



Kariuki v General & another (Environment & Land Case 7 of 2016) [2023] KEELC 19290 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 7 OF 2016**

**JO MBOYA, J
JULY 31, 2023**

BETWEEN

WILFRED MBITU KARIUKI PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

HARRISON NJUGUNA MBUGUA AND LOISE NJERI MBUGUA (SUING AS LEGAL REPRESENTATIVES OF ESTATE OF JOSEPH MBUGUA NJUGUNA) 2ND DEFENDANT

RULING

1. The instant suit was filed vide plaint dated the October 23, 2003; and in respect of which the plaintiff herein sought for various/plethora of reliefs pertaining to and concerning LR No Kiambaa/Kihara/2625, (hereinafter referred to as the suit property).
2. Upon the filing/lodgment of the instant suit, the plaint and summon to enter appearance were duly served upon the defendants herein and thereafter the 1st defendant duly entered appearance and filed a statement of defense dated the October 22, 2007; and in respect of which the 1st defendant, now deceased, denied the allegation/averments contained at the foot of the plaint.
3. On the other hand, the 2nd defendant similarly entered appearance and filed a statement of defense and which statement of defense is dated the December 22, 2003; and which was thereafter amended on the 25th November 2009.
4. For good measure, upon being served with the Statement of Defense filed by and on behalf of the 1st Defendant herein (now deceased), the Plaintiff crafted and filed a Reply to the 1st Defendant Statement of Defense in terms of Reply dated the 1st November 2007. Instructively, the Plaintiff disputed the averments contained at the foot of the 1st Defendant’s Statement of Defense.



5. Subsequently, the subject matter proceeded for hearing culminating into the delivery of a Judgment entered in favor of the Plaintiff on the 3rd October 2022. For coherence, it is the said Judgment, which is now the subject of the current Application.
6. In respect of the current Application, namely, the Notice of Motion Application dated the 12th June 2023; the 1st Defendant/Applicant herein has sought for the following reliefs;
 - i.Spent.
 - ii. THAT this Honourable Court be pleased to order for stay of execution of the Judgment and/ or decree made by Mr. Hon. Justice Oguttu Mboya on 3rd October, 2022 wherein the Honourable court ordered for the cancellation of the transfer and registration of Title Number Kiambaa/Kihara/2625, nullification of Title Number Kiambaa/KIhara/2625 by the Land Registrar, a permanent injunction against the 2nd Defendants and payment of Kshs. 5,000,000/= Only, as General damages by the 1st Defendant together with costs and interest at court rate (14%) per annum, pending the hearing and determination of this Application.
 - iii. THAT the Ex-Parte Judgment made by Mr. Hon Justice Oguttu Mboya on 3rd October 2022; against the 1st Defendant together with all the consequential orders be set aside and leave be granted to 1st Defendant to defend the suit. 4
 - iv. THAT upon the grant of prayer 3 above, Leave be granted to the 1st Defendant to file their Defence together with the List of Documents, List of Witnesses and the Witness Statements within 14 days from the date of the order.
 - v. THAT the costs of this Application be on cause
7. The instant Application is premised and anchored on the various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit sworn by Loise Njeri Mbugua; and which has been sworn on the 12th June 2023 and to which the Deponent has annexed two sets of documents.
8. In response to the subject Application, the Plaintiff/Respondent has filed three sets of Replying Affidavit. For good measure, the 1st Replying affidavit is sworn by one Wilfred Mbitu Kariuki, to wit, the Plaintiff/Respondent; the other Replying affidavit has been sworn by Bernard Munga Kamau; and the 3rd Replying Affidavit has been sworn by Ambrose Muthama, respectively.
9. Upon being served with the various Replying affidavits, the 1st Defendant/Applicant sought for and obtained Leave to file and serve a Supplementary affidavit. In this regard, Leave was duly granted and thereafter the 1st Defendant proceeded to and filed a Supplementary affidavit sworn on the 19th June 2023.
10. Be that as it may, the instant Application came up for hearing on the 20th June 2023, whereupon the advocates for the respective Parties agreed to canvass and dispose of the Application by way of written submissions. In this regard, the Honourable court thereafter proceeded to and circumscribed timelines for the filing and exchange of written submissions.



