



**Obwogo v Nyarotso (Environment & Land Case 484 of 2014)  
[2023] KEELC 17420 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17420 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 484 OF 2014**

**DO OHUNGO, J**

**MAY 16, 2023**

**BETWEEN**

**STEPHEN WERE OBWOGO ..... PLAINTIFF**

**AND**

**HAGGAI NGAMIA NYAROTSO ..... DEFENDANT**

**RULING**

1. Proceedings commenced in this matter when the plaintiff filed Originating Summons dated March 24, 2014, claiming that he had acquired the parcel of land known as South Wanga/Musanda/479 by adverse possession. The matter was heard, and judgment was delivered on July 24, 2018 by N. A. Matheka J as follows:
  1. A declaration that the defendant's/respondent's sole proprietary interests in the said land have been extinguished by virtue of the plaintiff's/applicant's adverse possession of the same.
  2. That the defendant/ respondent to execute all subdivision and transfer documents of a portion of land parcel No. South Wanga/Musanda/479 occupied by the applicant and in event of default the Deputy Registrar of this court be empowered to execute the same to give effect to the foresaid orders.
  3. That costs to be borne by the defendant.
2. Subsequently, the plaintiff filed bill of costs dated August 3, 2018 which was taxed at KShs 83,610 through ruling delivered on November 8, 2018. The plaintiff then embarked on the process of executing the decree on taxed costs, among others through Notice of Motion dated June 6, 2022, through which he sought leave to dispose of the defendant's land parcel number South Wanga/Musanda/893 by way of public auction. The defendant opposed the application through is replying



affidavit sworn on September 5, 2022. The application was however withdrawn on October 12, 2022. Later, the plaintiff filed Notice of Motion dated September 12, 2022, through which he sought leave to dispose of the defendant's land parcel number South Wanga/Musanda/393 by way of public auction. Notice of Motion dated September 12, 2022 is still pending.

3. On his part, the defendant filed Notice of Motion dated November 11, 2022, which is the subject of this ruling. The following orders are sought in the application:
  1. Spent
  2. Spent
  3. That this honourable court be pleased to set aside, review and or vacate the interlocutory judgment entered together with the ex parte proceedings and the resultant judgment delivered on 24/7/2018, the decree and all other consequential proceedings and orders made against the defendant/applicant.
  4. The honourable court be pleased to grant leave to the defendant/applicant to file a defence in terms of the annexed draft and he be heard on merit.
  5. Costs of this application be provided for.
4. The application is supported by an affidavit sworn by the defendant who deposed that he was never notified of the existence of this suit until July 5, 2022 when the plaintiff served him with the Notice of Motion dated June 6, 2022. That he was shocked by the application and that he perused the court file only to discover that the matter proceeded ex-parte leading to the judgment delivered on July 24, 2018. He concluded by deposing that he has a formidable defence to the suit and therefore urged this court to allow his application as prayed.
5. In response to the application, a replying affidavit sworn by the plaintiff was filed. He deposed that it is not true that the defendant was unaware of the suit as alleged. That the parties herein hail from the same locality and that the plaintiff directed process servers to the defendant's homestead to effect service. He further deposed that the defendant has not made any formal request to cross examine the process servers as to the contents of their affidavits of service. It was the plaintiff's further averments that for this court to exercise discretion in favour of the defendant, the defendant ought to establish that he has a defence raising triable issues, but he has failed to do so.
6. The application was canvassed through written submissions.
7. The applicant argued that no affidavit of service has been availed in respect of service of summons to enter appearance and that affidavits of service on record state that service of other notices was effected upon his wife whose name is not indicated in the affidavits. The applicant further argued that his defence raises triable issues and urged the court ought to grant him an opportunity to be heard.
8. In response, the plaintiff argued that the defendant has not sought to cross examine any of the process servers who swore affidavits of service detailing the manner in which they served him. That if anything, the defendant's draft replying affidavit indicates that the defendant has never been the registered proprietor of the suit property thus suggesting by deduction that he ought not to be a party to this suit. The plaintiff therefore urged the court to dismiss the application with costs.
9. I have considered the application, the affidavits, and the submissions. While considering an application such as the present one, the court is called upon to apply the principles laid down in *Mbogoh & another*



*v. Shab* [1968] EA 93 and reiterated in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR as follows:

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, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. ... In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment ...

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 justitiae*, as a matter of right.

10. The applicant contends that he was not served with any summons to enter appearance or any notice of the existence of the suit prior to hearing and delivery of the judgment. While insisting that the applicant was served, the respondent opted not to annex any affidavit of service to his replying affidavit, thereby leaving it to the court to scour through the file to locate any evidence of service.
11. To begin with, it must be remembered that an originating summons is like a plaint which is accompanied with summons to enter appearance. It requires the named defendant to enter appearance within a specified period. A perusal of the originating summons in this matter shows that it states on its face that the defendant herein was required to enter appearance within 15 days of service upon him of summons to enter appearance. I have perused through the file, and I have not found any affidavit of service in respect of either service of the originating summons or summons to enter appearance. The earliest affidavit of service that I have found is one sworn on March 22, 2017 by Masinde Mukosi Justus, wherein the said process server deposed that he served an “invitation notice” upon “the wife to the respondent.” The name of the so-called wife is not given. All subsequent affidavits of service prior to delivery of judgment state that service was effected upon the unnamed wife.
12. The plaintiff has suggested that the defendant should have sought to cross examine the deponents of the affidavits of service. While examination on oath of a process server is one of the ways of settling disputes on service, the party alleging service must first avail an affidavit of service that will form the basis of the examination. Having failed to avail an affidavit of service in respect of service of the originating summons and summons to enter appearance, the plaintiff cannot be heard to insist on such an examination.
13. In view of the foregoing, I am persuaded that the defendant was neither served with the originating summons and summons to enter appearance nor notice of any of the hearing dates in the matter. In such circumstances, the defendant is entitled to a setting aside as of right, to preserve his right to a hearing. I therefore need not enquire whether he has a defence that raises triable issues.
14. In the result, I find merit in Notice of Motion dated November 11, 2022. I therefore make the following orders:
  - a. The judgment delivered herein on July 24, 2018, the decree and all consequential proceedings and orders made against the defendant are hereby set aside.
  - b. The defendant is hereby granted leave to file a response to the Originating Summons.
  - c. Costs of Notice of Motion dated November 11, 2022 shall be in the cause.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF MAY 2023.**



**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**Mr Okali holding brief for Ms Ikhumba for the plaintiff**

**Ms Olucheli for the defendant**

**Court Assistant: E. Juma**

