of the appeal.
 - e. Any other relief that the court may deem fit to grant.
7. On 14th December, 2009, an order was issued by this court prohibiting any dealings with Land Parcel Numbers Kajiado/Kaputiei-North/2500 and 25001 both of which resulted from subdivision of the suit land. This order has never been set aside or reviewed.
8. According to a report dated 16/11/2022 the suit land is vacant, covered by natural vegetation and shortgrass with wild animals grazing thereon. The report is by Citiscape Valuers and it was filed pursuant to directions issued by this court on 27/10/2022 with a view to establishing the status quo. It is an annexure to the affidavit sworn by the Appellant on 5/12/2022 and filed in court on 21/12/2022.
9. Counsel for the parties filed written submissions 5/10/2012 and 7/3/2013. The Appellant filed submissions again on 22/7/2015 and finally on 6/12/2022. The issues raised in the submissions were as follows.
- i. Service.
 - ii. Cross –examination of the court process server.
 - iii. Merit of the Appellant's defence.
 - iv. Appeal being overtaken by events.
 - v. Pecuniary jurisdiction of the Senior Resident Magistrate's Court in 2007 to handle the dispute.
 - vi. Limitation of time.
10. I have carefully considered the appeal in its entirety including the proceedings before lower court, the ruling appealed against, the Memorandum of Appeal, the submissions by learned counsel for the parties and the issues raised therein and I make the following findings.
11. Regarding service, I find that the learned Magistrate erred in finding that the Appellant had been served. Service under Order 5, Rule 6 Civil Procedure Rules must always be personal on the Defendant. Any other mode of service must only be after personal service fails. The affidavit of service by Tom Oluchina dated 9/2/2007 does not explain what effort he made to trace the Appellant personally. It does not state the house number, the name of the estate and whether it had a gate. It says that he placed the plaint and summons to enter appearance under the door.



Many questions arise from that deposition in paragraph 5 of the affidavit. Who opened the gate for him? How could the plaint and the accompanying documents fit under the door? The trial Magistrate ought not to have accepted such uncertain service as proper especially when confronted by an affidavit by the Appellant saying that he never lived in Westlands. Even if that was his house, how sure were the process server and the plaintiff that the Applicant had not relocated?

12. On cross-examination of the process server, I find that the trial Magistrate was wrong to make the decision that he made rest on such a minor issue. The process serve had not filed a detailed affidavit. Service was not personal. These failures by process server should have been used against the Plaintiff who was the beneficiary of the questionable service but not against the Appellant who stood to lose 100 acres of land.
13. On the merit of the Appellant's defence, I find that it raised triable issues and it was backed by receipts and acknowledgment of cash payments by the Plaintiff himself. It is only a trial that would have confirmed the authenticity of the said exhibits.
14. I find that the appeal has not been overtaken by events because on 14/12/2009 an order was issued inhibiting any dealings with L.R. 25000 and 25001.

Secondly, a recent report dated 16/11/2022 and filed in court shows that the land is still in its pristine state covered by natural vegetation and shortgrass with wild animals grazing thereon. The transfers that took place immediately after the ex parte proceedings are the only events that have taken place. After a trial, the court will consider whether to reverse those events.

15. On the issue of the pecuniary jurisdiction of the Senior Resident Magistrate's Court in 2007, I find that this was not raised in the memorandum of appeal dated 20/4/2009 Under Order 42 Rule 4 Civil Procedure Rules, I find that such a ground should not be raised now.

It may be raised in the trial court. Unfortunately, even the report dated 16/11/2022 which is prepared by a valuer does not give the value of the suit land.

16. Regarding the final issue of limitation, I find that just like the issue of jurisdiction, it was not raised anywhere in the memorandum of appeal. Even if it had been raised in the appeal, I find that it would not matter because under Section 26(a) of the *Limitation of Actions Act*, where an action is based upon the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud. The Plaintiff's suit in the lower court was based on the alleged fraud of the Appellant.

17. In conclusion, I find that the Appellant was condemned unheard and as a result he lost 100 acres of land. This was grossly unfair and unjust and the trial court ought to have allowed his application to set aside the interlocutory and final judgments of 10/2/2007 and 14/3/2007.

For the reasons already given, I allow the Appellant's appeal and order as follows.

- i. The lower court's ruling delivered on 26/3/2009 is hereby set aside.
- ii. The Appellant's application dated 13/5/2008 is allowed.
- iii. The Appellant is granted leave to file a defence in the suit within 30 days.
- iv. Since this cause of action survives the deceased as it is in rem and not in personam, Samuel Koisani to take the place of his deceased father in the suit.
- v. Costs to the Appellant.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 16TH DAY OF MAY, 2023.

M.N. GICHERU

JUDGE