Submissions By The Parties

a. 1st Defendant's/applicant's Submissions:

11. The 1st Defendant/Applicant filed written submission dated the 27th June 2023; and in respect of which same has raised, highlighted and canvassed three (3) salient issues for consideration by the Honourable court.
12. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein had hitherto appointed and engaged the firm of M/s C.B Mwangela & Company Advocates to act for and on her behalf.
13. However, the named firm of advocate latter crafted and filed an Application dated the 3rd March 2022 and in respect of which same sought Leave of the Honourable court to cease acting for and on behalf of the First Defendant herein.
14. Furthermore, Learned counsel contended that upon the cessation of the named advocate to act for the Applicant, the Applicant herein neither appointed any other advocate nor filed a Notice to act in person, in the manner envisaged under the Law.
15. Owing to the fact that the Applicant herein neither appointed any other advocate nor filed a Notice to act in person, Learned counsel for the Applicant has therefore contended that the Applicant was therefore within the law in appointing the current advocate to come on record and to act for her in respect of the instant matter.
16. Additionally, Learned counsel has contended that insofar as the previous counsel had ceased to act for and on behalf of the Applicant, it was not incumbent upon the Applicant's current advocate to seek and obtain Leave prior to and before coming on record in terms of Order 9 Rule 9 of the Civil Procedure Rules, 2010 or otherwise.
17. Secondly, Learned counsel has submitted that the Applicant herein was neither served with the hearing notice relating to the schedule of the hearing of the matter which took place on the 13th June 2022, either as alleged by the Plaintiff/Respondent or at all. In any event, Learned counsel has added that the affidavit of service which has been filed by and on behalf of the Plaintiff/Respondent is replete with falsehoods and misrepresentations.
18. Further and in addition, Learned counsel for the Applicant has contended that even though the impugned affidavit of service alludes to the facts that the Applicant's Home has a Gate; however, the Applicant herein has deponed on Oath that her home does not have a Gate in the manner alluded to or at all.
19. In the circumstances, Learned counsel for the Applicant has impressed upon the Honourable court to find and hold that the Applicant herein was neither served with the Hearing notice nor notified of the hearing which took place on the 13th June 2022.
20. Thirdly, Learned counsel for the Applicant has submitted that having not been served with the Hearing notice relating to the scheduled hearing which took place on the 13th June 2022; the Applicant herein was therefore condemned unheard, albeit without any lawful basis and or reason.
21. Arising from the foregoing, Learned counsel for the Applicant has therefore contended that the impugned proceedings and the resultant Judgment was therefore arrived at without due regard to the provisions of Article 47 and 50(1) of *the Constitution*, 2010. In this regard, counsel has invited the



Honourable court to find and hold that the Applicant's Rights to Fair Hearing were breached, violated and infringed upon.

22. In support of the foregoing position, Learned counsel for the Applicant has cited and relied on, inter-alia, the case of Safaricom Limited versus Josenga Company Limited & 4 Others (2021)eKLR, Pinnacle Projects Limited versus Presbyterian Church of East Africa, Ngong Parish & Another (2018)eKLR, Wachira Karani versus Bildad Wachira (2016)eKLR and Butt versus Rent Restriction Tribunal (1979)eKLR, respectively.
23. Premised on the foregoing, Learned counsel for the Applicant has thus submitted that the Applicant herein has duly established and demonstrated the existence of sufficient cause and basis to warrant the exercise of discretion in favor of the Applicant. Consequently and in this regard, Learned counsel has implored the Honourable court to grant/ allow the Application under reference.

B. Plaintiff's/respondent's Submissions:

24. The Plaintiff/Respondent filed written submissions dated the 4th July 2023; and in respect of which same has raised, canvassed and highlighted four (4) pertinent issues for due consideration by the Honourable court.
25. First and foremost, Learned counsel for the Respondent has submitted that the 1st Defendant/Applicant herein instructed, engaged and retained the firm of M/s C.B Mwongela & Company Advocates; to act for same in respect of the instant matter. Further and in addition, Learned counsel has contended that the said law firm has remained on record to date and same has never ceased to act for the Applicant, either as alleged or at all.
26. Having retained and/or engaged the named firm of advocates to act for her, Learned counsel for the Respondent has contended that the current advocate could only come on record by filing a Notice of change of advocate, albeit after procuring and obtaining Leave of the Honourable court in accordance with the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010.
27. Nevertheless, Learned counsel has contended that the current advocates have however come on record on the basis of a Notice of Appointment of Advocate, which document does not amount to or constitute a change of advocate or at all.
28. Consequently and in the premises, Learned counsel for the Plaintiff/Respondent has contended that the current firm of advocate are not properly on record and thus the current Application has been filed and mounted by a stranger, albeit without the requisite Locus standi. In this regard, Learned counsel for the Respondent has thus implored the Honourable court to strike out and expunge the impugned Application.
29. Secondly, Learned counsel for the Respondent has submitted that the Applicant herein was duly and effectively served with the hearing notice relating to the scheduled hearing which took place on the 13th June 2022. In this regard, Learned counsel for the Respondent has invited the Honourable court to take cognizance of the affidavit of service which was filed before the Honorable court and which confirmed that service was duly effected upon the Applicant.
30. Further and in addition, Learned counsel for the Respondent has also invited the Honourable court to take cognizance of the affidavit of Ambrose Muthama; the Process server sworn on the 15th June 2023; and the affidavit of Bernard Munga Kamau, sworn on even date; both which confirm the manner in which the Applicant herein was duly served.



31. In the premises, Learned counsel for the Respondent has submitted that the Applicant herein was duly notified and thus aware of the scheduled hearing date, but same chose to ignore and/or disregard the court process, merely to defeat, delay and/or otherwise obstruct the cause of Justice.
32. In any event, Learned counsel has submitted that the Applicant herein, just as her predecessor has adopted a tendency whereby same is keen to obstruct, delay or defeat Justice by propagating falsehoods before the Honourable court.
33. Thirdly, Learned counsel for the Respondent has submitted that where service is disputed, like in the instant case, it was incumbent upon the Applicant to procure and obtain an order of the court for purposes of cross examining the Process Server, with a view to (sic) discrediting the affidavit of service.
34. Nevertheless, Learned counsel has submitted that despite having adverted to the aspect that same (Applicant) would seek Leave of the Honourable court to cross examine the Process server, the Applicant herein abdicated the opportunity and failed to pursue the aspect of cross examination of the Process Server.
35. Additionally, Learned counsel for the Respondent has submitted that insofar as the affidavit of service by the process server has not been challenged and or impugned, it behooved the Honourable court to make a presumption of service in favor of the Process server, in accordance with the established position of the law. In this respect, Learned counsel for the Respondent has invited the Honourable court to take cognizance of the holding in the case of Shadrack Arap Baiywo versus Bodi Bach (1997)eKLR.
36. Lastly, Learned counsel for the Respondent has submitted that the Applicant herein has not demonstrated and/or exhibited a Draft Defense to demonstrate and/or show that same has any defense on merits; which raises bona fide triable issues, capable of investigations and/ or interrogation during a Plenary hearing.
37. In the absence of a Draft Statement of Defense, which raises bona fide triable issues, Learned counsel for the Respondent has therefore submitted that the Applicant is thus not entitled to the orders sought at the foot of the current Application.
38. To highlight and amplify the foregoing submissions, Learned counsel for the Respondent has cited and relied on a plethora of case law, namely, Geoffrey M Asanyo & 3 Others versus Attorney General (2020)eKLR, Nicholas Kiptoo Salat versus IEBC & 3 Others (2013)eKLR, Equitable Party and two others versus IEBC (2022)eKLR, (Eco Bank Kenya Ltd versus Minolta Ltd & 20 Others eKLR, Philip Keipto Chemwollo & Another versus Augustine Kubende (1986)eKLR, Abdala Mohamed & Another versus Mbaraka Shoka (1990)eKLR, Moniks Agency Ltd versus Kenya Airports Authority (2019)eKLR, Prime Bank Ltd versus Paul Otieno Nyamodi (2014)eKLR and Patel versus East Africa Cargo Handling Services (1974) EA 75, Shah versus Mbogo (1967) EA 116 and Moses Kipsang versus Geoffrey Kiprotich Kirui & 2 Others (eKLR).
39. Arising from the foregoing, Learned counsel for the Respondent has implored the Honourable court to find and hold that the instant Application is devoid of merits and hence the Respondent implores that the Honourable court to dismiss the Application with costs to the Plaintiff/Respondent.



ISSUES FOR DETERMINATION

40. Having reviewed the Application date the 12th June 2023; and the Response thereto an upon consideration of the written submissions filed by and on behalf of the Respective Parties; the following Issues do arise and are thus worthy of determination.
- i. Whether the Advocates for the Applicants' are properly and legitimately on record or otherwise.
 - ii. Whether the Applicants were duly and effectively served with the Hearing Notice relating to the scheduled hearing which took place on the 13th June 2022 or otherwise.
 - iii. Whether the Applicant has demonstrated the existence of a sufficient cause and or basis to warrant the grant of the instant Application or otherwise.
 - iv. Whether the Applicant herein has a bona fide triable Defense/Defense on merit, capable of ventilation before the Honourable court; in the event of setting aside.

Analysis And Determination

Issue Number 1

Whether the Advocates for the Applicants are properly and legitimately on record or otherwise.

41. Learned counsel for the Plaintiff has ventilated a position that the Applicant herein had hitherto retained and/ or engaged the firm of M/s C. B Mwangela & Company Advocates; to act for and on her behalf, in respect of the instant matter.
42. Further and in addition, Learned counsel has submitted that the said firm of M/s C.B Mwangela & Co Advocate has neither filed any application to cease acting in respect of the instant matter. Consequently and in this regard, Learned counsel for the Respondent has submitted that the said firm of M/s C.B Mwangela and Company Advocates; therefore remains on record for and on behalf of the Applicant, until the requisite Notice of Change of Advocate is duly filed and served in accordance with the provisions of Order 9 Rule 9 of the Civil procedure Rules,2010.
43. Furthermore, Learned counsel for the Respondent has submitted that insofar as the current advocate did not file the requisite Notice of Change of advocates, after procuring and obtaining Leave of the Honourable court; the current advocate are therefore improperly before the Honourable court and hence the impugned Application ought to be struck out and/or expunged.
44. Additionally, Learned counsel for the Respondent has submitted that even though the current advocates have filed a Consent; the impugned consent has not been adopted and/or ratified by the Honourable court and hence in the absence of adoption/ratification, the impugned consent does not constitutes an order of the Honourable Court and cannot therefore anchor the entry onto record by (sic) Learned counsel for the Applicant herein.
45. In view of the foregoing, Learned counsel for the Respondent has adopted a position that the instant Application has been filed and or mounted by a stranger, albeit without the requisite Locus standi or at all.



46. Be that as it may and despite the elaborate arguments by Learned counsel for the Respondent, including the contention that the firm of M/s CB Mwangela & Co Advocates are still on record for the Applicant herein, unless lawfully replaced; it is instructive to note that the firm of M/s CB Mwangela and Company Advocates, filed an Application dated the 3rd March 2022; and wherein same sought Leave of the Honourable court to cease acting for and on behalf of the Applicant herein. For good measure, the impugned Application was duly served upon the Respondent's advocates on record.
47. Moreover, the named Application dated 3rd March 2022; came up for hearing on the 8th March 2022, in the presence of Mr. Ben Munyasya, Learned counsel for the Plaintiff/Respondent herein.
48. Instructively, when the Application came up for hearing, Learned Counsel Mr. Ochieng' appeared before the Honourable court and prosecuted the Application dated the 3rd March 2022; and thereafter the Honourable court proceeded to and made the following orders;
- i. The Application dated the 3rd March 2022 be and is hereby allowed.
 - ii. The firm of M/s C.B Mwangela & Company Advocates be and are hereby Discharged from the record.
 - v. The matter herein shall now be heard on the 13th June 2022.
 - vi. Learned Counsel for the Plaintiff be and is hereby directed to extract and serve a Hearing Notice upon the 1st Defendant
 - vii. The Plaintiff to ensure that the affidavit of service is filed prior to and before the return date.
49. From the foregoing, there is no gainsaying that the firm of M/s C.B Mwangela & Company Advocates; filed an Application to cease acting; which Application was duly heard and disposed of vide the order of the Honourable court made on the 8th March 2022.
50. Consequently and arising from the foregoing, it can no longer be stated and or contended that the firm of M/s C.B Mwangela & Co Advocates, are still on record for the Applicant herein, either as alleged by the Respondent or at all. For good measure, the said contention is not vindicated by the Records of the Court; and in any event, are contrary to the obtaining position, which is within the knowledge of the Respondent's Counsel.
51. First forward, upon the cessation of the firm of M/s C.B Mwangela & Co Advocates to act for the Applicant, in accordance with the provision of Order 9 Rule 12 of The Civil Procedure Rules; the Applicant herein was at liberty to instruct and engage such other advocate, if any, or better still to file a Notice of intention to act in person. See the Provisions of Order 9 Rules 7 and 8 of the Civil Procedure Rules, 2010.
52. However, in respect of the instant matter, the Applicant herein, neither appointed nor engaged any advocate, prior to and before the delivery of the Judgment. For good measure, by the time the subject matter proceeded for hearing and thereafter delivery of the Judgment, the Applicant herein had not retained any advocate to act for her.
53. Nevertheless, upon the delivery of the Judgment, the Applicant herein proceeded to and instructed the current advocates, who have since filed the Notice of appointment of Advocates to come on record for and on behalf of the Applicant and it is on this basis that Learned counsel for the Respondent now seeks to impugn and expunge the pleadings and documents filed by the Applicant, under the pretext that no Leave was ever sought and or obtained by the current advocates before coming on record.



54. Notably, the objection by the Respondent is premised and/or anchored on the provisions of Order 9 Rule 9 of The Civil Procedure Rules, 2010, which underscore the manner in which a Change of advocate can be effected after the delivery of Judgment.
55. Be that as it may, I have pointed out elsewhere herein before that the firm of M/s C.B Mwangela & Co. Advocates; sought for and obtained Leave of the Honourable court to cease acting and upon the issuance of the orders made on the 8th March 2022, the said law firm effectively ceased to be on record for the Applicant.
56. Having ceased to act for the Applicant and upon been duly discharged from the record, it was not necessary for the new/incoming advocate, to wit, the current advocates to seek for and or obtain either the consent of the said previous advocates (who had been discharged from record) or to file an Application for Leave or at all.
57. To my mind, the provisions of Order 9 Rule 9 of The Civil Procedure Rules 2010 were irrelevant and inapplicable to the circumstances obtaining in respect of the instant matter, and particularly, at the point in time when the current advocates sought to come and indeed, came on record for the Applicant.
58. Invariably, the previous advocate having ceased to act of the Applicant and following the order discharging same from record; the current advocates were at liberty to file and serve a Notice of appointment of advocate and not a Notice of change of advocate, in the manner contended by Learned counsel for the Respondent. Surely, there was No Advocate on record for the Applicants capable of being substituted vide a Notice of Change of Advocates or otherwise.
59. For the avoidance of doubt and to put the matter beyond peradventure, the previous counsel had been discharged from record and hence there was no advocate on record to warrant the filing of a Notice of change of advocate in terms of Order 9 Rules 5 and 6 of the Civil Procedure Rules, 2010.
60. Furthermore, there being no advocate on record at the time when the Judgment was rendered, the current advocate did not require Leave of the Honourable court to file and effect the Notice of appointment of advocate. For good measure, I reiterate that the provisions of Order 9 Rule 9 of the Civil Procedure Rules and which have been relied upon by Learned counsel for the Respondent are irrelevant, inapplicable and the submissions in that respect, are clearly misconceived.
61. In a nutshell, my answer to question number one is to the effect that the current advocate for the Applicants are properly on record and by extension; that Application filed by same, has been filed in accordance with the prescription of the law and not otherwise.
62. Consequently and in this respect, I therefore decline the invitation by and on behalf of the Respondent herein to strike out the instant Application and same shall now be considered on merits, which I propose to do by addressing Issues numbers 2 and 3, respectively, as hereunder.

Issue Number 2

Whether the Applicants were duly and effectively served with the Hearing Notice relating to the scheduled Hearing which took place on the 13th June 2022 or otherwise.

63. The gravamen/substratum of the current Application is to the effect that the Applicant herein was never served with the Hearing notice relating to the scheduled hearing on the 13th June 2022. In this regard, the Applicant contends that insofar as same was not notified of the scheduled hearing, same was therefore denied/deprived of the requisite opportunity to attend court and participate in the hearing before the Honourable court.



64. Furthermore, the Applicant has averred that having not been served, same has therefore been condemned unheard, contrary to and in contravention of the Rules of Natural Justice; and in violation of her right to Fair Hearing in terms of the Provisions of Article 50(1) of *The Constitution*, 2010.
65. Instructively, the Applicant herein had posited in the Further affidavit sworn on the 19th June 2023; that same was not served and that the affidavit of service which was filed by and on behalf of the Respondent herein was erroneous, misleading and false. In addition, the Applicant herein had signified that same would crave Leave of the Honourable court to cross examine the process server on the basis of the affidavit of service.
66. Nevertheless, it is not lost on this court that when the Application came up for hearing, the Applicant did not pursue the question of the cross examination of the process server or at all. To the contrary, the Applicant was contented with prosecuting the instant Application on the basis of the affidavit Evidence.
67. On the other hand, it is imperative to underscore that the Respondent maintained that the Applicant herein, was duly and effectively served with the hearing notice relating to the scheduled hearing of the 13th June 20-22; and an appropriate an affidavit of service was duly filed with the Honourable court.
68. Moreover, the Respondent has further contended that the Process server, who effected service and the person who escorted the process server to the home/homestead of the Applicant, have further sworn Replying affidavits; which have neither been controverted nor disputed.
69. In short, Learned counsel for the Respondent has maintained that the Applicant herein was knowledgeable of and privy to the scheduled hearing date, but chose to evade attending court with a view to frustrating the Due process of the Honourable court and to delay the determination of the instant matter.
70. Having reproduced the position taken by the respective Parties, it is imperative to state and underscore that where service is disputed, like in the instant case, it behooves the person, (read, the Applicant) challenging/disputing service to apply that the process server be summoned for cross examination, with a view to answering questions, if any, on the contents of the affidavit of service.
71. For good measure, the only way to impugn and /or impeach the contents of the affidavit of service, is by way of cross examining the process server and impeaching the contents of the said affidavit. Short of that; there is a presumption of service, which go in favor of the process server.
72. As pertains to the obtaining position of the Law, it is appropriate to restate, reiterate and adopt the dictum in the case of Shadrak Arap Baiwo versus Bodi Bach (1987)eKLR, where the court held and stated thus;

“There is a qualified presumption in favour of the process server recognized in *M B Automobile v Kampala Bus Service*, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. On *Chitale and Annaji Rao*; *The Code of Civil Procedure Volume II* page 1670, the learned commentators say:

“3. Presumption as to service – There is a presumption of services as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should



be put into the witness box and opportunity of cross examination given to those who deny the service.”

73. Further and in addition, the importance of cross examination in an endeavor to impugn and/or challenge service was also re-visited, underscored and highlighted by the Honorable Court of Appeal in the case of Dickson Daniel Karaba versus John Ngata Kariuki & 2 others [2010] eKLR, where the Court stated and observed as hereunder;

Indeed the Superior Court and the parties appreciated this imperative at an early stage of the proceedings and the Court made orders, correctly in our view, that the process server and the 1st Respondent be cross examined on their affidavits. There was a good reason for that order, traceable to the law on such matters, that there is a presumption that the court process was properly served unless such presumption is rebutted. We allude to the case of Shadrack arap Baiywo v. Bodi Bach, Civil Appeal No. 122/86 (UR) cited and applied in *Miruka v. Abok & Another* [1990] KLR 544, where in the former case Platt JA stated:-

“There is a qualified presumption in favour of the process server recognized in *MB Automobile v Kampala Bus Service* [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On *Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II* p 1670, the learned commentators say:

“3.Presumption as to service – There is a presumption of service as stated in the process server’s report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.”

Also, in *Karatina Garments Ltd. v. Nyanarua* [1976] KLR 94, the predecessor of this Court stated:-

“Where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter; if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”

74. Furthermore, the Honourable court emphasized the significance of cross examination of a process server by observing as hereunder;

“It is our view therefore that there was no firm basis for rejecting the affidavit of the process server or making the finding that his affidavit and that of Peter who supported him were mutually contradictory. On the contrary they both confirm that it was more probable than not that the 1st respondent and the process server met at the time stated by the process server and it was explained to him that a petition would be served on him . If the 1st respondent took evasive action thereafter or made it impossible for the process server to complete his mission, that was of no consequence. We further believe the affidavit evidence of the process server which was not challenged in cross-examination that he made his way to the 1st respondent’s offices and served him in the manner he stated he did. Again, declining or refusing to acknowledge service, was of no consequence.”



75. Having failed to pursue the question of cross examination of the process server and coupled with the failure to adequately respond to the contents of the two (2) Replying affidavits; which were filed by the Process server and the person who escorted the process server on the date of service, I come to the conclusion that the denials by and on behalf of the Applicant herein, are mistaken, false and otherwise calculated to defraud, nay, defile the cause of Justice.
76. Consequently and in view of the foregoing, I come to the conclusion that the Applicant herein was knowledgeable of and privy to the scheduled date of hearing, but for reasons known to her, same chose to evade attending court and to participate in the scheduled hearing, whose details were known to her.

Issue Number 3

Whether the Applicant has demonstrated the existence of a sufficient cause and or basis to warrant the grant of the instant Application or otherwise.

77. Before venturing to canvass and deliberate upon whether the Applicant has established and demonstrated sufficient cause, it is appropriate to underscore that there two types of Ex-parte Judgments.
78. Firstly, there is the Ex-parte Judgment which arises out of failure to effect service on the adverse Party, which essentially leads to the issuance of a Default Judgment. Nevertheless, a Judgment which is procured and obtained without service of court process, is irregular and when non-service is pointed out to the court, the designated court is obligated to set aside and or vacate the impugned Judgment as a matter of right. For good measure, the setting aside is done Ex-Debito-Justitiae.
79. On the other hand, there is an Ex-parte Judgment which is procured and/or obtained albeit and after due and effective service. In this case, the Ex-parte Judgment is a regular Judgment and same can only be set aside upon establishment and/ or proof of certain necessary ingredients. Further and in any event, the setting aside of a regular Judgment involves exercise of Judicial discretion.
80. Having pointed out the dichotomy in terms of the preceding paragraphs, it is now appropriate to underline that the current Judgment which is sought to be set aside is/was a regular Judgment which was procured after due and effective service on the Applicant.
81. In the premises, the Applicant herein can only succeed in setting aside the impugned Judgment, if same can demonstrate the existence of sufficient cause, devoid of any inaction, negligence, want of care and/ or such other deviant conduct; on her (Applicant's) the part.
82. To underscore the foregoing observation, it is appropriate to reiterate the holding of the Court of Appeal in the case of James Kanyiita Nderitu & another versus Marios Philotas Ghikas & another [2016] eKLR, where the court stated and observed as hereunder;

“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. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered;



whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v. Nzioki [2004] 1 KLR 173*).

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. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

83. In respect of the instant matter, I have found that the Applicant herein was duly served with the hearing notice relating to the scheduled hearing, but same failed and/or neglected to attend court and participate in the scheduled hearing, whose details were duly known to her.
84. However, despite having been duly served, the Applicant herein has now approached the Honourable court and purported to feign ignorance pertaining to the question of service. Clearly, the conduct of the Applicant in feigning ignorance and disputing service, when same knew that she had been duly served creates a blemish on the Applicant; and which thus deprives the Applicant of entitlement to partake of Equitable discretion.
85. For good measure, it is common knowledge that he/she who seeks Equity, must come to court with clean hands. Instructively, where the court discerns lack of candour on the part of an Applicant; then the court must not exercise Equitable discretion in favor of such an Applicant, whose hands are tainted.
86. To this end, I beg to adopt and reiterate the dictum of the Court of Appeal in the case of *Habo Agencies Limited versus Wilfred Odhiambo Musingo [2015] eKLR*, where the court held thus;

In the circumstances of this case, I find and hold that the basis for the exercise of my discretion has not been laid properly or at all. Reliance is merely made on alleged inaction by counsel on record, but that does not avail the applicant. I further find that the applicant was not candid in explaining the delay and this deprives it of equitable relief.

87. Other than the question of lack of candour, there is also an aspect pertaining to an inordinate and or unreasonable delay by and on behalf of the Applicant in making and mounting the instant Application. Clearly, the Judgment which is sought to be challenged was rendered on the 3rd October 2022; and yet the current Application was only filed on the 12th June 2023, which represents a duration of more than eight (8) months.
88. Despite the fact that the instant Application has been made with/ mounted with inordinate delay, the Applicant herein did not deem it fit to account for and/or explain the delay attendant to the filing of the subject Application. In this respect, it is my humble, albeit considered view that the Application is also barred the Doctrine of Latches.



89. As pertains to the import and tenor of the Doctrine of Laches, it is instructive to adopt and underscore the dictum of the Court of Appeal in the case of Chief Land Registrar & 4 others versus Nathan Tirop Koech & 4 others [2018] eKLR, where the honorable court stated and observed as hereunder;

“ 55. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379).

90. In my humble view, the length of time that was taken by the Applicant herein before mounting the instant Application, was inordinate and thus warrants the invocation and application of the Doctrine of Laches, more particularly when no explanation has been tendered and/or availed.

Issue Number 4:

Whether the Applicant herein has a bona fide triable Defense/Defense on merit, capable of ventilation before the court; in the event of setting aside.

91. Other than the question of sufficient cause, which has been discussed in the preceding paragraphs, the other critical ingredient, that would necessitate the exercise of equitable discretion to and in favor of an Applicant seeking the setting aside of an Ex-Parte/Default Judgment, is the existence of a Bona fide triable Defense, capable of being ventilated during a Plenary hearing.

92. As pertains to the instant matter, the Applicant herein proposes to canvass before the Honourable Court the fact that the transfer and registration of the suit property in favor of the Deceased was lawful and legitimate and that there was no fraud, irregularity, illegality or at all.

93. Additionally, I hear the Applicant to be contending that the purchase price/consideration, was also paid in full to and in favor of the Respondent herein. Furthermore, the Applicant contends that there was even an over payment made to and in favor of the Respondent.

94. Despite the foregoing proposed defense, which mirrors the averments that are contained at the foot of the Statement of Defense dated the 22nd October 2007; it is instructive to recall that the fraudulent manner in which the suit property was transferred to and registered in the name of the Deceased was adverted to and underscored by Hon Justice J V O Juma, Judge, (as he then was) vide Nyeri HCCA no. 20 of 2002 between Wilfred Mbitu Kariuki versus Josephat Njuguna Mbugua, now deceased, where the Learned Judge stated as hereunder;

“ It is instructive that the application for consent to subdivide land parcel number Kiambaa/ Kiharu/2515 dated the 22nd January 1998 was for the said land to be divided into two portions measuring 0.25 acres and 0.70 acres. It was not hectars. The consent to subdivide was also given in acres and not hectars on the 3rd February 1998. The Respondent was unable to explain how he got himself registered as the owner of a piece of land measuring 0.25 Hectars in the absence of land control board consent to that effect. If reliance were to be placed on the mutation form, then that would have been illegal.



95. My understanding of the observation by the Learned judge, who was dealing with an Appeal against the decision of the Provincial Lands Appeals Committee, which dealt with the manner in which the suit property was acquired by the 1st Defendant, now deceased, is testament to the fact that the subdivision, transfer and ultimate acquisition of the suit property; was fraudulent and illegal.
96. Surely, on the face of such a finding by the Learned judge, which finding colors the process leading to the subdivision, transfer and ultimate registration of the suit property in favor of the Applicant's predecessor, can it now be said that the Applicant herein has (sic) a bona fide triable defense.
97. In my humble view and taking into account the foregoing; the Applicant herein has no triable Defense and perhaps that explains the reason why both the original Defendant and the Applicant herein adopted an evasive tactic, to delay, obstruct and/or defeat the Due process of the court, to have the matter heard and determined expeditiously.
98. Lastly, it is important to point out that even though the Applicant herein has sought for Leave to file a Statement of Defense and bundle of documents, it is instructive to observe that the Applicant herein or better still, her predecessor indeed filed a Statement of Defense dated the 22nd October 2007; as well as List and Bundle of documents dated the 8th November 2007, respectively, which Documents are still on record.
99. Consequently and in the premises, it is not legally tenable for the Applicant herein to seek to file another set of Defense, yet there is already a Defense on record and which Defense; this court had occasioned to consider whilst crafting the Judgment which is the subject of the current Application.
100. For the avoidance of doubt, Paragraph 2 of the Judgment of the Honourable court alluded to and highlighted that the 1st Defendant duly filed a Statement of Defense, in opposition to the Claim by and on behalf of the Plaintiff/ Respondent herein.
101. Consequently and in the premises, no Leave to file a Statement of Defence can issue and/or be granted, where it is evident that a previous Defense has hitherto been filed; and same remains on record.
102. Clearly and to my mind, the request to this end, namely, for Leave to file and serve a Statement of Defence; constitutes an abuse of the Due process of the Honourable Court.

FINAL DISPOSITION

103. From the foregoing discourse, it must have become apparent and evident that the Application dated the 12th June 2023; is devoid and/or bereft of merits.
104. Consequently and in the premises, the orders that commend itself to me; is that the impugned Application dated the 12th June 2023; be Dismissed. In this regard, same be and is hereby Dismissed with costs to the Plaintiff/Respondent only.
105. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2023.

OGUTTU MBOYA,

JUDGE.

IN THE PRESENCE OF:

BENSON - COURT ASSISTANT.

MR BEN MUNYASIA FOR THE PLAINTIFF/RESPONDENT.



**MRS. MBUGUA H/B FOR MR. KAWAMARA FOR THE 1ST DEFENDANT/APPLICANT.
N/A FOR THE 2ND DEFENDANT/RESPONDENT**

